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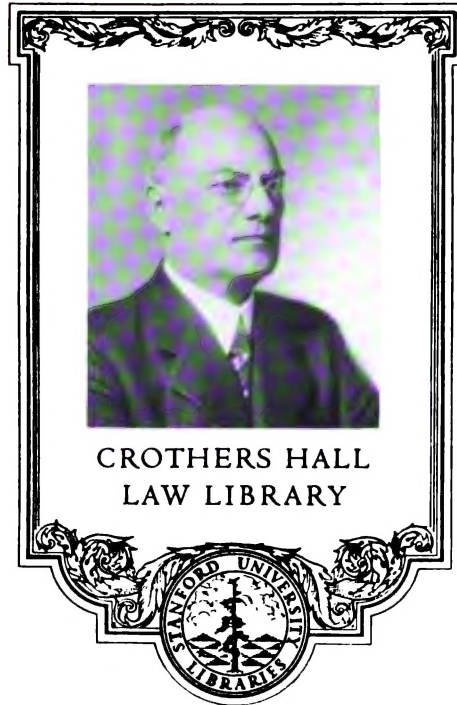
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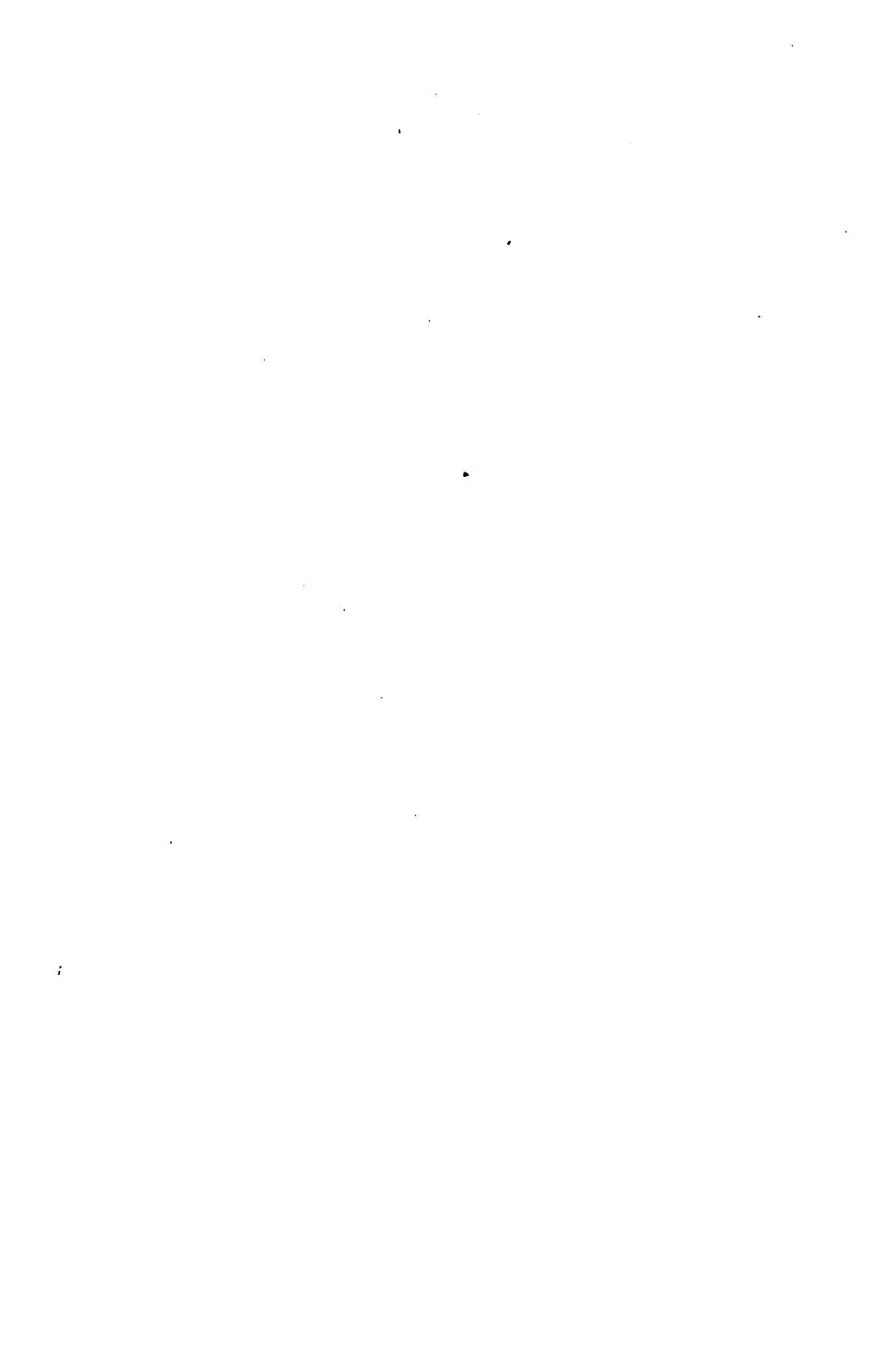
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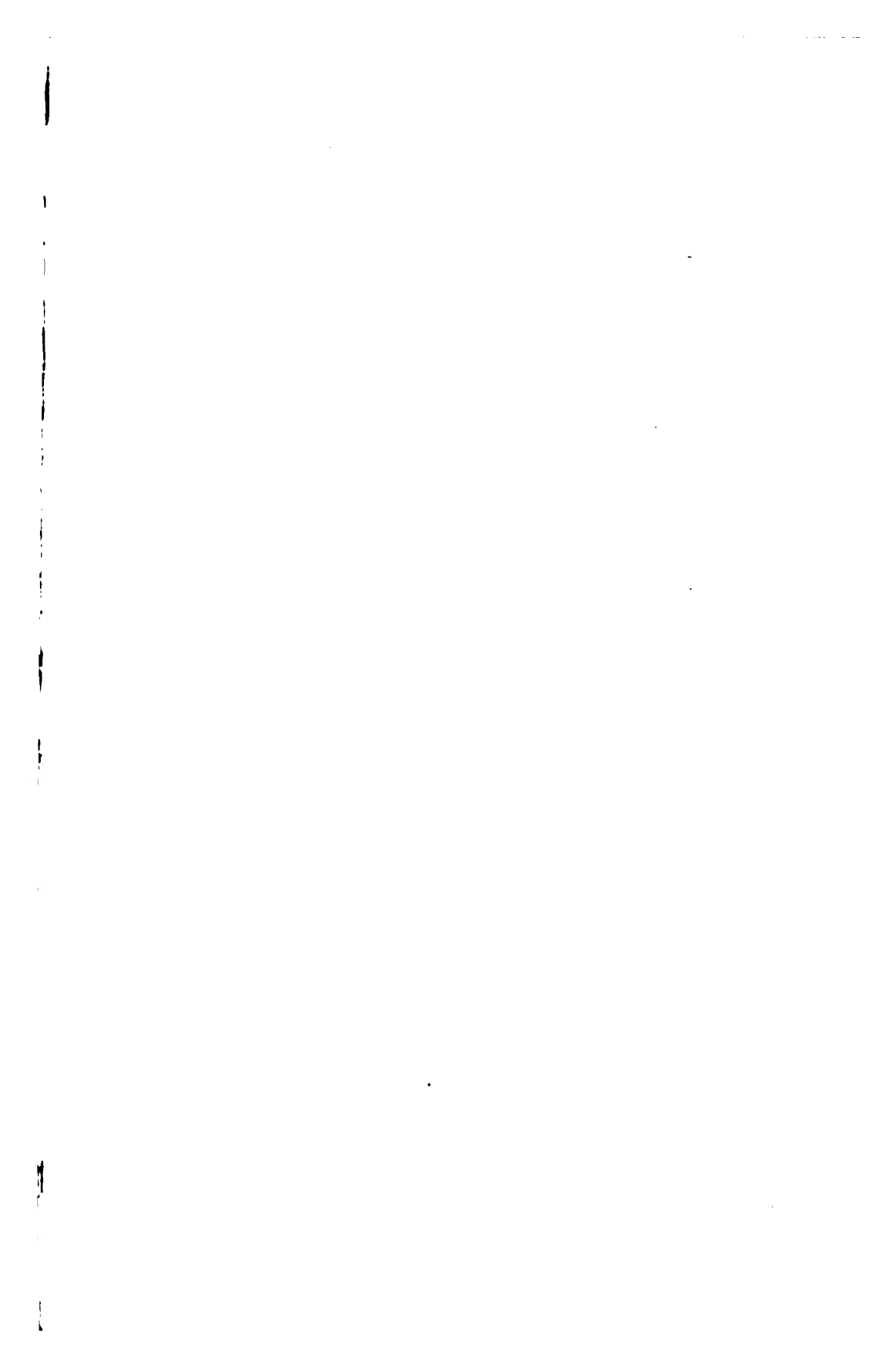
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JUSTICES OF THE SUPREME COURT

DURING THE TERM OF THESE REPORTS.

HON. AUGUSTUS L. RHODES.....	CHIEF JUSTICE.
HON. ROYAL T. SPRAGUE.....	} ASSOCIATE JUSTICES.
HON. JOSEPH B. CROCKETT.....	
HON. WILLIAM T. WALLACE.....	
HON. JACKSON TEMPLE.....	

JUSTICES QUALIFIED IN 1872:

HON. ADDISON C. NILES, VICE TEMPLE, term expired.
HON. ISAAC S. BELCHER, VICE SPRAGUE, deceased.

OFFICERS OF THE COURT:

CHARLES A. TUTTLE.....REPORTER.
JOHN L. LOVE.....ATTORNEY GENERAL.
GRANT I. TAGGART.....CLERK.
JAMES A. WAYMIRE.....PHONOGRAPHIC REPORTER.
CARL C. FINKLER.....SECRETARY AND LIBRARIAN.
THOMAS F. O'CONNOR.....BAILIFF.

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THIRD DISTRICT	SAMUEL BELL McKEE
FOURTH DISTRICT.....	ROBERT F. MORRISON
FIFTH DISTRICT.....	SAMUEL A. BOOKER
SIXTH DISTRICT.....	LEWIS RAMAGE
SEVENTH DISTRICT.....	W. C. WALLACE
EIGHTH DISTRICT.....	JOHN P. HAYNES
NINTH DISTRICT.....	A. M. ROSBOROUGH
TENTH DISTRICT.....	P. W. KEYSER
ELEVENTH DISTRICT.....	A. C. ADAMS
TWELFTH DISTRICT	E. W. McKINSTRY
THIRTEENTH DISTRICT	A. C. BRADFORD
FOURTEENTH DISTRICT.....	T. B. REARDON
FIFTEENTH DISTRICT.....	S. H. DWINELLE
SIXTEENTH DISTRICT.....	THERON REED
SEVENTEENTH DISTRICT	R. M. WIDNEY
EIGHTEENTH DISTRICT	H. C. ROLFE
NINETEENTH DISTRICT	E. D. WHEELER
TWENTIETH DISTRICT	DAVID BELDEN

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JANUARY TERM, 1871.

1871



REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
JANUARY TERM, 1871.

[No. 2,567.]

**CHARLES E. MACK v. MURRY MORRISON AND
JANE F. WHITE, EXECUTOR AND EXECUTRIX OF THE
ESTATE OF T. J. WHITE, DECEASED.**

CONSTRUCTION OF WRITTEN CONTRACT.—Where W. sold to M. a tract of land, supposed to be part of a Mexican grant, for two thousand dollars, six hundred dollars of which was paid down, and it was agreed: first, that the remaining fourteen hundred dollars should be paid when the grant should be finally confirmed and patent issued thereon, embracing these lands; second, that if the title to the grant should be rejected, or, if confirmed, not embrace the land sold, M. should be absolved from further payments; and, third, that if the title should be rejected the six hundred dollars paid should be refunded: *held*, that a confirmation of the grant, with such boundaries as not to include the tract sold, did not entitle M. to recover the six hundred dollars paid.

**APPEAL from the District Court, Seventeenth Judicial
District, County of Los Angeles.**

Opinion of the Court — WALLACE, J.

The defendants were the executor and the executrix of the estate of T. J. White, deceased. A copy of the contract was annexed to, and made a part of, the complaint. The contract was dated March 30th, 1858, and the complaint averred that the Sutter grant was confirmed and a patent issued therefor June 20th, 1860, but that the lots sold were not embraced within the boundaries of the grant. The defendants demurred to the complaint. The Court below overruled the demurrer, and the defendants declining to answer, judgment was rendered for the plaintiff, and the defendants appealed.

The other facts are stated in the opinion of the Court.

George Cadwalader, for Appellants.

The purchasers took the chances of the confirmed grant embracing the *locus in quo*, and they may have borne such a relation to the property as to have made this arrangement worth to them the six hundred dollars which they paid down for it.

Charles H. Larrabee, also for Appellants.

Alexander, Armstrong & Hinkson, for Respondents, argued that it was the intention of the parties, as shown by the terms of the contract, that the purchasers should have a good title to the land or receive their money back.

By the Court, WALLACE, J.:

Dr. White, in his lifetime, sold to the plaintiff certain "ten acre lots" lying in Sacramento County, south of the city. The whole purchase price was two thousand dollars; six hundred dollars of this sum was paid in hand. Mack was to pay the other one thousand four hundred dollars whenever the Sutter title should be finally confirmed and a patent issued thereon embracing these lands. This is sub-

stantially repeated in a subsequent part of the contract, in which it is provided that Mack *is not to pay* the one thousand four hundred dollars if the Sutter title shall be finally rejected or so confirmed as not to embrace these lands. It is then provided that "in case of the *rejection* of said title as aforesaid," Dr. White is to repay the six hundred dollars. It turned out afterward that the Sutter title was not "*rejected*," but was "*confirmed*," but so confirmed as to exclude these lands. The precise condition upon which Mack was to be released from further payment has thus happened. But he claims that he is, thereby, also entitled to receive again the six hundred dollars. If that is the real meaning of the contract, the parties have been at considerable pains to obscure it. They say, "and it is further expressly understood and agreed by and between the parties hereto, that if said Sutter title shall be finally rejected by the United States courts, or, if confirmed, not embrace the lands above described, then and in that event the above obligation on the part of the said parties of the second part to pay said one thousand four hundred dollars, and interest as aforesaid, shall be null and void." Here they might have added the words: "and said party of the first part shall also repay said six hundred dollars." This would have expressed the agreement just as the plaintiff now claims to understand it. Instead of doing this, however, they add (immediately after the words "null and void") these words: that "in case of rejection of said title as aforesaid," Dr. White is to pay the six hundred dollars.

The parties seem to have contemplated three contingencies, each of which was to produce a result different from either of the others:

First—The Sutter grant might be rejected in toto, in which event Mack was not only to be relieved from the payment of the one thousand four hundred dollars, but White was to repay him the six hundred dollars already received.

Opinion of the Court — Wallace, J.

Second — The grant might be confirmed so as to embrace these lands, in which event White was not only to keep the six hundred dollars, but Mack was to pay the remaining one thousand four hundred dollars.

Third — The grant might be confirmed, but not so as to include these lands within the lines of the confirmation, in which case no provision was made for the further payment by Mack, nor for the returning by White of money already paid.

The parties evidently used great care to so express themselves in the contract, and might much more easily and with fewer words have said, if they had so intended, that if these lands should be included in the Sutter patent, then Mack was to pay the balance, otherwise White was to refund the sum already received. Why they thus made a distinction between a total rejection of the Sutter grant on the one hand, and such a confirmation of it as would omit these lands on the other, was a matter for them and not for us to consider. We only see that they have done so. The record is entirely silent as to the possession of the lands when the contract was made. If Mack received it at the time from White, or if he already held it in hostility to the Sutter claim, it would not be difficult to see why this distinction was made.

The judgment is reversed and the cause remanded, with directions to sustain the demurrer to the complaint.

Mr. Justice SPRAGUE did not express an opinion.

[No. 2,349.]

WILLIAM CARUTHERS v. JOHN MCGARVEY.

SALE OF PERSONAL PROPERTY.—A sale of personal property is not completed, so as to pass the title to the property, so long as anything remains to be done to the thing sold, to identify it or discriminate it from other things.

APPEAL from the District Court, Seventeenth Judicial District, Los Angeles County.

Action on a promissory note, given by the defendant to John Lee on the 12th of October, 1867, payable on the 1st day of March, 1868. After the note fell due the payee indorsed it to the plaintiff. The defendant answered, that he paid the note to Lee, before the indorsement thereof to the plaintiff. The evidence to support the plea of payment tended to show that the defendant had a large quantity of corn husked, lying in heaps in his field, and agreed with Lee to sell him enough corn, at one dollar and fifty cents per hundred, to pay the note, and that the defendant and Lee were each to furnish a team to haul it to Lee's crib; but that nothing was done to weigh the corn or separate it from other corn in the field, and that the defendant notified Lee that the corn was ready, but he did not come to help remove it, and declined to take it away.

The Court below rendered judgment in favor of the defendant, and the plaintiff appealed.

V. E. & F. Howard & Sepulveda, and Thom & Ross, for Appellants.

The corn should have been both delivered and accepted. (Benjamin on Sales, 105; *Dole v. Stimpson*, 21 Pick. 384.) It was no delivery as long as anything remained to be done to ascertain the quantity by segregation from the mass. (1 Comstock, 271.) There could be no delivery or acceptance unless the corn was weighed by both parties. (*Howe v.*

Opinion of the Court — Rhodes, C. J.

Palmer, 5 Eng. C. L. Reps. 303; 3 Barn. & Ald. 321; *Stevens v. Stewart*, 3 Cal. 140.) There was no change in the character of the possession. (*Malone v. Plato*, 22 Cal. 103.) "If there was no delivery there could be no acceptance." (*Gardet v. Belknap*, 1 Cal. 400; Benjamin on Sales, 135.)

Kewen & Howard, and *George Cadwalader*, for Respondent.

"Where a sale is bona fide and for valuable consideration, slight evidence of delivery is sufficient." (8 Pick. 443.) "The law recognizes a constructive as well as actual delivery; and it is upon the question, what constitutes such constructive delivery, that most of the cases in the books have arisen." (Hilliard on Sales, Chap. III, Sec. 4.) "Where some act remains to be done in relation to the articles which are the subject of the sale, as that of weighing or measuring, and there is no evidence tending to show the intention of the parties to make an absolute and complete sale, the property in such articles does not pass to the vendee until such act is performed. But it is otherwise if the payment of the purchase money is not a condition precedent to the transfer, and it appears that the parties intended that the sale should be complete before the articles were weighed or measured." (*Riddle v. Varnum*, 20 Pick. 280; 13 Pick. 182.)

By the Court, RHODES, C. J.:

The defendant claims that the note in suit was paid, while in the hands of the payee, by the sale to him of corn, at the rate of one dollar and a half percental, the quantity sold to be sufficient to amount to the sum of four hundred and five dollars—the balance due on the note. The payee of the note was notified that the corn was ready for him, but it was not weighed, nor was the quantity to be delivered separated from the other corn in the field. It is elementary law that

Statement of Facts.

the property does not pass absolutely unless the sale be completed; and it is not completed, so long as anything remains to be done to the thing sold, to identify it or discriminate it from other things. (1 Pars. on Cont. 441.)

Judgment and order reversed, and cause remanded for a new trial.

Neither Mr. Justice CROCKETT nor Mr. Justice SPRAGUE expressed an opinion.

[No. 2,292.]

**WILLIAM S. WATSON v. SAN FRANCISCO AND
HUMBOLDT BAY RAILROAD COMPANY.**

PLEADING — SEVERAL CAUSES OF ACTION NOT TO BE UNITED.—The several causes of action upon which a party relies must be set out with directness and precision, the amount due upon each cause of action being separately stated.

DEFAULTS.—Applications to open defaults are addressed to the legal discretion of the Court.

IDEM.—As a general rule, when the circumstances are such as to lead the Court to hesitate upon a motion to open a default, it is better to decide in favor of the application.

TERMS ON OPENING DEFAULT.—In opening a default, terms and conditions ought generally to be imposed, which should be more or less severe, as the circumstances seem to warrant.

WHEN DEFAULT SHOULD BE OPENED.—Where a defendant has been misled by an incorrect publication of the time the suit was commenced, in a printed sheet containing information of Court proceedings, on which the business community generally relied, the default should be opened.

APPEAL from the District Court of the Twelfth District, City and County of San Francisco.

The complaint alleged as follows: "That defendant is a corporation duly organized, incorporated, and existing under and by virtue of the laws of the State of California. That said defendant is indebted to this plaintiff in the sum of

Argument for Appellant.

four thousand nine hundred and seventy-three dollars and sixty-two cents, balance due for the work and labor, care and diligence and attendance by said plaintiff made, performed, bestowed, and given in and about the business of the said defendant, and for and at the special instance and request of said defendant; and for money by said plaintiff paid, laid out, and expended to and for the use of, and in and about the business of the said defendant, and for his benefit and use, and at his like special instance and request, from the 4th day of March, A. D. 1868, until the 4th day of December, A. D. 1868, in the City and County of San Francisco, State of California, and in the cities of the Atlantic States, in advocating and urging upon the Congress of the United States the passage of an Act by said Congress granting certain lands to said defendant for the purpose of aiding said defendant in the construction of the road, as set forth in the articles of incorporation; and, also, in negotiating and making provisions for the purchase and delivery of the necessary iron and rolling stock for said defendant. That there remains a balance due this plaintiff from said defendant, for said work and labor, care and diligence and attendance so made, performed, bestowed, and given, and for said sums of money so paid, laid out, and expended, the sum of four thousand nine hundred and seventy-three dollars and sixty-two cents. That said plaintiff has presented his said account to the said defendant for payment, and payment has been refused."

The other facts are stated in the opinion.

O. H. Spencer, for Appellant.

As to what constitutes a legal and sufficient excuse to avoid a judgment by default, we have no direct authority; but as to what does not constitute a sufficient excuse, we respectfully refer to *Chase v. Swain*, 9 Cal. 186; *Elliott v. Shaw*, 16 Cal. 377. We are aware that this Court has repeat-

edly held, that orders like the present rest very much in the discretion of the court below. "The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. * * * In a plain case, this discretion has no office to perform, and its exercise is limited to doubtful cases, where an impartial mind hesitates." (*Bailey v. Taaffe*, 29 Cal. 424.)

Daingerfield & Olney, for Respondents.

We assume as axioms, that Courts should perform their duties, and that it is the object of law to administer justice. Courts will, therefore, in all cases, where a discretion is left them, so administer, or use that discretion that substantial right may be done between litigants. If, then, in the case under consideration, substantial justice has been done, and the appellant has suffered no wrong, this Court will not reverse the judgment.

Where a judgment is set aside under the sixty-eighth section of the Practice Act, and a party permitted to come in and defend, the Supreme Court will not interfere, unless there was a clear abuse of discretion in the Court below. (*Roland v. Kreyenkagen*, 18 Cal. 455; *Mulholland v. Heyneman*, 20 Cal.) In setting aside a judgment, the Court below will use its own discretion, and this Court will not interfere, unless in case of gross abuse. (*Woodward v. Backus*, 20 Cal. 137.) The order will not be vacated unless the discretion has been grossly abused. (*Howe v. Independent Co.*, 27 Cal. 72.)

By the Court, WALLACE, J.:

The complaint in this case is directly within the objections pointed out in *Buckingham v. Waters*, 14 Cal. 147, for it is a jumble of several causes of action in one count. It

Opinion of the Court — Wallace, J.

does not allege, for instance, how much of the four thousand nine hundred and seventy-three dollars sued for was owing to the plaintiff for his own work and labor bestowed upon the business of the defendant, nor how much was paid out for the use of the defendant in California; nor yet, how much was expended on the Atlantic side, "in advocating and urging upon the Congress of the United States the passage of an Act by said Congress, granting certain lands to said defendants," etc. More directness and precision in pleading these matters seems to be required by the code, as interpreted by this Court.

The defendant is a corporation, and the summons was served on its Secretary, August twenty-fourth. The fourth day of September following would be the first day upon which default could be taken for want of an answer. On that day default was entered and final judgment demanded, and on the same day an application was made by the defendant to open the default. This was allowed upon condition that the defendant should pay the plaintiff twenty dollars, and also make answer within five days. From this order this appeal is taken by the plaintiff. Applications of this character are addressed to the discretion — the legal discretion — of the Court in which the default has occurred, and should be disposed of by it as substantial justice may seem to require. Each case must be determined upon its own peculiar facts, for perhaps no two cases will be found to present the same circumstances for consideration. As a general rule, however, in cases where, as here, the application is made so immediately after default entered as that no considerable delay to the plaintiff is to be occasioned by permitting a defense on the merits, the Court ought to incline to relieve. The exercise of the mere discretion of the Court ought to tend in a reasonable degree, at least, to bring about a judgment on the very merits of the case; and when the circumstances are such as to lead the court to hesitate

upon the motion to open the default, it is better, as a general rule, that the doubt should be resolved in favor of the application. In connection with its allowance, terms and conditions ought generally to be imposed upon the party in default, which, of course, should be more or less severe as the particular circumstances would seem to warrant.

In this case, as we have already seen, the defendant was required, as a condition of opening the default, to pay the plaintiff a fixed sum of money, and also to plead issuably within five days.

Upon such an appeal as this the only question for us is, whether or not the Court below abused its discretion in opening the default. If there is no showing of facts whatever in support of the application, an order granting it will be reversed, as was done in *People v. O'Connell*, 23 Cal. 282. In the case at bar, it appears that the Secretary of the defendant was misled by an incorrect publication of the time of the commencement of the suit, appearing in a printed sheet regularly issued, and containing information of Court proceedings relied upon by the business community in the City of San Francisco, and which had always been theretofore found to be "invariably accurate."

If this sheet had been correct in fact, then the defendant had the whole of the fourth day of September in which to answer. It was on that day that the default was entered, and on that day, too, that application for relief was promptly made by the defendant.

Upon these facts, in view of the statement of a meritorious defense to the action and the conditions imposed upon the defendant, we can not say that the court below abused its discretion in opening the default.

Order affirmed.

Mr. Justice SPRAGUE did not express an opinion.

Points decided.

[No. 2,006.]

**GEORGE W. HENLEY AND THOMAS B. HENLEY v.
A. P. HOTALING AND LLOYD TEVIS.**

CONVERTING A DEED INTO A MORTGAGE.—When an attempt is made to convert a deed, absolute in form, into a mortgage, the evidence ought to be so clear as to leave no doubt that the real intention of the parties was to execute a mortgage; otherwise, the intention appearing on the face of the deed will prevail.

IDEM.—Parties may buy lands in satisfaction of a debt, or for a consideration paid, and contract to reconvey upon the payment of a sum certain, without any intention that the transaction should create a mortgage.

COVENANT TO RECONVEY.—A covenant to reconvey does not necessarily convert an absolute deed into a mortgage. It may be one among other facts showing that the parties intended the deed to operate as a mortgage.

PUBLIC POLICY.—A sale of land, with a reservation to the vendor of the right to purchase, is not opposed to public policy.

RESERVATION OF RIGHT TO REPURCHASE.—To convert an absolute deed into a mortgage, something more must be shown than a reservation of the right to repurchase.

NO MORTGAGE WITHOUT DEBT.—The existence of a debt—an obligation to pay money—is essential to the existence of a mortgage.

CLAIM OF LAND.—One in possession of public land, sufficiently describes the same in a power of attorney, by calling it his claim of land.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

William R. Storms was in the possession of two thousand acres of public land at Round Valley, Mendocino County, and gave to S. P. Storms a power of attorney, of which the following is a copy:

“ROUND VALLEY, 7th Oct., 1859.

“Know all men by these presents, that I, Wm. R. Storms, of Boston, County of Suffolk, State of Massachusetts, have made, constituted, and appointed, and by these presents do make, constitute, and appoint S. P. Storms, of Round Valley, County of Mendocino, State of California, my true and lawful attorney, for me, and in my name, place, and stead, to buy and sell all kinds of stock that is on my ranch in said Round

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Valley, or in the State of California; to buy and sell any claims of land in said valley or State; to buy or sell all kinds of merchandise, and to make contracts in any business that may occur to carry on my business in the State of California, giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in the whole State of California, as fully to all intents and purposes as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all my said attorney or his substitute shall lawfully do or cause to be done by virtue hereof."

On the 13th of December, 1860, the attorney in fact called upon defendant, Hotaling, and solicited a loan of five thousand dollars, and offered as security a mortgage on said land. Hotaling agreed to make the loan on the security, if his counsel approved of it; and Storms and Hotaling went to the office of his attorney, who advised that the power of attorney did not authorize S. P. Storms to negotiate a loan or execute a mortgage. Hotaling then declined to make the loan. S. P. Storms then offered to sell the land to Hotaling for five thousand dollars, and Hotaling accepted the proposition. S. P. Storms, as attorney in fact, then, on the 13th of December, 1860, executed to Hotaling a deed of the land, absolute on its face, and Hotaling paid him the five thousand dollars. Hotaling then executed to William R. Storms a bond, conditioned that if said Storms paid him five thousand dollars, with interest at three per cent. per month one year from date, he would convey the land to him. The bond provided, that until the payment of the money, it should remain in the custody of Hotaling's attorney as an escrow, and that if Storms failed to pay the money, the bond should be delivered up to Hotaling to be canceled. Hotaling, at the same time, gave S. P. Storms a lease of the land for one year. At the end of the year Storms refused to deliver up

Argument for Appellants.

possession, and Hotaling recovered possession in an action for holding over contrary to the terms of the lease. In 1862, Wm. R. Storms, being indebted to the plaintiffs, executed to defendant Tevis a deed of the land in trust for the plaintiffs. The plaintiffs brought this action to have the deed to Hotaling canceled, and to obtain possession of the land, and a conveyance from Tevis, their trustee. Storms did not pay the five thousand dollars mentioned in the bond. Defendant, Hotaling, recovered judgment, and the plaintiffs appealed.

The other facts are stated in the opinion of the Court.

James B. Townsend, for Appellants.

The power did not authorize a sale of the land. The clause under which the power is claimed is that in relation to buying and selling "claims of land." The object of the power was to have his aforesaid business in California "carried on" during his absence from the State.

A power should be construed according to the intention of the parties. (Story on Agency, Secs. 21, 65, 66, 68, 69, 71, 72, 83; *Lord v. Sherman*, 2 Cal. 499, 501; *Washburn v. Alden*, 5 Cal. 463; *Johnson v. Wright*, 6 Cal. 373; *Billings v. Morrow*, 7 Cal. 171; *Dupont v. Werthman*, 10 Cal. 354; *Ferreira v. Depew*, 17 How. Pr. N. Y. 418; *Lumbard v. Alrich*, 8 N. H. 34, 35; *Rossiter v. Rossiter*, 8 Wend. 494.)

The deed given to Hotaling, when viewed in the light of the circumstances which preceded and followed its execution, became in fact and in law a mortgage. (*Flagg v. Mann*, 2 Sumn. 535; *Kerr v. Gilmore*, 6 Watts, 405, 407; *Clark v. Henry*, 2 Cow. 327, 330, 331, 332; *Bright v. Wagle*, 3 Dana, 253; *Brown v. Dewey*, 1 Sandf. Ch. 61, 64; *Morris v. Ex'r of Nixon*, 1 How. U. S. 118; *Tilson v. Moullon*, 23 Ill. 655, 656; *Wright v. Bates*, 13 Verm. 348; *Sear v. Dixon*, 83 Cal. 326; *Gay v. Hamilton*, 33 Cal. 686; *Pierce v. Robinson*, 13 Cal. 125, 133; *Cunningham v. Hawkins*, 27 Cal. 606; *Robinson v. Cropsey*, 6 Paige, 480; *Colwell v. Woods*, 3

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Watts, 188, 196, 167; *Van Buren v. Olmstead*, 5 Paige, 9, 10; *Clark v. Henry*, 2 Cow. 324; *James v. Johnson*, 3 Johns. Ch. 417, 429; *Carey v. Rawson*, 8 Mass. 159; *Stocking v. Fairchild*, 5 Pick. 181; *Eator v. Green*, 22 Pick. 526, 529; 4 Kent's Com. 142, 143; *Taylor v. Luther*, 2 Summ. 232, 233.)

In a court of equity an absolute deed, with a bond or agreement for a reconveyance, is treated as a mortgage. (*Polhemus v. Trainer*, 30 Cal. 687; *Kerr v. Gilmore*, 6 Watts, 408; *Colwell v. Woods*, 3 Watts, 196; *Erskine v. Townsend*, 2 Mass. 494, 495; *Carey v. Rawson*, 8 Mass. 159; *Rice v. Rice*, 4 Pick. 349; *Newhall v. Burt*, 7 Pick. 157, 159; *Manlove v. Bale*, 2 Vern. 84; *Wharf v. Howell*, 5 Binn. 499.)

McAllister & Bergin, for Respondents.

The question whether a deed given under circumstances like those in this case was intended as a conditional sale or a mortgage is purely one of fact, and the finding of the Court thereon is conclusive. (*Sears v. Dixon*, 33 Cal. 330.)

Where there is no debt and no loan, an agreement to resell will not change an absolute conveyance into a mortgage. (*Glover v. Payn*, 19 Wend. 521; *Rich v. Doane*, 35 Verm. 135; *Slowe v. McMurray*, 27 Mo. 113; *Williams v. Owens*, 5 Mylne & Cr. 303; *Hughes v. Sheaff*, 19 Iowa, 331.)

Although this transaction had its inception in a proposition to borrow money, yet there was, in fact, no loan of money. (*Pearson v. Seay*, 35 Alabama, 616; *Bodwell v. Webster*, 13 Pick.; *Flagg v. Mann*, 14 Pick. 477; *Johnson v. Clarke*, 5 Pike, 321; *King v. Kinsey*, 1 Ired. Eq. 187; *McDonald v. McLeod*, Id. 221; *McLaurin v. Wright*, 2 Id. 94; *Kelly v. Bryan*, 6 Ired. Eq. 284; *Hickman v. Cantrell*, 9 Yerger, 172; *Lans v. Dickerson*, 10 Yerger, 373.)

By the Court, RHODES, C. J.:

Was the instrument which was executed by William R. Storms, by his attorney in fact, S. F. Storms, to Hotaling, what it purported to be, an absolute conveyance of the premises in controversy, or was it a mortgage? The Court below found it to be the former, and the evidence was amply sufficient to justify the finding. The parties consulted the legal adviser of Hotaling, and by him they were informed that the letter of attorney did not empower the attorney in fact to execute a mortgage. Thereupon a proposition was made by one party, and accepted by the other, for a sale of the premises, and the deed and the other papers relating to the transaction between the parties were prepared and executed under the supervision of the same counsel; and in giving his testimony he says: "The parties gave me positive instructions to have it a sale, and not a mortgage, and if those papers make it anything else, then the papers did not perform the object of the parties and their transaction." The attorney in fact manifested some annoyance when informed that the power of attorney did not authorize him to execute a mortgage, and he suggested a sale, and the papers were drawn with that object. There can be no question, from the evidence, that the counsel who prepared the deed and the other papers relating to the transaction, understood from the parties that they desired a sale of the premises, and that they were prepared and executed under his direction, in the manner stated in the evidence, with the intent that the transaction should not, by construction, be held to amount to a mortgage.

When the intention of the parties to a deed, absolute in form, is sought to be ascertained, not in the usual way, by reading and construing the instrument, in connection with evidence to identify the subject-matter, the parties, etc., but by evidence to establish an equity beyond and outside of the

deed, and thus to convert the deed into a mortgage, the evidence ought to be so clear as to leave no doubt that the real intention of the parties was to execute a mortgage, otherwise the intention appearing on the face of the deed ought to prevail. There can be no question that a party may make a purchase of lands either in satisfaction of a precedent debt or for a consideration then paid, and may at the same time contract to reconvey the lands upon the payment of a certain sum, without any intention on the part of either party that the transaction should be, in effect, a mortgage. There is no absolute rule that the covenant to reconvey shall be regarded, either in law or equity, as a defeasance. The covenant to reconvey, it is true, may be one fact, taken in connection with other facts, going to show that the parties really intended the deed to operate as a mortgage, but standing alone, it is not sufficient to work that result. The owner of the lands may be willing to sell at the price agreed upon, and the purchaser may also be willing to give his vendor the right to repurchase upon specified terms; and if such appears to be the intention of the parties, it is not the duty of the Court to attribute to them a different intention. Such a contract is not opposed to public policy, nor is it in any sense illegal; and Courts would depart from the line of their duties should they, in disregard of the real intention of the parties, declare it to be a mortgage. "To deny the power of two individuals," says Chief Justice Marshall, "capable of acting for themselves, to make a contract for the purchase and sale of lands defeasible by the payment of money at a future day; or, in other words, to make a sale with a reservation to the vendor, of the right to repurchase the same land, at a fixed price and at a specified time, would be to transfer to the Court of Chancery, in a considerable degree, the guardianship of adults as well as infants." (*Conway's Executors v. Alexander*, 7 Cranch, 237.)

Conceding to parties the right to contract in that manner,

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it necessarily follows that something more than a reservation of the right to repurchase, or a covenant to reconvey, must be shown, in order to convert an absolute deed into a mortgage. There is one fact which is indispensable for this purpose. A mortgage is a security for the performance of an agreement, which is usually to pay a sum of money. Leaving out of view other agreements than those for the payment of money, it is essential that there be an agreement, either express or implied, on the part of the mortgagor, or some one in whose behalf he executes the mortgage, to pay to the mortgagee a sum of money. If there is no debt there is no mortgage. We look in vain, in this case, to find any evidence of a promise on the part of Storms to repay the purchase money, or of the existence of a debt of any kind from him to Hotaling. The arrangement was, that Hotaling should execute a bond to reconvey the premises; but Storms did not agree to repurchase, and the bond was delivered as an escrow, and it remained an escrow until after the time therein mentioned for the execution of the deed, and was then canceled. If the deed was intended as a mortgage, the mortgagee would have a right of action to foreclose the mortgage; but if he had brought such an action, the answer that there was no promise, either express or implied, on the part of the alleged mortgagor, to repay the purchase money, would have been a complete bar. This case differs from *Sears v. Dixon*, 38 Cal. 326, in the important particular, that in that case the mortgagor covenanted to repay the purchase money at a fixed time, and, under the name of rent, to pay interest thereon at a stipulated rate. And the Court also found that the parties intended to execute a mortgage; but in this case the Court found that the parties intended the deed to be, in fact, as it was in form, an absolute conveyance.

It is contended by the plaintiffs, that if the deed is held to be absolute, it is void, because it was executed by the

Points decided.

attorney in fact, without authority. The letter of attorney authorized him "to buy and sell any claims of land in said valley or State" — Round Valley or State of California — and it is insisted that the premises in controversy do not come within the general designation of "claims of land." It appears that at the time the contract was entered into, the "Storms ranch" was public land of the United States, and was in the possession of William R. Storms, his attorney in fact having the management of it. The term "claim" is more frequently used than any other to describe such interest in a parcel of the public lands of the United States as the person in possession thereof holds. (See *Marshall v. Shafter*, 32 Cal. 191.) When a person has entered into possession of public lands, he describes the act by saying that he has taken up a claim; and a sale, abandonment, etc., is mentioned in common speech as a sale, abandonment, etc., of his claim; and that term is employed in contracts in describing his interest in the lands, and the grantor conveys by that designation, as well his interest in the lands in his possession, as his demand for, or asserted right to, the lands in the possession of another.

Judgment affirmed.

Mr. Justice TEMPLE dissented; Mr. Justice SPRAGUE did not express an opinion.

[No. 2,607.]

EX PARTE T. W. VOLL.

PETITION FOR HABEAS CORPUS.— One who applies upon habeas corpus to be admitted to bail, pending an appeal, after conviction for the crime of manslaughter, must state in his petition facts upon which the Court can exercise an intelligent discretion in determining the question; such as, that injustice has been done him during the trial, and that the appeal has been taken in good faith, and others of a like nature.

Opinion of the Court—Wallace, J.

CONSTITUTIONAL LAW AS TO BAIL.—The Constitution of this State, in declaring bail to be a matter of right, contemplates only those cases in which the party has not been already convicted.

BAIL AFTER CONVICTION.—The statute which makes bail a matter of discretion after conviction for manslaughter is not unconstitutional.

The facts are stated in the opinion.

G. W. Tyler, for Petitioner.

Attorney General *Jo Hamilton*, for the People.

By the Court, WALLACE, J.:

Upon petition for writ of habeas corpus.

It appears by the petition filed in this case that the prisoner is now detained at the Penitentiary by the Warden, pursuant to the judgment of the District Court of the Fifteenth Judicial District, adjudging him to suffer certain imprisonment there as a punishment for the crime of manslaughter, of which he had been convicted in that Court. It is also averred in the petition that from that judgment the prisoner has taken an appeal to this court, which is yet undetermined, and that he is pecuniarily able to give bail for his appearance if he should be permitted to do so.

The statute (Cr. Pr. Act, Sec. 509) provides that a person charged with such an offense as manslaughter may be admitted to bail *before* conviction, "as a matter of right," but (Sec. 512) *after* conviction "as a matter of discretion" merely.

If we are to consider this application as made to our discretion under the statute, the petition is insufficient, in that it sets forth no fact or circumstance whatever upon which it would be possible for us to exercise an intelligent discretion in determining the application. It is not averred, for instance, that any injustice has been done the prisoner in the course of the judicial proceedings had in the District Court; nor that any error of law intervened to his prejudice

on his trial; nor that it is hoped that the judgment of conviction appearing to have been rendered against him will, for any reason, be disturbed here. It is not even stated that the appeal appearing to have been taken was taken in good faith; or that it will be prosecuted to a final determination in this Court. For these and like reasons, not necessary to be stated in detail, the petitioner has not brought the case within the statutory requirements concerning applications for bail after conviction of the crime of manslaughter.

The argument however, which was made in support of the petition denies the constitutionality of the statute in so far as it enacts that a conviction already had shall take away the right to bail, and leave it a question to be determined by the mere discretion of the Court, upon the facts appearing in the particular case. In support of this view the Constitution (Art. I, Sec. 7) is cited. Its language is as follows: "All persons shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident, or the presumption great."

Upon this it is claimed that the Constitution first announces the general rule that "all persons shall be bailable by sufficient sureties;" it next declares the only admissible exception to the rule, *i. e.*, "capital offenses;" and, lastly, narrows this exception to those capital offenses "in which the proof is evident, or the presumption great."

It is insisted that the language of the Constitution is sufficiently broad to embrace not only a case where no trial has been had, but equally a case in which a conviction of an offense, less than capital in degree, has occurred; that the Constitution does not regard the particular stage of proceedings which the prosecution may have reached, but only the grade of the offense involved as being less than the capital grade. It is said that at common law an application for bail was addressed solely to the discretion of the Judges,

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“without certain rules to guide it, which has ever been regarded with jealousy by a people tenacious of liberty;” and that the purpose of the Constitution was to place the right to bail upon a more assured basis than mere discretion. It is true that at common law applications for bail in criminal cases were said to be addressed to the discretion of the Judges, to be exercised upon the circumstances appearing; the form of the entry upon which the prisoner was released on bail being “*de gratia curiæ speciali*.” We think, however, that the clause of the Constitution cited is only designed to alter this rule of the common law as to certain criminal cases before conviction; and that the matter of bail after conviction is still left discretionary, as it was at common law, with the modifications wrought by the statute of this State. We are of opinion that the Constitution, in declaring bail to be a matter of right, contemplated only those cases in which the guilt of the party had not been already judicially ascertained; cases in which the prisoner as yet stood upon his plea of not guilty, supported with all the presumptions of innocence with which the law delights to surround him. But when his trial has been had, and his plea proven false, the law will not stultify itself by presuming him other than that it has itself adjudged him to be. If the Constitution, indeed, intended to introduce the rule of absolute right to bail, as well after as before conviction of such felonies, it would result that no convict could be punished for his ascertained crime if he had either wealth or friends; for no mere pecuniary considerations could weigh against the alternative of a degrading imprisonment, at hard labor, for a crime involving moral turpitude. It would operate in practice as a mere money commutation for the infamous corporeal punishment which the law has denounced against the perpetration of crime.

The literal interpretation insisted upon—following, as it does, the mere words of the Constitution—would not only

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entitle the prisoner to bail, pending his appeal taken, but would have done so had he not taken an appeal at all. In this view it was unnecessary for him to have stated, as he has done in his petition, that he had appealed from the judgment of conviction, because, upon the literal reading of the Constitution, upon which he insists, that is not a condition imposed upon his right to bail; it is one which is only to be found in the statute, which he seems, however, to have so far observed, even while coming here to assail its constitutionality. Indeed, upon the interpretation here insisted upon, the right to object would still belong to the prisoner, even if it had appeared in the petition that his appeal was no longer pending here, but that the judgment of the District Court had been affirmed in this Court, because it will be seen that the mere words of the Constitution have not, for this purpose, announced any distinction between cases in which judgments have been already affirmed and cases yet pending on appeal. In either case, or, indeed, in any other conceivable case in which an offense less in degree than capital should be involved, the absolute right to bail must, upon this theory, be accorded to every prisoner; at least, so long as the phrase "all persons" is sufficiently comprehensive to include him, he must continue to be "bailable by sufficient sureties." A construction leading to such consequences cannot be supposed to have been intended by the framers of the Constitution, and, in our opinion, ought not to be attributed by us to that instrument.

The application must be denied and the prisoner remanded, and it is so ordered.

Neither Mr. Justice TEMPLE nor Mr. Justice SPRAGUE expressed an opinion.

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Statement of Facts.

[No. 2,252.]

**CHARLES E. RICH AND MARY ELISE RICH v.
CHARLES STANLEY TUBBS AND HENRY DURANT TUBBS.**

SEPARATE PROPERTY OF WIFE.—If the husband purchases real estate with the separate property of the wife, but takes the conveyance to himself, the land thus purchased is also the separate property of the wife, as between the husband and the wife.

HOMESTEAD—TITLE TO—PROBATE COURT.—The Probate Court, in setting apart for the use of the family of the deceased husband or wife property which had been dedicated as a homestead under the Homestead Act, does not change or transfer the title; nor does it adjudicate the question of title.

ISSUE.—The purpose and effect of an order of the Probate Court, setting apart such homestead, is, that the property be relieved from administration, and that it does not constitute assets of the estate of the deceased.

INHERITANCE OF HOMESTEAD.—Under the fourth section of the Homestead Act of 1860 the legitimate children are entitled to take an interest in the homestead upon the death of either the husband or wife.

ISSUE.—Since the passage of the Homestead Act of 1862 the children of the deceased husband or wife do not inherit any interest in the homestead, but the same vests absolutely in the surviving husband or wife.

INHERITANCE.—The inheritance is regulated by the law in force at the time of the death.

APPEAL from the District Court of the Fourth Judicial District, City and County of San Francisco.

The first husband of the plaintiff, Mary Elize Rich, was Mr. Tubbs. To them were born two children during wedlock. At the time of her marriage with Mr. Tubbs she had property, with which, at her request, he purchased the land in controversy. Tubbs and wife filed a declaration of homestead in January, 1861. Tubbs took the conveyance to himself, and afterwards died, and the widow married the other plaintiff, Charles E. Rich. This action was brought to quiet the title to the land thus purchased, against the adverse claim of said children. Judgment was rendered in the Court below in favor of the plaintiff, and the defendant appealed from the judgment. The other facts are stated in the opinion of the Court.

B. F. Morrison, for Appellants.

McCullough & Boyd, for Respondents.

Were this a transaction between strangers, undoubtedly it would be held that Mr. Tubbs simply held the legal title in trust for Mrs. Tubbs, who was the real owner. (*Bayles v. Baxter*, 22 Cal. 575; *Millard v. Hathaway*, 27 Cal. 119; *Settembre v. Putnam*, 30 Cal. 490; *Sandfross v. Jones*, 35 Cal. 486, 487; *Case v. Coddington*, 35 Cal. 191.)

As it was, the whole consideration for the premises being paid from the separate property of the wife, it was a mere change in the *form*, without in the least changing the *character* of the property as her separate estate; and this fact can always be shown, as against the deed, and when clearly and satisfactorily shown, the property remains the separate estate of the party whose money or other property was employed in the acquisition. (*Ramsdell v. Fuller*, 28 Cal. 42, 43; *Peck v. Vandenberg*, 30 Cal. 42.)

[See *Barber v. Babel*, 36 Cal. 11, as to homestead.—*REP.*]

By the Court, RHODES, C. J.:

The facts found by the referee, fully establish that, as between the female plaintiff and her then husband, the premises in controversy were the separate property of the wife. The declaration of homestead was executed by both husband and wife; under the Act of 1860; and assuming that the separate property of the wife may be dedicated as a homestead, two questions arise for consideration:

First—What was the effect of the order of the Probate Court, setting apart the homestead for the use of the family of the deceased husband? The Probate Court, in setting apart property which has been dedicated as a homestead under the Homestead Act, does not change nor transmit the title; nor, indeed, does it adjudicate the question of title as

Opinion of the Court — Rhodes, C. J.

between the parties who assert a claim to it. The purpose and effect of the order setting apart such homestead is merely that the property be relieved from administration — that it does not constitute assets of the estate of the deceased — and the order sets it apart for whom it may concern. The question of title, as between the claimants, is to be determined in another forum. (*Estate of James*, 23 Cal. 417; *Estate of Orr*, 29 Cal. 101; *Estate of Delaney*, 37 Cal. 176.)

Second — In whom did the title vest upon the death of the husband? The Homestead Act of 1860 declares, that the husband and wife shall hold the homestead property as joint tenants; but that provision is to be read in connection with the fourth section of the Act, which provides that upon the death of the husband or wife the homestead shall be set apart, by the Probate Court, for the benefit of the survivor, and his or her legitimate children. Although they are denominated joint tenants, they are not such in the full sense of the common law definition of that term. The "legitimate children" are entitled to take an interest upon the death of either the husband or wife. It is unnecessary, in this case, to define the nature of the interest which descends to the children; but it is clear that, under the fourth section of the Act of 1860, they take some interest by inheritance from their deceased father or mother. The Homestead Act of 1862 contains no such provision as is found in Section 4 of the Act of 1860. After providing that the husband and wife shall be joint tenants, it provides that, on the death of either, the homestead property shall vest absolutely in the survivor. No provision is therein made, for the inheritance of any interest in the homestead property, by the children of the deceased. As the defendants (the children of the deceased husband) took nothing by inheritance, unless the law in force at the time of the decease of their father so provided, the question on which the case turns is, at what time did he die? It is found that he died in 1862 — the pre-

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cise time not being stated. The order of the Probate Court was made July 7th, 1862. The Homestead Act of 1862 was passed and took effect May 12th, 1862. It is incumbent on the defendants alleging error—in other words, claiming that they acquired an interest in the homestead property by inheritance—to show that the deceased died, before their right to take by inheritance, was cut off by the passage of the Act of May 12th, 1862. This fact is not shown by the record.

Judgment affirmed.

[No. 2,357.]

THE PEOPLE v. RENFROW.

CHALLENGE OF JUROR.—A challenge of a juror in a criminal case must specify the particular ground of challenge. If for bias, it must state what kind of bias, and the particular cause from which such bias is to be inferred.

CHALLENGE TO JUROR FOR ACTUAL BIAS.—A challenge to a juror for actual bias must be entered on the minutes of the Court; and an application must be made to the Court to have triers appointed.

EXCEPTION TO RULING OF COURT.—When the Court overrules a challenge, and the prisoner excepts, the exception is to the decision overruling the challenge, and not to the right of the Court to decide the question at all.

INADMISSIBLE EVIDENCE.—Where a party on trial for murder offered to prove that the deceased had said, in conversation some three years before the killing, that he had enemies in the county who, he was afraid, would take his life: *held*, that the evidence was properly excluded.

APPEAL from the District Court, Seventh Judicial District, Sonoma County.

The facts are stated in the opinion of the Court.

William Ross, for Appellant.

Attorney General *Jo Hamilton* and *O. P. Overton*, for the People.

By the Court, WALLACE, J.:

The appellant was convicted of the crime of murder in the first degree, in the alleged killing of Johnson Wilson, and sentenced to be executed.

On the trial, Stewart, being under examination as to his competency as a trial juror, stated that he had heard all about the case—all about the circumstances of the case; that he didn't know that he had formed any opinion as to the guilt or innocence of the prisoner. He was then asked the question: "Could you, now, after hearing what you have, serve on this jury without any partiality?" He answered: "I do not think that I could." Thereupon the counsel for prisoner said: "We challenge the juror." District Attorney: "We deny the challenge." The Court: "The challenge is overruled." Prisoner's counsel: "We except to the ruling of the Court." Another of the prisoner's counsel here added:

"We object to the juror on the ground of positive bias." Stewart was then peremptorily challenged by the prisoner.

The challenge, as here interposed, is general in its terms; it specifies nothing whatsoever. The language is, "We challenge the juror." For what? If for actual bias, the Court could not determine it, but must appoint triers for that purpose. If for implied bias, it was the duty of the Court itself to decide upon the objection. When a prisoner intends to exercise his right of challenge under the statute, he is bound to designate, in some way, the objection upon which it is his purpose to rely. He is not to be permitted to interpose a challenge of such an indefinite character that it cannot be ascertained if it be for implied bias or for actual bias, nor whether its truth is to be determined by the Court itself or by triers appointed for that purpose.

In the case of *The People v. Reynolds*, 16 Cal. 130, the challenge was more specific than in the case at bar; it purported to be for implied bias. Yet it was held insufficient.

because it did not specify any one of the causes enumerated in Section 347 of the Criminal Practice Act. Said the Court: "Unless the cause be alleged, the challenge may be disregarded by the Court. It is not enough to say: 'I challenge the juror for implied bias,' and then stop. The particular cause from which such bias is to be inferred must be stated. Such was the rule of the common law, and such is the direction of the statute of this State."

If we are to consider the challenge as made for implied bias, it was properly overruled by the Court, because no one of the several grounds for challenge of that character was made to appear, and it is evident that the challenge was intended to be for implied bias only, for the Court was permitted to decide upon its sufficiency, without objection. It is true that the prisoner excepted to the decision of the Court, but this was an exception to the particular decision, as made in denying the challenge, and not an objection to the right of the court to decide the question at all. The remark made by one of the counsel for the prisoner, after the challenge had been overruled and an exception taken, that he objected to the juror "on the ground of positive bias" (by which we understand him to have meant actual bias), goes for nothing, because it was not passed upon by the Court below nor insisted upon by the counsel; nor, so far as appears, even called to the attention of the Court; nor was any exception based upon it. A party who intends to interpose a challenge for actual bias must allege that the juror is biased against him, and the challenge must be entered on the minutes of the Court. Upon the entry of such a challenge upon the minutes of the Court, its duty is pointed out by the statute, and a failure to pursue it would undoubtedly be erroneous. But when no such challenge is made or entered, and no application to the Court to have the necessary triers appointed, a party cannot complain here, even if he show

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a state of facts upon which the juror probably would have been excluded by the triers, if they had been appointed.

The evidence upon which the verdict was found was mainly, if not altogether, circumstantial. No witness was produced who saw the prisoner shoot the deceased. We have carefully examined it, and we are satisfied that the Court below did not err in refusing to set aside the verdict as being contrary to the evidence. The offer of the prisoner to prove that the deceased had said, in a conversation some three years before his assassination, that he had enemies in the county who, he was afraid, would take his life, was properly excluded as being too remote. But we do not intend to be understood as intimating that the statement of the deceased, upon that point, would have been admissible, under the circumstances of this case, even if made recently before his death.

The instructions of the Court, given to the jury at considerable length, presented the principles of law applicable to the case with remarkable perspicuity; indeed, there is no complaint made here on the part of the prisoner that any instruction was improperly given or refused by the learned Judge of the Court below.

We see no error in the record, and the judgment is therefore, affirmed.

Points decided.

[No. 2,344.]

DAVID MAHONEY AND SOLOMON A. SHARP v.
JOHN MIDDLETON, PATRICK HIGGINS, HER-
MAN WOHLER, DANIEL C. BREED, ALFRED
BOREL, — RODGERS, JOHN HIGGINS, EXEC-
UTOR OF DANIEL N. BREED, DECEASED, WM. HENRY
GREEN, LEWIS WELSCH, PETER DONAHUE,
JOHN LEMMON, SAMUEL P. MIDDLETON, L.
L. ROBINSON, AND EDWARD SWEENEY.

PRIORITY OF CONVEYANCES AND OF RECORDING DEEDS.—A conveyance to one who has notice of a prior unrecorded deed, given by his grantor to a third person, passes no title to the grantee, and an innocent purchaser from such grantee does not acquire any title, except through the Registry Act, in getting his deed recorded before the record of such prior deed.

PURCHASER WITH CONSTRUCTIVE NOTICE.—A purchaser from one who bought with notice of a prior unrecorded deed, given by his grantor to a third person, has constructive notice of such prior deed, if it is recorded before the execution of his conveyance, and he is not a purchaser in good faith, although the deed to his grantor may have been recorded before the record of such prior deed. In such case the prior deed will take precedence.

PRESUMPTION THAT SUMMONS WAS SERVED.—When the judgment roll which is offered in evidence is silent as to the issuing and service of process, it will be presumed that process was issued, and served on the defendants, and the judgment is not void.

RECORD NEED NOT SHOW SERVICE OF SUMMONS.—The fact alone, that the judgment roll does not show that summons was served on the defendants, does not sustain a finding of the Court that there was no service of summons. The fact that the judgment roll does not show that summons was served does not tend to sustain such finding.

APPEARANCE OF DEFENDANT BY ATTORNEY.—The appearance of a defendant by an attorney gives the Court jurisdiction over such defendant.

MORTGAGE BY TENANT IN COMMON.—If a party who owns an undivided one seventh of a tract of land, as a tenant in common with others, is in possession of a portion of the tract, and mortgages all such portion, describing it by metes and bounds in the mortgage, and the mortgage is foreclosed, the purchaser at the mortgage sale acquires the title to only an undivided one seventh of the portion thus mortgaged.

EJECTMENT AGAINST TENANT IN COMMON.—In ejectment by one tenant in common against another who is in possession of a portion of the demanded premises described by metes and bounds, the defendant can-

Points decided.

not resist a recovery as to the portion he thus possesses, on the ground that in equity his interest in all the demanded premises should be set off so as to include the portion which he thus occupies.

DEED BY TENANT IN COMMON.—If a party purchases from one who owns one undivided one seventh of a tract of land, a portion of such tract described by metes and bounds, he acquires the title to only one undivided one seventh of the portion he has purchased.

EFFECT OF JUDGMENT IN EJECTMENT.—A judgment in ejectment does not transfer to the prevailing party the title of the adverse party; but it awards to the successful party the possession, because the opposite party had no title to the land in controversy, and estops him, and those claiming under him, from setting up or offering proof of title to the land recovered, as against the successful party, or his privies in estate.

CONVEYANCE AFTER RECOVERY IN EJECTMENT.—If a party, who owns an undivided one seventh in a tract of land, recovers a judgment in ejectment for such one seventh, against a tenant in common, and afterwards sells his interest in the tract, his conveyance passes to his grantee only the undivided one seventh which he owned before the commencement of the action.

WHEN EJECTMENT LIES.—Ejectment cannot be maintained against one who is not in possession of the demanded premises when the action is commenced.

FINDING INTEREST OF PLAINTIFF IN EJECTMENT.—The plaintiff in ejectment, who owns an undivided interest in the demanded premises, is entitled to recover upon a finding of the fact that he holds an interest in common with others in the premises; but it is not error for the Court to find the extent of his interest, and it is proper that it should do so.

IDEM.—When the plaintiff in ejectment, between tenants in common, has made conveyances of parcels of the demanded premises, the Court should, in finding his interest, deduct the parcels thus conveyed.

JUDGMENT IN EJECTMENT.—It is error to recite in a judgment in ejectment between tenants in common, that the plaintiff has owned the premises recovered for a longer period than the proofs warrant.

IDEM.—If the proofs in ejectment show that the plaintiff was, at the commencement of the action, in possession of a portion of the demanded premises, he should not recover judgment for this portion.

FORM OF JUDGMENT IN EJECTMENT.—In ejectment against a number of persons who are severally in possession of different portions of the demanded premises, when no damages or mesne profits are claimed, the recovery against each defendant should be confined to the parcel in his possession.

NOTICE OF PRIOR DEED.—When a purchase of land is negotiated and made through an agent, notice to the agent of a prior unrecorded deed, made by the grantor, is notice to the principal.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

Statement of Facts.

Francisco de Haro died intestate on or about the 1st day of January, 1849, leaving him surviving the following heirs at law, viz.:

1. Josefa de Haro, who intermarried with James G. Deniston;
2. Rosalia de Haro who intermarried with Charles Brown;
3. Prudencio de Haro, a male;
4. Carlotta de Haro, who intermarried with Isaac V. Deniston;
5. Candelaria de Haro, who intermarried with Juan Pruzzo;
6. Natividad de Haro, who intermarried with Paul Tissot;
7. Alonzo de Haro.

The Rancho Laguna de la Merced contained one half a square league of land. Natividad and Paul Tissot, her husband, on the 4th day of March, 1857, mortgaged to Ramon Briones and his wife one undivided one seventh of the rancho, and on the 28th day of October, 1857, a complaint was filed in the Twelfth District Court, in an action to foreclose the mortgage.

On the 7th day of November, 1857, judgment was rendered in the action. On the 22d day of February, 1855, John Middleton was in the possession of a portion of the land contained within the exterior boundaries of said rancho, containing six hundred and forty acres, and called the "Lake House tract," but had no title thereto; and on the same day conveyed it to Michael Reese. April 3d, 1855, said Reese conveyed the same to Charles Brown, the husband of Rosalia. Reese had no title, but Brown entered into possession of the "Lake House tract." The conveyances of this tract described it by metes and bounds. On the third day of April, the same year, Brown and Rosalia, his wife, executed to said Reese a mortgage on the "Lake House tract," in which the property was described as in said deeds, which mortgage was assigned to Joseph C.

Statement of Facts.

Palmer in trust for Middleton's wife, who brought suit in said Court to foreclose the mortgage, on the 15th day of February, 1856. On the fifteenth day of March following both defendants answered by their attorney, and judgment of foreclosure was entered May 25th, 1857. The property was sold by the Sheriff to F. M. Haight, and he received a Sheriff's deed on the 11th day of May, 1858. In the complaint and Sheriff's deed the property was described as in the mortgage. Haight, on the 29th of December, 1858, quit-claimed the same land to said Middleton, who, on the 26th day of May, 1860, conveyed to Daniel Green a portion of the same, described by metes and bounds, and Middleton and his son Samuel, on the 26th day of January, 1861, conveyed one undivided one half of the "Lake House tract" to Levi Parsons, which interest by mesne conveyances, afterwards became vested in the plaintiff Mahoney. Before the commencement of this action, plaintiff Mahoney conveyed to plaintiff Sharp an undivided interest in the rancho equal to two hundred acres. The Court found that the plaintiff, Mahoney, was the owner in fee at the commencement of the action of four hundred and thirty five hundred and sixtieths ($\frac{435}{60}$) of the rancho, and gave judgment that the plaintiffs recover possession of the same. The plaintiffs did not ask a judgment for damages or mesne profits. The defendants were separately in possession of several parcels of the rancho, but the judgment was against the defendants jointly for the interest recovered by the plaintiffs. The interest which the Court found Mahoney owned included the land which he had conveyed to Bergin and others. The defendants appealed. After the judgment was rendered in the Supreme Court, the plaintiff filed the release spoken of in the opinion.

The other facts are stated in the opinion.

Wilson & Crittenden, for Appellants.

Wohler was not bound to take notice of every paper which was recorded, but only of *those in the chain of title down to his immediate grantor*. The state of the record at the moment of the recording of his grantor's deed, determined the right in respect to himself. All that was required of him by the law, was to examine the title to that time, and when he found a good conveyance to his grantor, he was under no obligation to look further, not even as said in one of the cases, to look at the records of the next day. (2 Hilliard on Real Property, 457; *State of Connecticut v. Bradish*, 14 Mass. 296; *Trull v. Bigelow*, 16 Mass. 419; *Hooker v. Pierce*, 2 Hill, N. Y. 650.)

If this be not the law then it would follow that every purchaser is chargeable with notice of every instrument upon record, down to the time he records his own deed, if it relates to *the land*, though it is outside of *the title* and wholly unconnected with it.

Had the law even imposed on Wohler the obligation to search the records down to the day of the date, and recording of his own deed, and charged him with notice of everything then appearing of record, he would have been a purchaser in good faith.

At that time, the record, it is true, disclosed the fact that Mahoney claimed under a deed from Prudencio, dated June 14th, 1860, but it also disclosed that the deed was void as against Pichoir, whose deed from the same grantor was subsequent in date, but was first recorded.

Wohler had then a right to assume, for the law authorized him to do so, that Pichoir had *not* at the time of purchasing and the time of recording his deed from Prudencio any notice or knowledge of the prior deed to Mahoney, and was a purchaser in good faith, and, therefore, as against Mahoney and all other persons claiming under him, had the better

Argument for Appellants.

title to the land. If he could not so assume and with safety purchase from Pichoir upon that assumption, but on the contrary, should be held to have been put, by the subsequent recording of the deed to Mahoney, upon inquiry as to the facts of good faith and actual notice, Pichoir would lose the benefit of that protection which the law was intended to afford him, and the whole policy of the law would be defeated.

The effect of Haight's purchase at the Sheriff's sale was to place him in the position in which he would have stood had he acquired title under a voluntary deed by Brown and wife.

And the question is, simply, what right does one acquire under a conveyance of a designated and described piece of land, parcel of a larger tract, when the conveyance is made by one only of seven, who, as tenants in common, with equal interests, are owners of the whole?

Does he take merely the undivided one seventh of the piece of land described in his deed?

The Court so decides in the present case, for by its judgment it gives to the plaintiff Mahoney the whole one seventh interest of Rosalia in the Rancho Laguna de la Merced, less the undivided one fourteenth of that interest in the "Lake House tract," and it assigns that undivided one fourteenth only to the defendant Middleton.

Or does he take the land conveyed to him subject to the contingency of its being afterwards, upon partition, assigned to him as the share of his grantor; and with the right, until partition, to the use and possession of the land conveyed to him, as a co-tenant with the other tenants in common of his grantor?

We submit that this latter is the correct statement of the nature and quality of the right acquired by such a purchaser. (*Stark v. Barrett*, 15 Cal. 368-371; *Gates v. Salmon*,

Argument for Respondents.

35 Cal. 578.) And if so, the Court erred in its conclusion upon this point.

However the judgment of Le Roy against Green might operate as between themselves and by way of estoppel, it certainly did not have the effect of a conveyance from Green to Le Roy; and in the present action, and as against Middleton, could not show, nor tend to show, any transfer of title from Green to Le Roy; and if it had not that effect the deed from Le Roy to Mahoney was irrelevant.

Ejectment is a possessory action, and must be brought against the occupant. It determines no rights but those of possession at the time, and it matters not who has, or claims to have, the title of the premises. If there is a tenant in possession the tenant is the proper party. (*Dutton v. Warschauer*, 21 Cal. 609; *Fogarty v. Sparks*, 22 Cal. 148; *Owen v. Fowler*, 24 Cal. 192; *Hawkins v. Reichart*, 28 Cal. 534; *Dimick v. Derringer*, 32 Cal. 488.)

Caperton v. Schmidt, 26 Cal. 490, and *Marshall v. Shafter*, 32 Cal. 176, only determined that a judgment was as conclusive in an action of ejectment as in any other actions, in respect to what was at issue and tried, and would be an estoppel as between the parties. But this does not touch the question of parties, nor alter the rule upon that subject. There is a manifest absurdity in maintaining an action for possession against one who is not in possession.

W. H. Patterson, for Respondents.

Section twenty-six of the Statute of Conveyances does not make the unrecorded deed void. It passed the title without record. It is void only as against a subsequent purchaser in good faith, and for a valuable consideration, whose conveyance is first duly recorded. (*Jackson v. Bogott*, 10 Johns. 457, 466; *Jackson v. Phillips*, 9 Cow. 94; *Van Rensselaar v. Clark*, 17 Wend. 25; *Jackson v. Post*, 15 Wend. 588; *Averill*

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v. *Loucks*, 6 Barb. 373; *Hunter v. Watson*, 12 Cal. 363; *Ricks v. Reed*, 19 Cal. 553; 26 Cal. 405.)

Borel, Wohler, Middleton, Higgins, Smith, and Breed, having taken their respective conveyances, after the conveyances to Mahoney were recorded, had record notice. (*Jackson v. Post*, 15 Wend. 588; *Van Renesselear v. Clark*, 17 Wend. 25; *Schutt v. Large*, 6 Barb. S. O. 381; *Flint, administratrix, v. Arnold*, 2 Metcalf, 622, 623; *Strong v. Smith*, 3 McLean, 362.) The judgment of *Briones and Wife v. Tissot and Wife* was good.

The record establishes: First, there was a complaint filed; second, that defendants voluntarily appeared and answered. (Practice Act, Secs. 523-35.) Said recital cannot be contradicted. (*Hahn v. Kelly*, 34 Cal. 391; *Sharp v. Daugney*, 33 Cal. 575; *Sharp v. Lumley*, 34 Cal. 616; *Banett v. Casney*, 34 Cal. 537.)

When it was determined that ejectment involved title, and was *res judicata* as to something more than possession (*Yount v. Howell*, 14 Cal.), then the reason of the rule that it could not be maintained except as against the terre tenant ceased, and to be consistent it must be held to be maintainable against him who keeps the tenant there. The landlord is as much a wrongdoer as the tenant. Should he employ another to commit any other tort he would be liable, "and if one by his agent disseise another, he is liable to the injured party." (*Gurrioch v. Stanner*, April, 1869; *Newell v. Woodruff*, 30 Conn. 425, 433.)

By the Court, RHODES, C. J.:

Action to recover possession of Rancho Laguna de la Merced. The title was confirmed to the seven heirs of Francisco de Haro as tenants in common, and the plaintiffs and all the defendants who set up title, claim under them. It is conceded that the interests held by Josefa and Alonzo — one

undivided seventh each—passed to Mahoney, and it appears that three eighths of the interest of Candelaria vested in the plaintiffs, and that the remainder of her interest vested in the defendants, or some of them.

Prudencio conveyed his interest in the rancho — one seventh — to Mahoney, June 14th, 1860, and the deed was recorded in San Francisco, July 2d, 1862, and in San Mateo, July 3d, 1862. The rancho consists of one body of land, and is situated partly in each of those counties. Prudencio also conveyed the same interest to Pichoir — under whom some of the defendants claim — June 28th, 1862, and the deed was recorded in San Francisco on the same day, and in San Mateo, July 2d, 1862. The Court found that Pichoir, before he paid any part of the purchase money, had notice in fact of the prior conveyance to Mahoney.

Carlotta conveyed her interest — one seventh — to Mahoney, March 3d, 1860, and the deed was recorded in San Mateo, April 16th, 1860, and in San Francisco, July 2d, 1862. She also conveyed the same interest to Spear, June 28th, 1862, and the deed was recorded in San Francisco on the same day, and in San Mateo, July 2d, 1862. Some of the defendants claim under this deed. The Court found that Spear, before he paid the purchase money, had notice in fact of the prior deed to Mahoney, and had also constructive notice by means of the record of a deed in San Mateo County. The question presented in regard to the conveyances of the interests of Prudencio and Carlotta, being quite similar, will be considered together.

It is admitted by the defendants' counsel, that Spear and Pichoir, in making their respective purchases and taking their conveyances, were mere trustees; that the purchases were negotiated and conveyances procured through the agency of Parsons & Thorne, and that Thorne had notice of

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the prior deeds to Mahoney. Notice to Thorne, it is admitted, was notice to his principals. But it is insisted by the defendants that Wohler, who claims a portion of the interests conveyed to Spear and Pichoir, is not chargeable with the notice to Thorne, because Thorne was not his agent. Spear and Pichoir conveyed to Borel, in trust for Wohler, a certain portion of those interests, by deed dated July 14th, 1863, and the deed was recorded August 7th, 1863. The Court found, as appears from the sixteenth finding, that the defendants, except one who is named, had both actual and constructive notice of the prior conveyances to Mahoney. It will be observed that the conveyances to Mahoney, were recorded both in San Mateo and San Francisco Counties, prior to the execution of the deed to Borel. As Spear and Pichoir had notice of Mahoney's deeds, they took no interest in the land under their deeds, and of course could not convey any interest to Borel, except by the aid of the Registry Act. Their conveyance to Borel, standing by itself, passed no title, and the only mode in which it could have been made effectual, was by recording it before the deeds of Mahoney were recorded. The accumulation in this Court of cases waiting decision, forbids the discussion, at any considerable length, of this interesting question, or a review of the authorities bearing upon it. Our conclusion is, that Borel having purchased from Spear and Pichoir, after the deeds of Mahoney were recorded, had constructive notice of those deeds, although the deeds to Spear and Pichoir were first recorded; that because of such notice, he is not a purchaser in good faith, and that therefore the deeds to Mahoney will take precedence over the deed to Borel. (See *Flynt v. Arnold*, 2 Met. 619; *Jackson v. Post*, 15 Wend. 588; *Van Rensselaer v. Clark*, 17 Wend. 25.) The question whether Wohler had actual notice of the conveyances to Mahoney, need not be discussed.

Was the judgment recovered by Briones and wife, against

Natividad and Paul Tissot, her husband, void? It is therein recited that "this cause having been brought on to be heard upon the complaint of the plaintiffs, and the confession and answer of the defendants under oath filed herewith, by which it appears that there was due to the plaintiffs at the date of the commencement of said suit," etc. The judgment contains no recital in respect to the issue or service of summons, nor does the roll contain an appearance, answer, or demurrer on the part of the defendants. The record being silent as to the issuing and service of process, it will be presumed that process was duly issued and served on the defendants. (*Hahn v. Kelly*, 34 Cal. 391.) The Court having acquired jurisdiction of the defendants, as must be presumed, and there being no question as to its having had jurisdiction of the subject matter of the action, the judgment is not void.

There is as little ground to question the validity of the judgment of Palmer against Rosalia and her husband, Charles Brown, as of the judgment last mentioned. There is nothing in the judgment roll tending to prove that Rosalia was not served with process, and it will be presumed, as the defendants on this point contend; that the process was duly served on her. There is no legal evidence in the record in this cause to justify the finding that she was not served. The plaintiffs, to show the want of service, rely on the failure of the judgment roll in that case to directly show the service; but that is manifestly insufficient and does not tend to sustain the finding. Were the finding sustained by the evidence, there is still enough in the case to give the Court jurisdiction of Rosalia, for the appearance of herself and husband in the action, was entered by an attorney of that Court.

The judgment in that case, ordered the Lake House tract to be sold, in satisfaction of the amount found due on the mortgage. The tract was accordingly sold, and was con-

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veyed by the Sheriff to the purchaser. What interest passed to the purchaser by that conveyance? Throwing out of consideration any possession which Brown may have had—as it is of no moment in the controversy between the holders of the title—it is apparent that the only title which passed, was the undivided seventh of the interest in that tract, which was held by Rosalia. The purchaser took her position in respect to the tract, and until a partition shall be made, he and his assigns will hold the same right to the possession, that she would have enjoyed, had her interest therein not been sold. Whether there are any legal or equitable reasons, why Rosalia's interest in the whole rancho, shall be set off so as to include the Lake House tract, is a question that will not arise except on proceedings for partition; but in the meantime, the purchaser at the foreclosure sale and his assigns, succeeded only to such right of possession as she held at the time of the sale. It appears from the evidence, that Rosalia's interest in all the rancho, except the Lake House tract, vested in Mahoney, and that one half of her interest in the latter tract which passed at the foreclosure sale also vested in Mahoney, and the other half vested in Middleton. The decision of the Court in respect to that interest, was in accordance with the evidence, and is correct.

There is a further question in respect to the Lake House tract, arising upon this state of fact. While Middleton was the owner of the interest which passed at the foreclosure sale, he conveyed a specific parcel of the land to Daniel Green. Subsequently Le Roy, claiming one undivided seventh of the entire rancho, commenced an action of ejectment against Green and others, to recover the possession of the rancho. It was adjudged in the action, that he was the owner of one seventh of the rancho; and he had judgment for the possession of the same against Green and other defendants. After the recovery of the judgment, Le Roy conveyed all his interest in the rancho to Mahoney. The

interest which Green took under the deed, was the undivided seventh of the parcel described in the deed—that is to say, the title thereto which Rosalia held previous to the foreclosure sale. The judgment rendered against him, while he was thus the owner of the one seventh of the specific parcel described in the deed, operated by way of estoppel, so as to preclude him from setting up such title against Le Roy or his privies in estate. A judgment in ejectment, does not transfer to the successful party, the title of the adverse party, but if presented in the proper mode, whenever such adverse title is drawn in issue, it shuts out all proof of such adverse title. Its effect bears a closer resemblance to an extinguishment, than a transfer of the adverse title. The judgment awards the possession to the prevailing party, because he had title at the commencement of the action, and because the losing party had no title, or not such title as would authorize him to withhold the possession; but it neither directly nor indirectly transfers the title. The conveyance of Le Roy to Mahoney passed to the latter only such interest as Le Roy had before the commencement of that action; and Mahoney, by virtue of the privity in estate thus created, can avail himself of the judgment of Le Roy against Green, as a bar or by way of estoppel, as the case may require, whenever the title of Green is set up against him.

Borel was not shown to be in possession of any portion of the rancho. It has been held, from an early date, in this State, that ejectment cannot be maintained against a person who is not in possession. (*Dutton v. Warschauer*, 21 Cal. 609; *Hawkins v. Reichart*, 28 Cal. 534; *Dimick v. Derringer*, 32 Cal. 488.) The judgment, therefore, as to him, is erroneous.

The defendants complain of the findings and judgment, because they determine the amount of interest held by the plaintiffs, and they say that this course was both unnecessary and improper. The plaintiffs would be entitled to a recov-

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ery—so far as it depended on the issue of title—upon a finding, that they held an interest in common with others in the premises. But it is not improper to find the extent of such interest. The parties may be tenants in common, and if such be the fact, they are entitled to the rents and profits in proportion to their respective interests in the premises; and in order to determine their rights in that respect, when the plaintiffs shall be admitted into possession with the defendants, it would not be improper to determine the extent of their interest. In a controversy of this character, when the Court is finding whether the plaintiff has any interest in the premises, there is no reason why the court should not find and determine the amount of such interest. But the Court in this case erred in finding the amount of Mahoney's interest, and the length of time during which the plaintiffs had held their interests. The interest of the plaintiff, Sharp—an undivided interest of two hundred acres—was derived from Mahoney, and should be deducted from the amount of interest adjudged to be held by Mahoney. Mahoney also conveyed to Thomas I. Bergin an undivided interest of twenty acres; to John B. Felton and Benjamin S. Brooks an undivided interest of eight acres; and Susan M. Green a like interest; and to Alonzo de Haro an undivided interest of seventy acres in the rancho; and those interests should be deducted from the interest found in Mahoney.

The Court recited in the judgment, that the plaintiffs had been, for over three years next prior to the commencement of the action, the owners of the respective interests therein mentioned; but it does not appear how long before the commencement of the action Sharp acquired his interest, and it is shown that three eighths of the interest of Candelaria was conveyed to Mahoney five months before the commencement of the action, and that Le Roy conveyed his interest to Mahoney six months before the commencement of the action.

Points decided.

The recovery included the whole rancho, but Mahoney testified that at the commencement of the action he was in possession of about three hundred acres of the rancho. He cannot maintain the action as to the portion of which he had possession; nor should there be a recovery against any of the defendants, except as to the respective parcels in their possession. The error, however, in rendering judgment against a defendant, for land not in his possession, would be immaterial, were it not for the rule permitting the plaintiff to offer the judgment in evidence, in a suit for the recovery of damages and mesne profits.

Judgment as to Boral reversed, and cause remanded for a new trial.

Judgment as against the other appellants reversed and cause remanded for a new trial, unless the respondents shall, within twenty-five days after the filing of this opinion, release to the appellants last mentioned, all claims for damages and rents and profits, and consent that the judgment be modified in accordance with this opinion.

Release was filed and judgment was modified. (See order of Court. — REP.)

Mr. Justice OROCKETT and Mr. Justice WALLACE, being disqualified, did not participate in the decision of this case.

[No. 2721.]

WILBUR CURTIS v. THOMAS SPRAGUE AND
CHARLES E. HUSE.

STRIKING OUT PART OF ANSWER.—It is error in the Court to strike out a counter claim in an answer, without a motion being made for that purpose.

REPLY.—A replication, setting up the Statute of Limitations to a counter claim contained in an answer, does not authorize the Court to strike out the counter claim.

Argument for Appellant.

MOTION TO STRIKE OUT PLEADING.—A demurrer to a replication, filed to a counter claim set up in an answer, is not equivalent to a motion to strike out the counter claim.

COUNTER CLAIM.—*Query:* In an action against the maker and indorser of a promissory note, brought by one to whom it was indorsed after it fell due, must not a counter claim set up in the answer be confined to some matter connected with the note, such as payment, want or failure of consideration, etc., or can a collateral demand be set up as such counter claim?

IDEM.—*Query:* In such action, if the counter claim exceeds the amount due on the note, can judgment be rendered against the plaintiff for the balance?

IDEM.—*Query:* In an action against the maker and indorser of a promissory note, must not a counter claim, to be available at law, be one existing in favor of the defendants jointly?

APPEAL from the District Court of the First Judicial District, County of Santa Barbara.

The facts are stated in the opinion.

Barnes & Bowie, for Appellant.

The action of the Court in these proceedings was erroneous. Courts are not counsel and Court, making motions and orders in civil cases *ex suo motu*. They are not intrusted with any duty other than that of administering the law between parties who invoke it. If the plaintiff had found himself aggrieved by denials that were bad, or by sham defenses, he should have tested them by moving for judgment upon the pleadings, or to strike out the answers as sham; failing to do so, the defendants' right to stand upon their pleadings was complete. While it is the duty of Courts to grant meritorious motions, properly made, we conceive it to be error in any Court to administer what it may consider justice without itself pursuing and requiring parties to pursue the ancient and customary paths of practice.

Albert Packard, for Respondent.

By the Court, WALLACE, J.:

Curtis commenced this action against Sprague, the maker, and Huse, the indorser of a negotiable promissory note, made to one Thomas Dennis, as payee, and assigned by him to the plaintiff after it had become long overdue. The note fell due in November, 1865, and was assigned to Curtis in May, 1869, and this action was brought shortly thereafter. The complaint, after setting out the note sued upon, admitted that certain payments had been made thereon, and concluded with a prayer for judgment for the balance.

The defendants answered, and set up a payment of two hundred dollars, which, they alleged, had been in fact made on the note, but was not credited in the complaint. As it is conceded, however, that in the judgment, which the Court subsequently rendered in favor of the plaintiff, this two hundred dollars credit was allowed in favor of the defendants, no further notice of this part of the answer need be taken.

The defendants further relied upon a counter claim, which was alleged to have existed at the time of the assignment, in favor of the defendant Huse, and against Dennis, the assignor of the note sued on. This counter claim arose on an instrument in writing, signed by Dennis, and of which the following is a copy:

“SANTA BARBARA, December 15, 1862.

“I, Thomas Dennis, defendant in the suit of *Lewis T. Barton v. Thomas Dennis*, Sheriff of Santa Barbara County, hereby appoint Charles E. Huse as my attorney to obtain a dissolution of the injunction in said action; and I hereby agree to pay him one thousand dollars as a fee for obtaining the dissolution of said injunction. Witness my hand and seal the day and year above written.

“THOMAS DENNIS.”

It was averred in the answer that no part of the fee had been paid. To so much of the answer as set up the counter claim the plaintiff demurred, "for insufficiency in not stating facts sufficient to constitute a counter claim." This demurrer was overruled.

The plaintiff, therefore, filed a replication to the counter claim contained in the answer, in which he set up the Statute of Limitations, that Dennis "never signed the article of agreement set forth in the answer for the purposes as set forth in said counter claim," and that Huse himself was interested in the dissolution of the injunction named in the obligation signed by Dennis, and that his services in procuring the dissolution were in his own behalf, and for his own benefit. On motion of the defendants the replication was stricken out. At the June term of the Court, about six months thereafter, the plaintiff, by leave of the Court, and over the objection of the defendants, filed an amended replication. This was followed at the same term by a motion of the defendants to strike out the "amended replication," which motion was denied. This amended replication again set up the Statute of Limitations against the counter claim, and averred, in general terms, that the instrument on which the counter claim was founded was obtained by Huse from Dennis by misrepresentation of its contents; that no services were performed by Huse on behalf of Dennis in the dissolution of the injunction, nor had Dennis any interest in getting it dissolved.

When the Court denied their motion to strike out the amended replication the defendants demurred to it, and the demurrer was overruled. Upon overruling the demurrer the Court below ordered the counter claim to be stricken from the answer, holding "that the plea of the Statute of Limitations in the amended reply was well and properly pleaded, and that the same was effective as against the counter claim set up in the answer of the defendants." The

Court thereupon directed its Commissioner to compute the amount due on the note, allowing the two hundred dollars credit claimed in the answer, and subsequently rendered judgment for the balance appearing to be due.

We think the Court erred in striking out the counter claim, so called, from the answer. There was no motion before the Court to strike it out, and the demurrer to the replication was not equivalent to such a motion.

We are not to be understood as determining the sufficiency of the defense interposed in this case. Its consideration involves several important questions not argued before us—at least not on the part of the respondent.

Is the agreement of Dennis to pay Huse one thousand dollars a counter claim against Curtis within the second subdivision of section forty-six of the Practice Act? If it be really a counter claim, and had exceeded the amount due on the note in suit, could judgment be rendered against Curtis for the balance owing by Dennis, under section one hundred and seventy-six and section one hundred and ninety-nine of the Practice Act? Supposing the demand against the defendants to be joint, must not the set-off, to be available *at law*, under section five, be one existing in favor of the defendants jointly, as was held in *Warner v. Barker*, 3 Wend. 399, and *Banks v. Pik.*, 15 Maine R. 268? Though Curtis received the note overdue, is it in his hands subject to the collateral claim here interposed, or does not the rule confine the defense to some matter connected with the note itself, such as payments, want or failure of consideration, etc., according to the doctrine of *Burrough v. Moss*, 10 B. & C. 558; *Whitehead v. Walker*, 10 Meeson & Welsby, 695; *Gullett v. Hoy & Orten*, 15 Mo. R. 399? These and other important questions arise in the record, but they have not been argued before us. We are not to be expected to perform the duties of counsel.

The judgment is reversed and the cause remanded, with

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directions to set aside the order striking out the counter claim, and to permit the plaintiff to file a demurrer to the answer, or to such portion thereof as he may be advised.

Mr. Justice SPRAGUE did not express an opinion.

[No. 2,658.]

W. L. UHLER v. THOMAS D. BOYD.

STIPULATION BY OFFICER WITHOUT LEGAL ADVICE.—An officer, either of the State, or of a county or city, having public funds under his control, ought not to enter into a stipulation in respect to the facts in a suit affecting such funds, without acting under the advice of counsel.

MANDAMUS ON COUNTY TREASURER.—If, in an application for a writ of mandate, to compel a County Treasurer to pay money, such Treasurer stipulates as to the facts, without the advice of counsel, and no attorney appears for him, the Court will order the proceedings to be stayed until a copy of the record is served on the District Attorney and Chairman of the Board of Supervisors.

APPLICATION to the Supreme Court for writ of mandate.
The other facts are stated in the opinion.

Haymond & Stratton, for Petitioner.

By the Court, RHODES, C. J.:

The purpose of this action is to compel the defendant, as the Treasurer of Sutter County, to pay certain warrants.

The application for the writ of mandamus is presented on a statement of facts, signed by the attorneys for the petitioner, and by the defendant in person, as the Treasurer of Sutter County. The Treasurer is not represented in this Court by an attorney; nor does it appear that in agreeing to the statement of facts, he acted under the advice of counsel. An officer, either of the State or of a county or city, having public funds or property under his control, ought not to enter

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into a stipulation in respect to the facts in a case, affecting such funds or property, without acting under the advice of counsel.

The money sought to be reached in this case belongs to the Swamp Land Fund of one of the districts in Sutter County; and the Supervisors of the county ought to be apprised of these proceedings, so that such action may be taken, as they may deem necessary for the protection of the interests of the county, or of the Swamp Land Funds.

It is therefore ordered that the proceedings in this cause be stayed, until a copy of the record in the cause be served upon the District Attorney and the Chairman of the Board of Supervisors of Sutter County; and that thereafter, upon five days' notice to them, or to the attorney for the defendant, should he appear by an attorney, the petitioner may have the cause placed on the calendar for hearing.

Mr. Justice TEMPLE did not express an opinion.

[No. 2,525.]

**EDWARD B. WALSWORTH v. G. S. JOHNSON AND
C. A. SPAULDING.**

CONFLICT IN EVIDENCE.—Where there is a substantial conflict in the evidence, the judgment will not be reversed on the ground that the evidence does not warrant it.

CREDIBILITY OF WITNESS.—The question of the credibility of a witness is for the Court below, and not for the appellate Court, to determine.

DEFENSE OF ANOTHER ACTION PENDING.—The defense that there is another action pending between the same parties for the same cause must be pleaded, otherwise evidence cannot be introduced to support it.

ANOTHER ACTION PENDING FOR SAME CAUSE.—A defendant who interposes a defense of another action pending between the same parties for the same cause must support it by the record of an action in which he is also a defendant, and the present plaintiff is plaintiff. If the party who interposes such defense is a plaintiff in such other action, it is no defense, although for the same cause.

APPEAL from the District Court, Third Judicial District, Alameda County.

The facts are stated in the opinion of the Court.

R. F. Ryan, for Appellants.

H. P. Irving, for Respondent.

By the Court, WALLACE, J.:

The plaintiff brought this action against the defendants, under section two hundred and fifty-four of the Practice Act, to quiet his title to certain real property, of which he was in the admitted actual possession at the time.

The cause was tried by the Court without the intervention of a jury. Findings were filed, and judgment rendered for the plaintiff. From the judgment, and from an order denying their motion for a new trial, the defendants appealed.

The points relied upon for reversal are only those errors which were assigned as grounds in support of the motion for a new trial in the Court below.

The first, second, third, fifth, and sixth of these grounds are, in substance, that the defendants were in the adverse possession of the premises from 1853 until 1867 (at which time the defendants claim that the plaintiff obtained possession by collusion with a tenant of theirs). We have carefully examined the record and find a substantial conflict upon this point. For instance, the plaintiff, who was called as a witness by the defendants themselves, stated, on his cross-examination, as follows: "I bought in 1860-1861; I bought the whole plot, No. 20, from Mr. Jules Bangelli; Mr. Bangelli bought from Mr. Alstrun; I was put in entire possession of the whole property according to this plot, and this piece of land was considered a portion of it." The witness further stated that he was in possession in March

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1866, when he went on a visit to the East — “in the undoubted possession of the property” — which is near three acres in extent; that he had a fence around it, and used it as a pasture lot, etc. The credibility of this witness is not for us but was for the court below to consider, and we cannot disturb the conclusions arrived at upon that matter.

The fourth ground is that the Court below excluded certain records offered by the defendants, by which it would have appeared that at the time of the commencement of this action there was already pending in the County Court of Alameda County another action, in which the defendants here and one Buchan were plaintiffs, and the plaintiffs here and one Gunter were defendants. A sufficient answer to this point is found in the fact that no such defense as that there is another action pending between the same parties, for the same cause, is pleaded. But if such a plea had been filed, the facts offered to be shown by the record from the County Court would not have supported the plea. The parties in these two suits are not the same. The plaintiff here is not the plaintiff in the County Court. The very foundation of such a defense is the maxim “*Nemo debet bis vexari*,” etc.; and manifestly this can have no application when the first suit is brought, not by, but against, the person who is the plaintiff in the second action.

I see no error in the record, and the judgment and order are affirmed.

[No. 2589.]**ALBERT E. CRANE v. DANIEL M. SALMON.**

QUITCLAIM DEED OF SPANISH GRANT.—A quitclaim deed of a Spanish grant, executed by the grantee before he receives a patent from the United States, conveys to the purchaser the title, and the patent afterwards issues to his benefit.

APPEAL from the District Court, Third Judicial District, County of Alameda.

Action in ejectment, and judgment for plaintiff. Defendant moved for a new trial. The Court denied the motion, and defendant appealed from the judgment and from the order of the Court denying the motion for a new trial.

The other facts are stated in the opinion.

E. A. Lawrence, for Appellant.

First — Ejectment could be maintained upon strict title, as this is (the plaintiff and his grantors never having been in possession) only by the patentees Alviso and Pacheco, or by those who were their grantors subsequent to the patent, which was issued February 21st, 1866. (*Emeric v. Penniman*, 26 Cal. 119; *Clark v. Lockwood*, 21 Cal. 222; *Salmon v. Simonds*, 30 Cal. 306; *Minturn v. Brower*, 24 Cal. 744; *Henderson v. Pointdexter*, 12 Wheat. 543.

Second — Plaintiff was not a grantee of Alviso or Pacheco *subsequent* to the patent, because he acquired his title by divers mesne conveyances *passing through Strode*, who acquired his title by deed of October 14th, 1852.

Third — Neither did plaintiff acquire the benefit of this after-acquired title of Pacheco's *by estoppel* — because the deed from Pacheco to Strode of October 14th, 1852, was a *quit-claim* deed — it is alleged merely to convey "all his (Pacheco's) interest in said rancho." It is also alleged that he (Pacheco) "*granted, bargained, and sold*" all his interest to Strode; but it is *not* alleged that he did so by a *grant, bargain, and sale deed*, or by a deed with covenants.

Fourth — The character of the other mesne conveyances, except the one from Pacheco to Strode, is not set forth, and the Court will not presume that they had covenants trans-lative of the after-acquired title of the patent.

Even if the title of Pacheco acquired by the patent inured

for the benefit of Strode by his deed, there is nothing to show that it inured to Strode's grantee or the plaintiff, because the character of their deeds is not set forth.

A. M. Crane, for Respondent.

The point of appellant resolves itself into the proposition that a conveyance of grant, bargain, and sale in fee simple by a Mexican grantee, made before the confirmation of the claim, does not convey the legal title. It is quite unnecessary to contend against this assumption, and it would be but a waste of time to argue that the authorities cited by appellant sustain no such proposition.

By the Court, CROCKETT, J.:

The description of the land, as contained in the complaint, findings, and judgment, is sufficiently certain to identify it, which is all that is necessary. It appears that the land in contest was granted by the Mexican Government to Pacheco and Alviso, and their title having been finally confirmed, a patent was duly issued to them in 1866. In 1852 Pacheco conveyed to Strode all his interest in the rancho, of which the land in controversy forms a part; and thereupon a deed of partition was executed between Strode and Alviso, whereby, as the Court finds, the premises in controversy were set apart to Strode, from whom the plaintiff derails title by regular mesne conveyances. The defendant shows no title, but claims: first, that by the partition deed the said premises, if they formed any part of the rancho, were set apart to Alviso, and not to Strode; and second, that, even though they were set apart to Strode, the legal title conveyed by the patent did not inure to his benefit, inasmuch as Pacheco conveyed to him only by quitclaim deed. On the first point it is sufficient to say that there is

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evidence to support the finding to the effect that said premises are included in the patent, and by the partition deed were set apart to Strode.

The second point is not tenable. The patent, on its face, runs to Pacheco and Alviso, their heirs and assigns; and upon well settled rules of construction their prior vendees are their assignees of the title, in a legal sense. It is clear that the patent inured to the benefit of Strode, and of the plaintiff, as his successor in interest.

Judgment affirmed.

Mr. Justice SPRAGUE expressed no opinion.

[No. 2,447.]**THE PEOPLE v. LEWIS MURRAY.**

IMPEACHMENT OF WITNESS.—Where the defendant introduces witnesses to impeach the credibility of one of plaintiff's witnesses, it is not an abuse of discretion in the court to limit him to eight witnesses, provided the plaintiff introduces no witnesses to sustain his credibility.

INSTRUCTIONS TO JURY.—Where an instruction asked has already been given substantially by the Court, it is not error to refuse it, but in a criminal case the better course is to give it.

INFERENCE OF GUILT FROM CIRCUMSTANTIAL EVIDENCE.—The law does not require, in order to justify the inference of legal guilt in cases of circumstantial evidence, that the existence of the inculpatory facts must be absolutely incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt. The true rule is, that the fact shall not only be consistent with the guilt of the accused, but inconsistent with any other rational conclusion.

APPEAL from the County Court of Sutter County.

The defendant was convicted of the crime of an assault with intent to commit murder, and appealed.

The other facts are stated in the opinion.

Whitesides & McQuaid, and *Coffroth & Spaulding*, for Appellant.

Attorney General *Jo Hamilton*, for the People.

By the Court, RHODES, C. J.:

The record does not show that the prosecution introduced any evidence, to sustain the witness, whose credibility was attacked by the defendant. Under those circumstances, it was not an abuse of discretion, for the Court to limit the defendant to eight witnesses, on the question of the credibility of the witness for the prosecution.

The defendant's first instruction was substantially given in the charge of the Court, and its refusal, therefore, was not erroneous. But, as has frequently been said by this Court, it is the better course for the Court in such case to give the instruction. The labor and expense of a motion for a new trial, or of an appeal, may thus be sometimes avoided.

The appellant's third point is not tenable. The instruction refused is as follows: "In order to justify the inference of legal guilt, the existence of the inculpatory facts must be absolutely incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt." To require the facts to be "absolutely incompatible" with the innocence of the accused, is to require proof of his guilt beyond the possibility of a doubt. The law requires that the facts shall not only be consistent with the guilt of the accused, but inconsistent with any other rational conclusion. A higher degree of certainty, in establishing the guilt of the accused, by means of circumstantial evidence, cannot be required without rendering such evidence valueless. (*People v. Dick*, 32 Cal. 215; *People v. Cronin*, 34 Cal. 201.)

Judgment affirmed.

Argument for Appellant.

[No. 1,802.]

**M. C. TILDEN v. THE BOARD OF SUPERVISORS
OF THE COUNTY OF SACRAMENTO.**

BOARD OF SUPERVISORS.—A Board of Supervisors of a county, in allowing or disallowing a claim, exercise judicial functions.

WRIT OF MANDATE.—When a Board of Supervisors have acted on a claim, either by allowing or disallowing it, a writ of mandate will not be issued to reverse or review its judgment.

IDEM.—Before such writ can be properly awarded the Board must refuse to act upon the claim, after it has obtained jurisdiction of it.

IDEM.—A statute declaring that a Board of Supervisors shall not be sued in any action whatever, but that it may be proceeded against by mandamus, does not change the essential nature or office of the writ itself.

RESOLUTION OF BOARD OF SUPERVISORS REVOCABLE.—A resolution of a Board of Supervisors, after it has disallowed a claim, reciting that the services on which it is based have been performed by the claimant, but that the Board has doubts as to its legality, and directing the District Attorney to enter the appearance of the Board in any Court in which the claimant may commence an action to require the Board to allow the claim, which resolution is not agreed to or accepted by the claimant, is revocable at the pleasure of the Board.

APPEAL from the District Court, Sixth Judicial District, Sacramento County.

The facts are stated in the opinion of the Court.

James C. Goods, District Attorney, and *Daniel J. Thomas*, for Appellant.

First—The Court had no jurisdiction in this proceeding to render any judgment except one of dismissal.

Second—If it had in this case power to render any judgment other than of dismissal, that power only extended to a direction to the Supervisors to act, and did not extend to an order to pay a specific sum of money. (*People v. El Dorado County*, 8 Cal. 61.)

Mandamus lies only “either to compel the performance of ministerial acts, or is addressed to subordinate judicial tribunals requiring them to exercise their functions and ren-

Argument for Respondent.

der some judgment in cases before them, when otherwise there would be a failure of justice from delay or refusal to act. But when the act to be done is judicial or discretionary, the Court will not direct what decision shall be made." (*Chase v. Blackstone Canal Co.*, 10 Pick. 244, cited as authority by this Court in *People v. Sexton*, 24 Cal. 83.)

"The mandate can proceed no further than to order them [the Supervisors] to take action on the report." (*People v. Lake Co.*, 33 Cal. 493; *Hastings v. San Francisco*, 18 Cal. 59; *People v. Pratt*, 28 Cal. 169; *Flagley v. Hubbard*, 22 Cal. 36.)

John K. Alexander, District Attorney, also for Appellant.

Bowie & Catlin, and *R. C. Clark*, for Respondent.

Whether the remedy adopted by the petitioner in this case is the proper one involves the question whether the act which he demands the Supervisors to perform is a judicial act, or whether it is merely a ministerial duty.

Mandamus may compel an inferior tribunal to perform a judicial function, but it will not guide or direct as to the manner of the performance. The resolution passed by the Board leaves nothing to be done except the mere ministerial duty of ordering the bill to be paid. (*Hunt v. Supervisors of San Francisco*, 28 Cal. 429; *Moses on Mandamus*, 103, 105, 125; *People v. Supervisors of Richmond County*, 20 N. Y. 253.)

In Sacramento County the functions of the writ of mandate are enlarged by the Act which tenders this writ in lieu of all other remedies.

S. W. Sanderson, also for Respondent.

The plaintiff's claim is a legal charge against the county. Mandamus is the proper and legal remedy, and the plaintiff has no other plain, speedy, and adequate remedy. There is

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no remedy against the County of Sacramento, except such as may be afforded by certiorari, mandamus, or injunction. Neither certiorari nor injunction will afford any relief. Supervisors exercise mixed functions, partly judicial, and partly ministerial. When there is nothing of a claim left, except the question whether it is a legal charge, mandamus is the remedy. (*C. W. & Z. R. R. Co. v. Com. of Clinton Co.*, Ohio State R. 77, 105; *People v. Supervisors Richmond Co.*, 20 N. Y. 253; *Bright v. Supervisors of Chenango*, 18 John. 242; *People v. Whitman*, 6 Cal. 659.)

By the Court, WALLACE, J.:

It is provided by the Act of April 25th, 1863, that the Board of Supervisors of Sacramento County "shall not be sued in any action whatever," but that they may be proceeded against by certiorari, mandamus, or injunction to prevent or compel their proceedings, "if the same can legally be prevented or compelled."

Tilden presented a claim to the Board and it was disallowed. He then obtained a writ of mandamus from the Court below, commanding the Board to allow a specified portion of the claim. From this judgment the Board bring this appeal.

In disallowing the claim the Board unquestionably acted in the exercise of judicial functions, and having arrived at a determination upon the matter pending before it, it is not to be turned round to some other judgment, not its own, through the instrumentality of the writ of mandamus. Before such a writ can be properly awarded, it must be made to appear that the Board refuses to perform some designated act which the law specially enjoins upon it as a duty. The complaint here is that it refuses to allow Tilden's claim. But the answer is, that there is no duty resting on the Board to allow this particular claim, either in whole or in

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part; that its only duty was to act upon it as a claim, and that that duty is as fully discharged (so far as a writ of mandamus can enforce it) by a rejection as it would have been by an allowance of the claim.

Our attention has been called to the fact that at the time at which the Board rejected the claim it also adopted the following resolution:

“Resolved, Whereas, doubts exist in the minds of a majority of the Board of Supervisors of Sacramento County whether the claims against said county presented to said Board by M. C. Tilden, City Attorney, for fees of that office, are a legal charge against said county, and are desirous of having a legal decision by some Court of competent jurisdiction and authority to determine the same; and whereas, said Board and said City Attorney are desirous of testing said question in Court, with as little expense and delay as possible; with a view to that end, it is hereby admitted on the part of said county and said Board of Supervisors that the claims filed by said Tilden with the Clerk of said Board on the — day of April, 1868, marked “A” and “B,” were presented in due form; that the labor therein charged for was performed by said Tilden, while City Attorney of Sacramento City, at the dates therein set forth, and that no part of said fees have been paid by the county or otherwise, and that the above claims have been rejected and disallowed by said Board; and the District Attorney is hereby directed to enter the appearance of this Board in any action or proceeding which said Tilden may commence in any Court, not a Court of a Justice of the Peace, for the purpose of requiring said Board to allow the said claims, and defend the action of this Board therein.”

It is said that the Board thus substantially determined in favor of the claim, while formally rejecting it; that it found all the facts to be true, which are necessary to make out a valid claim in favor of Tilden, and that in this condition it

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had remaining no judicial discretion to reject the claim. The language of the resolution is, that certain facts are "admitted," and this seems to have been done merely with a view to making an agreed case for determination in the Courts. It looked to something in the nature of an arbitration; it was never accepted or agreed to by Tilden, and was, therefore, certainly revocable by the Board. Acting under its own sense of duty to the public, it afterwards instructed the District Attorney to resist the claim of Tilden upon all possible grounds. This, I think, it had a right to do, if it saw proper.

There is nothing in the proposition that the writ of *mandamus*, when directed to the Board of Supervisors of the County of Sacramento, should have a more enlarged or more efficacious operation than is to be accorded to it under general rules when issued against other Boards of County Supervisors. It is true that the statute which has been cited denies any other remedy than this one to the petitioner; and so far it may be said to show that he has no plain, speedy, or adequate remedy in the ordinary course of law; but there is nothing in the statute which, even in *such* a case, undertakes to change the essential nature or office of the writ itself, as not being designed to control the judicial discretion of the Board, or to compel it to any particular determination.

The judgment and order denying a new trial are reversed, and the cause remanded, with directions to dismiss the writ.

Mr. Chief Justice RHODES delivered the following concurring opinion, Mr. Justice TEMPLE concurring:

When a claim against a county is presented to the Board of Supervisors, there are only four courses which may be adopted. The Board may allow the claim in whole or in part; it may reject it — that is to say, refuse to allow any

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portion of it; or it may refuse to take cognizance of the claim; or, after having taken jurisdiction of the claim, it may, for some cause, refuse to proceed; and in that case, if the right of the claimant is clear, the Board may be compelled to proceed to a determination of the matter. In the first and second cases the Board takes jurisdiction of and passes on the claim; and in the third case it refuses to entertain jurisdiction of or consider the claim. I cannot conceive of any other mode in which the Board can act. The order in this case is a rejection of the claim, as I read it. The claim certainly was not allowed, nor can it be claimed that the Board refused to consider it, for it was finally disposed of, so far as the Board was concerned. The validity or invalidity of the grounds or reasons on which the Board acted, afford no test of the question as to whether the Board did disallow and reject the claim. If a claim is disallowed because the evidence is deemed insufficient, or because, in the opinion of the Board, it is not a county charge, or because the Board doubts whether it is a county charge, the final determination is the same—that is to say, the claim is rejected. When certain facts are presented to a Court or a Board, exercising judicial functions, there is only one judgment or determination that can legally be rendered or made; and if the judgment or order which is rendered or made is not such as the law demanded, it is merely erroneous—assuming that the Court or Board had acquired jurisdiction, and had competent authority to render or make the judgment or order—but because the facts were misapprehended, or the law misunderstood or doubted, it cannot be said that the matter presented for determination has not been decided. It will not be contended that the judgment of a Court rendered *pro forma*, because of doubts entertained as to the law applicable to the case, and in order

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that the case may be heard by an appellate Court, is not a judgment. In this case the Board doubted whether the petitioner's claim was legally chargeable against the county; and in order that the question might be determined by the proper Court, the Board, doubtless misapprehending the effect of the special statute which had been tinkered up for Sacramento County, providing what actions may be maintained against the county, rejected the claim. However desirable it may be that the question as to the legality of the claim should be answered, the law of mandamus must not be tortured for the purpose of eliciting the answer.

It is contended that, as the performance of the services mentioned in the petitioner's account was sufficiently proven, there was no duty to be performed by the Board except that of the allowance of the account, and that such duty is merely ministerial. I am not aware of any authority which sustains that position; and it appears to me to be altogether indefensible on principle. The Board, in passing on a claim, acts judicially. The allowance or rejection of the claim is the determination of the matter submitted to the Board; and it occupies the same relation to the claim, that a judgment does to an action. If, in an action where the facts are admitted, or otherwise satisfactorily proven, the rendering of judgment is a ministerial act, then the order of the Board allowing or rejecting a claim, upon similar proof of the facts, is also a ministerial act; but if the former is necessarily a judicial act, so is the latter. Mandamus does not lie to a Board to compel it to enter a particular order of a judicial character; and clearly not to enter an order reversing its former order.

I concur with Mr. Justice WALLACE, and think the writ should be dismissed.

CROCKETT, J., dissenting:

The plaintiff was the City Attorney of the City of Sacramento, and, in his official capacity, conducted certain prosecutions for violations of the laws of the State and other prosecutions for violations of city ordinances. Claiming that he was entitled to be paid for these services by the county of Sacramento, under the statutes then in force, he made out his account against the county and presented the same to the Board of Supervisors for allowance. In the account he claimed to be entitled to the sum of four hundred and sixty-one dollars, for prosecutions for violations of the laws of the State, and the remainder of the account was for prosecutions for the violation of city ordinances. The Board of Supervisors, on examining the account, was satisfied that the plaintiff had rendered the services as charged, and that the items of the account were just, but doubted whether, under the law, the account was a county charge; and because of this doubt, and for that reason only, as appears by the record of their proceedings, refused to allow the account. The plaintiff applied to the District Court for a mandamus, to compel the Supervisors to audit and allow the account. On the hearing, the District Court ordered a mandamus to issue, requiring the Supervisors to audit and allow so much of the account as was for services rendered in conducting prosecutions for violations of State laws, but denied the mandamus as to the remainder of the account. Neither the plaintiff nor the District Attorney was satisfied with this decision, the former claiming that a mandamus should have issued directing the whole account to be allowed, whilst the District Attorney insists: First—That no part of the account should have been allowed. Second—That if the account was a county charge and justly due, mandamus was not the proper remedy. We shall first consider the latter point. On the former hearing of this cause we held that this was

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not a proper case for mandamus; that it was the province of the Board of Supervisors to audit and allow, or reject the plaintiff's claim; and that having acted in the premises by rejecting the claim, they could not be compelled by the writ of mandamus to reverse their decision, and allow the demand, even though we should be satisfied that the claim was improperly rejected. On further reflection, I am convinced we fell into an error in this respect. Whilst it is perfectly well settled, by an almost unbroken line of decisions, that where an inferior tribunal is authorized to exercise its discretion, whether or not it will perform a given act, or as to the mode or manner of its performance, it cannot be controlled in the exercise of this discretion by means of the writ of mandamus, nevertheless, if it refuses to act at all, and to exercise the discretion with which it is clothed, and if there is no other plain, speedy, and adequate remedy at law, it may be set in motion by this writ, and compelled to act. But there is a large class of cases in which an inferior tribunal acts in a twofold capacity; in one of which it is required to exercise a discretion on a given subject, and after having exercised it, will still have to perform a merely ministerial duty in carrying its decision into effect. In so far as the exercise of its discretion is concerned, it cannot be controlled by mandamus; but after having exercised its discretion in the given case, if there results therefrom a merely ministerial duty, involving the exercise of no discretion, it may be compelled by mandamus to perform it, if the law has provided no other speedy, plain, adequate remedy for such a case. In the case supposed, all that required the exercise of discretion has been performed, and nothing remains to be done except a mere ministerial act; and if the law has provided no other method to compel the performance of this act, the party aggrieved would be wholly without redress unless he could invoke the aid of this writ, the peculiar province of which is to enforce the performance of purely ministerial

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duties. These principles have been repeatedly recognized in this and other courts. (*C. W. & Z. R. R. Co. v. Commissioners of Clinton County*, O. St. R. 77, 105; *People v. Supervisors of Richmond County*, 20 N. Y. 253; *Bright v. Supervisors of Oneida*, 19 Johns. 259; 3 Mich. 475; *People v. Mead*, 24 N. Y. 121; *Fowler v. Pierce*, 2 Cal. 165; *McDougall v. Bell*, 4 Cal. 177; *Thomas v. Armstrong*, 7 Cal. 286; *People v. Whitman*, 6 Cal. 659; *McCauley v. Brooks*, 16 Cal. 11; *Frank v. City and County of San Francisco*, 21 Cal. 668; *Ex parte Spring Valley Water Works*, 17 Cal. 132; *Perry v. Washburne*, 20 Cal. 318; *People v. Supervisors etc.*, 28 Cal. 429; *Anderson v. Pennie*, 31 Cal. 265.)

In this case the only discretion to be exercised by the Board of Supervisors was in respect to the fact whether or not the plaintiff had rendered the services which he claimed to have performed. Having ascertained this fact, as they did, to their satisfaction, all the rest was a mere matter of law. The statute fixed the compensation for such services, and all that remained for the Board of Supervisors was to determine whether the claim was a county charge to be paid out of the County Treasury. It appears the Board decided this question in the negative, and on that ground only refused to allow the claim. If they were mistaken in their view of the law, it was their duty to direct their Clerk to enter an order allowing the claim, so that it might be paid by the County Treasurer. If the performance of mere ministerial duties cannot be enforced by mandamus, simply because the officer or Board charged with their performance misconstrues the law, the writ would be of but little value and would be deprived of one of its most useful functions. Upon that theory in almost every case, it would be a sufficient answer to the writ for the officer or tribunal to whom it was directed to say that, in his opinion, the law did not authorize or require him to perform the given act; that they had the right to decide the law of the case, and having decided it,

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their action could not be reviewed by the writ of mandamus. This would be to destroy the efficacy of the writ in a large class of cases which most demand its aid. Nor is there in this case any other plain, speedy, and adequate remedy, inasmuch as there is no appeal from the order of the Supervisors; and even if a suit in the ordinary form against the county should be deemed a plain, speedy, and adequate remedy, the statute denies this form of redress. (Stats. 1863, p. 503, sec. 1.)

I deem it unnecessary, in this opinion, to enter into a critical analysis of the several statutes defining the duties and fixing the compensation of the City Attorney of the City of Sacramento. It will suffice to say on this point that after a careful examination of these statutes, I am satisfied the county is responsible for the compensation of the City Attorney, for services rendered in prosecutions for violations of the laws of the State; but is not liable for services rendered in prosecutions for violations of city ordinances.

I am, therefore, of the opinion that the order of the District Court directing a mandamus to issue to compel payment of the first, and denying it as to the latter class of services, was correct, and ought to be affirmed.

[No. 2,574.]**JOHN GAMBETTE v. JOHN BROCK.**

JUDGMENT — MARRIED WOMAN.— A judgment against a married woman upon a contract, made by her during the marriage, is valid until reversed, and cannot be impeached in a collateral action on the ground of her coverture.

MARRIED WOMAN — HOMESTEAD.— A declaration of homestead made by a married woman, under the Homestead Act of 1860, is valid, notwithstanding her husband never resided or made his home on such homestead, and never executed or acknowledged the homestead claim made by her, and in the absence of any showing as to the causes of his absence from such homestead, or that he had a home or fixed residence elsewhere, or any family other than his wife.

Argument for Appellant.

Issue.— The question as to the validity of the wife's homestead claim, when it appears that she and her husband were living separate by agreement, or that he had abandoned her, or that he had fixed a home and residence elsewhere, not decided.

APPEAL from the District Court of the Fifth Judicial District, San Joaquin County.

The case is stated in the opinion.

J. H. Budd and *F. T. Baldwin*, for Appellant.

First— The said judgment rendered in said Justice's Court was binding and conclusive as to all matters in issue in that action. (1 Green. Ev., Sec. 528; 20 Howell, 538; *Harvey v. Richards*, 2 Gall. 229; *Hibrands v. Dullevan*, 4 Halst. 183; *Bridge v. Sumner*, 1 Pick. 371.)

Second— In this action plaintiff had no opportunity to plead said judgment of said Justice's Court in bar as an estoppel, and said judgment is equally conclusive as if it had been so pleaded. (1 Green. Ev., Sec. 631; *Howell v. Mitchell*, 14 Mass. 241; *Howes v. McMichael*, 6 Paige, 139.)

Third— The premises sued for in this action were not a homestead at the time of said Constable's sale. To constitute a homestead there must have been residence by the head of the family on the land claimed as a homestead. The alleged husband of the said defendant in the action in said Justice's Court never lived on said premises.

The defendant in this action claims that the property sued for was the separate property of the said Isadora Rodriguez, in findings in this action mentioned. The findings show that her husband never resided on the land, and the same could not become a homestead under the laws of this State. (*Cary v. Rice*, 6 Cal. 625.)

The husband cannot have two homesteads of the family, and unless he resided on the premises they never could have become a homestead; otherwise married people may have two homesteads, the one claimed by the husband, the

Argument for Respondent.

other claimed by the wife, as such. It has been held that even if the wife did not reside on the land claimed as a homestead it cannot be held as such. A Court of limited jurisdiction has a right to determine whether the facts of any particular case sustain such jurisdiction. (*Crepps v. Duden et als.*, 1 Smith's Leading Cases, 827, and the authorities there cited.)

Fourth — The husband is the head of the family, and not the wife. (*Guiod v. Guiod*, 14 Cal. 506.)

Byers and Elliott, for Respondent.

A married woman cannot incur a personal liability. Under the law of this State and decisions of this court she cannot create a personal liability by contract in any form, unless in exceptional cases, as under the Sole Trader's Act, etc., which could be enforced in equity against her or her separate property. (*Simpers et al. v. Sloan et al.*, 5 Cal. 457; *Luning v. Brady et al.*, 10 Cal. 265; *MacLay v. Love et al.*, 25 Cal. 367; *Smith v. Greer et al.*, 31 Cal. 476.) Certainly no valid judgment could be obtained in a Justice's Court against a married woman, whether she plead coverture or not.

The contract being void, it is not a matter to be avoided or not at the pleasure of the *feme covert*; but any judgment by default would be as utterly without validity as though the coverture had been plead, proved, and judgment rendered notwithstanding. (1 Parsons on Contracts, 346, 5th ed.; 3 Parsons on Contracts, 413, 5th ed.)

The judgment of the Justice could not have been plead as an estoppel if the action had been brought by defendant against plaintiff, because the parties to the two actions are not the same, neither is the subject matter the same. (1 Greenleaf's Evidence, Sec. 528.)

The cases cited by appellant have no bearing upon the homestead law under which Isadora Rodriguez took her

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homestead — this law having been enacted subsequent to the decisions quoted. Under the Homestead Act of 1860 either the wife or the husband may make the declaration. It does not follow that the husband had any other homestead than that taken by his wife. Why he had never lived with his wife on the homestead does not appear, but it will hardly be contended that, should a husband desert his wife, she would not be entitled to make a homestead for the benefit of herself and those under her charge, or even for herself alone, being married and without family. The Court finds a homestead; hence the conclusion is that the Judge believed that, whereas the said Isidora *claimed* the niece and sister as part of her family, the niece and sister constituted a part of her family.

A purchaser at Sheriff's or Constable's sale is bound to see that there is a judgment which is not void. (*Blood v. Light*, October Term, 1868, of this Court; *Wells v. Stout*, 9 Cal. 498.)

By the Court, CROCKETT, J.:

This is an appeal on the judgment roll alone, by the plaintiff in ejectment, from a judgment in favor of the defendant. It appears from the findings that an action was commenced in a Justice's Court against one Isidora Briones, a married woman, to recover a sum of money alleged to be due on a contract, which it now appears was made during the marriage; that the said Isidora was duly served with a summons in said cause, and filed an answer therein, setting up her coverture as a defense to the action. The cause was tried by the Justice, who rendered a judgment against her for the amount claimed to be due; on which judgment an execution was duly issued, and was levied on the land in contest as her property. The land having been sold by the Constable, under the execution, and purchased by the plaintiff in this ac-

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tion, and there having been no redemption, he obtained the Constable's deed therefor.

This is the plaintiff's title. It further appears from the findings that the said lot of land was the separate estate of the said Isidora prior to her marriage in 1864, and that after her marriage she actually resided on said lot with her sister and a young niece, whom she had raised, and whom she claimed to be a part of her family; that in 1866, whilst actually residing upon said lot with her sister and niece, and claiming it as her home, she filed a declaration in due form, claiming said lot as a homestead, which claim of homestead has never been abandoned. It further appears that the husband of Isidora has never at any time resided upon said lot, or made his home there, and never executed or acknowledged the homestead claim filed by her. But it does not appear why the husband did not reside with his wife on said premises, nor where he resided, nor that he in any manner dissented from her action in filing the homestead claim, or that he claimed a homestead elsewhere.

On these facts two questions are raised on this appeal, to wit: first, whether the judgment against Isidora Briones in the Justice's Court was void on account of her coverture; and second, whether her homestead claim was valid.

The judgment in the Justice's Court was clearly valid until reversed, and cannot be impeached in a collateral action on the ground alleged. The Justice had jurisdiction of the subject matter of the action, and of the person of the defendant, whose coverture was made an issue in the cause. This issue was decided against her by the Justice, and, for aught that appears, may have been properly so decided on that trial for want of proof of the marriage. But however erroneous the judgment may have been, it was not void. There would be no safety in purchasing at judicial sales, under judgments rendered after due service of process on female defendants, if the title of the purchaser could be

defeated by proof in a collateral action, that the defendant in the judgment was a married woman at the time of the institution of the suit, or that she was incapable in law of contracting the debt for which the judgment was rendered. The fact that the Court had jurisdiction of the subject matter, and of the person of the defendant, is sufficient to establish the validity of the judgment until reversed or set aside. (*Moore v. Martin*, 38 Cal. 428.)

The second point raised on the appeal presents more difficulty. Under the Homestead Act, as it originally stood, all that was necessary to create the exemption of the property from forced sale was, that the premises should be occupied by the family as a home; and under the provisions of that act it was held that a homestead claim could not be created by the residence of the husband alone, in the absence of the wife and family. (*Cary v. Tice*, 6 Cal. 625; *Benedict v. Bunnell*, 7 Cal. 245; *Benson v. Aitken*, 17 Cal. 163.)

But the Homestead Act was materially modified by the statute of April 28th, 1860. (Stats. 1860, p. 311.) By the provisions of that act, either the husband or wife, or other head of a family, was authorized to select and dedicate the homestead by a declaration in writing, to be executed and recorded as provided in the Act. In construing this statute we have held that an actual residence upon the land was necessary to consummate the homestead claim. (*Gregg v. Bostwick*, 33 Cal. 220; *Mann v. Rogers*, 35 Cal. 316.)

But the question is now presented for the first time, whether the residence of the wife alone, under the circumstances stated in the findings, will be sufficient to establish the homestead claim when a proper declaration has been filed by her.

On the one side it is said that the husband is the head of the family, and that, in contemplation of law, his residence is the residence of his wife; and that if the residence of the wife alone would establish the homestead, the husband also might establish another homestead by his separate residence

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at another place, and thus there would be two valid homesteads, when the law authorizes but one; and that it is, therefore, plain that the homestead claim can only exist when the husband, who is the head of the family, has dedicated it as such by his actual residence on the land.

On the other hand it is said that the absence of the husband may be, and for aught that appears was, in this case, involuntary; that he may during the whole period of the marriage have been a soldier in active service at a remote point, or confined in the State Prison, or in a lunatic asylum, or voluntarily absent on a long journey, and that under such circumstances it would contravene the spirit of the Act if the wife was not allowed to establish a homestead by an actual residence on the land with other members of her family.

The point is not free from difficulty. It is clear that under the Act there cannot be two separate valid homestead claims, the one by the husband and the other by the wife, upon separate parcels of land; but in the absence of any showing as to the causes of the absence of the husband from the homestead selected by his wife, or any proof that he had a home or fixed residence elsewhere, or any other family than his wife, it appears to me to be entirely consistent with the spirit of the Homestead Act that the wife, having a family of her own, should be allowed to select and establish a homestead by her own residence upon it with her family.

This view appears to be supported by the provisions of the Act of 1860, defining what the declaration of homestead shall contain. It provides that "said declaration shall state that they, or either of them, are married, or if not married, that he or she is the head of a family; that *they, or either of them*, as the case may be, are at the time of making such declaration residing with their family, or with the person under their care and maintenance on the premises."

It is unnecessary to decide in this case how the validity of

Argument for Appellant.

the wife's homestead claim would have been affected if it had appeared that she and her husband had been living apart by agreement, or that he had abandoned her, or that he had a fixed home and residence elsewhere; but, upon the facts contained in the findings in this case, I think the homestead claim of the wife was valid, and that the judgment ought to be affirmed

And it is so ordered.

Mr. Justice SPRAGUE expressed no opinion.

[No. 2,424.]

THOMAS UPTON v. JOHN ARCHER.

INSERTING NAME OF GRANTEE IN A DEED.—A deed, in due form, signed and acknowledged by the grantor, does not become his deed until the name of a grantee is inserted therein; and an agent of the grantor cannot insert the name of a grantee in the absence of a grantor, unless his authority is in writing.

DEED FRAUDULENT IN LAW.—If the grantor leave with his agent a deed, in due form, signed and acknowledged, with a blank left for the grantee, and the agent, without authority in writing and in the absence of the grantor, fill the blank with the name of a grantee and deliver it, the deed is fraudulent in law and void.

JUDGMENT ON FRAUDULENT DEED.—If a deed is fraudulent in law and void, the proper judgment is that the deed be canceled. The judgment should not direct the grantee to reconvey.

APPEAL from the District Court, Fifth District, San Joaquin County.

The Court below dismissed the complaint, and the plaintiff appealed.

The other facts are stated in the opinion.

J. H. Budd, for Appellant.

Webster could not, as the agent of plaintiff, grant any interest in or to the land described in the complaint to the

Argument for Respondent.

defendant, because not authorized in writing so to do. (Sec. 6 of the Act concerning fraudulent conveyances and contracts, passed April 19th, 1850, p. 266; *Gardner v. Gardner*, 5 Cush. Rep. 583; *Lloyd v. Titus*, 2 Johns. Rep. 430.)

W. L. Dudley, for Respondent.

We cannot see how the sixth section of the Statute of Frauds avails the plaintiff. It has no application to this case, because the interest granted in this land was by act of plaintiff himself. We admit that there is some conflict of authorities upon the question whether a parol authority is adequate to authorize an alteration or addition to a sealed instrument; but Mr. Justice NELSON, of the Supreme Court of the United States, in the case of *Drury v. Foster*, 2 Wallace's Reports, 24, in speaking of authority by parol to alter or add to a sealed instrument, says: "Although it was at one time doubted whether parol authority was sufficient, etc., the better opinion at this day is that the power is sufficient." In the case of *The Inhabitants of South Berwick v. Huntress et al.*, 53 Maine, 89, the Court held that "a party executing a deed, bond, or other instrument, and delivering the same to another as his deed, knowing that there are blanks in it to be filled, necessary to make it a perfect instrument, must be considered as agreeing that the blanks may be thus filled up after he has executed it." And in the same case the Court say: "It seems to be now well settled that where a party executes a deed, or bond, or other instrument, and delivers the same to another in an imperfect state, and gives authority to that person to fill up the blanks, and thus perfect the instrument, and he does so, its validity cannot be controverted. This authority may be by parol. It may be implied from the facts proved, when those facts fairly considered justify the inference." In this case will be found numerous authorities cited on this subject.

By the Court, RHODES, C. J.:

The plaintiff being the owner of the tracts of land described in the complaint, offered to sell the same to two certain persons, and before they had accepted the offer, he signed and acknowledged an instrument, in form a deed, sufficient to convey the lands, except that a blank was left for the insertion of the names of the proposed purchasers as the grantees. He left this instrument with Webster, and gave him verbal directions to fill the blank with the names of the proposed purchasers if they accepted the offer. During the absence of the plaintiff, Webster sold the lands to the defendant, on the same terms that the plaintiff had offered to sell them to the proposed purchasers from him, caused the name of the defendant to be inserted in the instrument above mentioned, delivered it to the defendant as the plaintiff's deed, and received and still retains the portion of purchase money which was paid in hand, and the defendant's promissory note payable to the plaintiff for the residue of the purchase money. Upon the plaintiff's return, he refused to receive from Webster the money or the note.

When that instrument was left with Webster by the plaintiff, it was not his deed, for the obvious reason that there was only one party to it. No one could convert it into his deed except the plaintiff himself, or some one by him thereto duly authorized; and as it could not become the plaintiff's deed until the name of a grantee was inserted, that act could not be performed by an agent, in the absence of the plaintiff, unless his authority was in writing. (Story on Agency, Sec. 49, and notes; Dunlap's Paley on Agency, 157, and notes.) The case comes within the sixth section of the Statute of Frauds.

The plaintiff is entitled to judgment on the findings, but not to the judgment which he prayed for in his complaint—that the defendant be ordered to reconvey the premises to

Points decided.

the plaintiff—for the deed not being the deed of the plaintiff, the title to the premises did not pass to the defendant. But the plaintiff is entitled to a judgment ordering the deed to be canceled. It apparently conveys the title; but as to the plaintiff, it was at its inception, fraudulent in law and void, and it became and still remains a cloud upon his title.

Judgment reversed and cause remanded, with directions to enter a judgment, ordering the deed to be delivered up and canceled.

WALLACE, J., concurring specially:
I concur in the judgment.

Mr. Justice SPRAGUE expressed no opinion.

[No. 2,600.]

AMELIA A. BROWN v. GEORGE BROWN AND
BENJAMIN X. BROWN.

TESTIMONY CONFINED TO ISSUES.—In reviewing a case, the appellate Court will not consider the testimony as going beyond or outside the issues made in the pleadings.

EVIDENCE TO SUPPORT JUDGMENT.—The judgment will not be reversed by the appellate Court, on the ground that there was no evidence to sustain it, if there was some evidence tending to support the conclusion arrived at by the Court below.

FACTS TENDING TO SHOW A TRUST.—In an action by the wife against the husband to obtain a divorce, and to have property which the husband has deeded to a third person, decreed to be held in trust for the husband, and adjudged to be community property, and awarded to her, the facts that such third person is a brother of the husband, that the latter held a letter of attorney from the former, who lived in the Atlantic States, that the husband managed the property as he pleased, and the brother took little or no interest in it, that the brother was a man of small means at his own home, while the property here was valuable, and that the brother was not present at the trial in which his title was involved, are some evidence tending to show that the husband is the true owner, and that the sale to the brother was fraudulent.

Argument for Appellant.

POINT NOT DECIDED.—Will the appellate Court, on an appeal from the judgment, with a statement of the evidence annexed to the judgment roll, review the testimony, for the purpose of determining whether any evidence was introduced in the Court below to sustain the allegations of the complaint on which issue is taken?

APPEAL from the District Court of the Fifteenth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

M. A. Wheaton, for Appellant.

1. All questions of pure law can properly be considered by this Court on an appeal taken from the judgment, without any motion for a new trial having been made in the lower Court.

2. A plaintiff, having the affirmative of an issue to establish, must introduce some evidence tending to prove his side of that issue, or if he fails in so doing, the defendant has a right, as a matter of law, to a decision in his favor upon the issue.

3. In all cases the question as to whether the evidence introduced tends to prove the affirmative of a contested issue, is a question of pure law, and nothing else.

The first of the foregoing propositions is established in *Preston v. Walls*, 25 Cal. 61, 62; *Rice v. Gashire*, 18 Cal. 53; *Brown v. Tolles*, 7 Cal. 399; *Harper v. Miner*, 27 Cal. 109, 110; *Treadwell v. Davis*, 34 Cal. 604.

The second proposition is little less than a legal axiom. The maxim is, "*Ei incumbit probatio qui dicit non qui negat.*" (1 Greenleaf on Ev., Secs. 51, 71, 81.) Also the cases hereinafter cited where nonsuits were granted. (*Prevost v. Gratz*, 6 Wheat. 494; *Dewey v. Gravens*, 13 Cal. 49; *Pratt v. Hull*, 13 John. 354; *Masten v. Griffing*, 33 Cal. 114; *Dow v. Gould & Curry S. M. Co.*, 31 Cal. 650.)

Argument for Respondent.

G. F. & W. H. Sharp, also for Appellant.

If the plaintiff's theory be correct, the sequence she claims cannot be sustained by law. However fraudulent the transfer was as to creditors, it was good between the parties to it. (*Montgomery v. Hunt*, 5 Cal. 368; *Thornburg v. Hand*, 7 Cal. 561; *Page v. O'Neal*, 12 Cal. 498.)

That the husband can make a conveyance of his separate estate without consideration, and which will be good against all the world except existing creditors, there can be no doubt. Upon the plaintiff's own theory of the facts in this case, had the property in dispute been the separate property of George Brown, the conveyances to this appellant would have been entirely valid against the plaintiff. She claims, however, that the property was the common property of herself and George Brown, and not his separate property. In that case even an undivided one half of the property belonged to George Brown, which he could convey as he saw fit; and as to this half, the conveyances were valid and binding, and an undivided half of the property awarded belonged to this appellant clear from any claims of plaintiff.

R. W. Hunt and John L. Love, for Respondent.

This Court will not review the facts of a case on an appeal from the judgment. (*Griswold v. Sharp*, 2 Cal. 17; *Brown v. Graves*, 2 Cal. 118; *Ingraham v. Gildermeister*, 2 Cal. 483; *Covillaud v. Tanner*, 7 Cal. 38; *Brown v. Tolles*, 7 Cal. 399; *Garwood v. Simpson*, 8 Cal. 101; *Rhine v. Bogardus*, 18 Cal. 73; *Liening v. Gould*, 13 Cal. 598; *McCartney v. Fitz Henry*, 16 Cal. 184; *Gagliardo v. Hoberlin*, 18 Cal. 394; *Allen v. Fennon*, 27 Cal. 68.)

As an abstract proposition of law, that a husband can convey away, without consideration, the common property of himself and wife, in anticipation of a divorce suit, and with the intent to defraud or deprive his wife of her interest

therein or to defeat the judgment of the Court awarding more than half of the common property to the wife, the assertion of counsel that it is good as to one half, is not correct. The conveyance being without consideration, the equitable title was in the husband still, and the Court could control it in making its award. The fee remains in the husband. The naked legal title goes to the grantee in the deed. His interest is *nihil*. What he never had he can't be deprived of. (*Frakes v. Brown*, 11 Blackford, 295.)

By the Court, WALLACE, J.:

The plaintiff having brought an action against her then husband, one George Brown, obtained a decree of divorce from him upon the ground of extreme cruelty. He seems content with the decree, and does not appeal. The action, however, was not limited to the matter of divorce merely; it involved the alleged common property of the spouses, claimed to be of the value of fifty thousand dollars, consisting, in part, of several lots in San Francisco; and the complaint averred that this property was nominally held by Benjamin X. Brown, a brother of George Brown (who was, therefore, made a defendant, and is the sole appellant here), in trust for George, who is alleged to be the true owner, etc.

A jury trial was first had, as between the plaintiff and the defendant, George; and the verdict was that the latter was guilty of the extreme cruelty charged in the complaint.

The case was then referred to a Commissioner, to take and report to the Court the testimony concerning the alleged common property. Upon the coming in of the report, the Court adjudged that three several lots in the City of San Francisco, appearing in the name of the appellant, Benjamin, were, in fact, property belonging to the community about to be dissolved. It awarded the whole of the property to the plaintiff, and directed the defendant, Benjamin,

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to convey it to her for her own use and benefit. It is this portion only of the decree which is brought in question by the appeal.

The issue made by the pleadings, between the plaintiff upon the one part and the appellant upon the other, concerned the ownership of this real property. The plaintiff, in the Court below, claimed that it belonged altogether to the marital community, of which she was a member; the appellant, on the other hand, asserted that neither the community nor either of its members had any interest in it whatever, but that it was wholly his own. I do not propose, therefore, to consider the argument now made here, and which suggests, for the first time, that, after all, the community may have owned one undivided half and the appellant the other undivided half of the premises in controversy. The pleadings exclude that question, and the testimony cannot, of course, be considered as going beyond or without the issues presented by the pleadings. This would be so, even if a motion for a new trial had been denied; but no motion for a new trial was made in the Court below. The appeal is brought only upon the judgment roll, to which is annexed a statement on appeal, which, in upwards of two hundred folios, presents *in extenso* the evidence taken before the referee, by question and answer, but not a single exception or even an objection appears. The point now made upon the record is that there was no evidence tending to support the findings and decree of the Court below. It is conceded by the counsel for the appellant that this Court cannot review the evidence except a motion for a new trial be first made in the Court below; yet it is claimed that a statement on appeal may be made for the purpose of showing that, notwithstanding the plaintiff's allegations were fully denied by the answer, there was *no evidence whatever* adduced in support of the complaint, and therefore it was error, in point of law, to have rendered judgment for her. It is likened, in

argument, to a case in which A. sues B. in an action of assumpsit; the latter answers, traversing every allegation of the complaint. In this condition of the pleadings a trial is had, in which the plaintiff offers no evidence whatever to sustain the allegations of his complaint, but, nevertheless, recovers judgment. It is said that in such a case a motion for a new trial is not necessary, but that a statement may properly be made and annexed to the judgment roll, by which this obvious error may be made to appear. This may be so, but it is not necessary now to determine the supposed case. In the case actually here there are more than sixty closely printed pages of evidence, given on the hearing below, and considered by the Court without objection. I have looked into it somewhat, enough to see that it is not true that "no evidence whatever was adduced in support of the complaint." The ultimate fact sought to be established by the plaintiff, and which she did succeed in proving to the satisfaction of the Court below, was, that the appellant was a mere stakeholder for his brother George. The fact that these two are brothers; that George lived in this State, and held a letter of attorney from the appellant, who lived in one of the Atlantic States; that under this power of attorney George managed the property here as he pleased; that the appellant seemed to take little or no interest in how it was managed; that, though a man of small means at his own home, he paid little or no personal attention to this comparatively valuable estate; that he was not even present at the trial in which his alleged title was involved; these, and a variety of other cognate facts that might be pointed out in the record, though each of itself not sufficient to prove that George was the true owner and the appellant only his trustee, yet, when taken together, show that there was some evidence tending to support the conclusion arrived at by the Court below.

Judgment affirmed.

Statement of Facts.

[No. 2,453.]

EDWIN TOMLINSON v. ALONZO MONROE.

AMBIGUOUS COMPLAINT.—A complaint is ambiguous, unintelligible, and uncertain, which avers that the plaintiff delivered a horse to the defendant of the value of three hundred dollars, on an agreement that the latter would sell him and account for the proceeds; and that the defendant accepted the horse at the price of three hundred dollars, and promised to sell him at that price and account for the proceeds, and that the defendant sold the horse without stating at what price.

IDEM.—Such a complaint is founded on contract and not upon tort.

PROOF OF ALLEGATION WHEN DENIED.—If the answer denies the contract as alleged in the complaint, the plaintiff must prove it substantially as alleged.

VARIANCE BETWEEN ALLEGATION AND PROOF.—A material variance between the contract as alleged and proved, is a ground of nonsuit, unless the plaintiff obtains leave to amend his complaint, so as to make it conform to the proofs.

IDEM.—If the complaint alleges that the defendant accepted a horse upon an agreement to sell him for a price not less than three hundred dollars, testimony that the horse was left with the defendant with *authority* to sell him at not less than three hundred dollars is no proof that the defendant bound himself to sell at not less than three hundred dollars, and there is a variance.

IDEM.—If the complaint avers that the defendant accepted a horse with an agreement to sell him and account for the proceeds, proof that the price of sale was limited to three hundred dollars is also a variance.

APPEAL from the District Court of the Eighth Judicial District, County of Humboldt.

The complaint averred that the horse was delivered to the defendant at Eureka, Humboldt County, California, and that the defendant proceeded to the City of Austin, State of Nevada, and there sold the horse.

The proofs of the plaintiff showed that the horse was left at a livery stable in Eureka, Humboldt County, in which Fenton Tomlinson, a brother of the plaintiff, owned, in partnership with the defendant.

When the plaintiff rested, the defendant's attorney moved for a nonsuit, because Fenton Tomlinson was jointly liable with the defendant.

The Court granted a nonsuit, and the plaintiff appealed.

L. M. Buck, and *A. G. Stafford*, for Appellant, argued that the action was for a tort, and that, in actions for a wrong, all the parties might be sued jointly, or either might be sued severally, and that as the defendant Monroe had not in his answer pleaded the nonjoinder of Fenton Tomlinson, the question could not be raised on motion for a nonsuit.

H. W. Havens, and *Elisha Cook*, for Respondent, argued, that as the complaint alleged that the defendant sold the horse in pursuance of an agreement, the action did not sound in tort; that the proof did not sustain the allegations of the complaint, and that the nonsuit was properly granted—it mattered not what reason the Court assigned for granting it.

By the Court, CROCKETT, J.:

If the complaint in this action had been demurred to as ambiguous, unintelligible, and uncertain, the demurrer ought to have been sustained. It sets out with an averment that the horse in contest was of the value of three hundred dollars, and that the plaintiff delivered him to the defendant on an agreement that the latter would sell him and account to the plaintiff for the proceeds; and it avers that the defendant sold the horse in Nevada, but does not state at what price. It then alleges that the defendant accepted the horse at the agreed price of three hundred dollars, and promised to sell him at that price, and to account therefor to the plaintiff; and avers that he has failed to account for that sum, for which it prays judgment. Taking all these averments together, the only rational construction that can be given to the complaint is that it was intended to aver that the plaintiff delivered the horse to the defendant for sale at a price to be not less than three hundred dollars, and that the defendant has sold the horse

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and failed to account for the proceeds. But whatever the complaint may mean, it is clear that it is founded upon contract and not upon *tort*. The answer explicitly denies the contract; and it was incumbent on the plaintiff to prove it substantially as alleged. A material variance between the contract as alleged and proved would be a ground of nonsuit, unless the plaintiff obtained leave to amend his complaint so as to make it conform to the proofs. In this case there was a fatal variance between the contract alleged and the one proved, and the plaintiff failed to ask leave to amend his complaint. The proof does not show or tend to show that the defendant accepted the horse upon an agreement to sell him for a price not less than three hundred dollars. On the contrary, the testimony of the plaintiff himself was that the horse was left with the defendant with *authority* to sell him at not less than three hundred dollars, and there is no proof whatever that the defendant bound himself, as averred in the complaint, to sell him for that price. On the other hand, if the complaint be construed as setting out a contract to the effect that the defendant was to sell the horse and account to the plaintiff for the proceeds, there was still a fatal variance between the complaint and the contract as proved, inasmuch as the plaintiff testifies that the price was limited at three hundred dollars, which was a material element in the contract, and was not averred in the complaint. In any view, therefore, which I have been able to take of the complaint, the proof did not sustain it, and the nonsuit was properly granted.

Judgment affirmed.

Mr. Justice SPRAGUE did not express an opinion.

Statement of Facts.

[No. 2,277.]

CHARLES SMITH v. ROBERT CUSHING ET AL.

FINDINGS OF FACTS.—Where there are findings of facts the presumption is that the Court has found all the facts in issue in favor of the party in whose favor the judgment is rendered, unless the contrary appears from the findings themselves.

FINDINGS OF FACTS AND JUDGMENT.—Whether there are findings of fact or not, and if there are findings, whether they cover all the issues or not, the appellate Court will not disturb the judgment, unless the appellant can show that the facts found, or some of them, are inconsistent with the judgment.

ABANDONMENT OF TOWN LOTS.—The fact that one who purchases town lots at auction, which were in the possession of his grantor, does not inclose, cultivate, or improve them, or put them to any actual use, does not show an abandonment of them.

ABANDONMENT.—To constitute an abandonment the premises must be left vacant without the intention of reclaiming the possession, and open for the occupation of any one who may choose to enter.

APPEAL from the District Court of the Twelfth Judicial District, City and County of San Francisco.

In 1851 Alfred Green inclosed a tract of land containing one hundred and sixty acres in the City and County of San Francisco, and resided on it until 1853, when he sold it to D. C. Broderick, who kept the same inclosed with a fence, and cultivated it until 1859, when he died; and his executors continued to use and cultivate it until 1861, when they divided it into lots and blocks and sold the same at public auction. At the sale Charles Alpers bought two of the lots, and received a deed, and afterwards, in 1867, sold it to the plaintiff. After the sale at auction the exterior fences were not kept up, and streets were opened through the land, and many lots were built on and used as homesteads. Neither the plaintiff nor his grantor inclosed or used the lots in controversy. October 2d, 1867, the defendants entered into possession of said lots and inclosed the same. On the four-

Opinion of the Court — Rhodes, C. J.

teenth day of November following this action was commenced. The plaintiff recovered judgment in the Court below.

The other facts are stated in the opinion.

Barstow, Stetson & Houghton, and *W. H. Patterson*, for Appellants.

The language, "except to hold the same as town or city lots," and the facts which he states in the same finding, rebut the presumption of *intention*, for they show an entire absence of any *act* throughout the period of six years, on the part of Alpers, until he made a conveyance to the plaintiff, two months before this action was brought. He was not at liberty to take six years to decide whether at the end of that time it would be to his advantage to assert a right to the property, and especially so with respect to property of this description. And the mere act of executing a conveyance at the end of that period is no evidence of previous intention. (*Willson v. Cleaveland*, 30 Cal. 192; *Davis v. Perty*, 30 Cal. 630; *Davis v. Butler*, 6 Cal. 510; *Gluckauf v. Reed*, 22 Cal. 468; *Davis v. Gale*, 32 Cal. 26; *Kean v. Canavan*, 21 Cal. 291; *Bequette v. Caulfield*, 4 Cal. 278.)

Wilson & Crittenden, for Respondents.

The correctness of the judgment is to be tested by the facts applicable to the issues, and not merely by the facts set forth in the findings; and the Court will presume that every fact admissible under the issues was not only proved, but actually found in favor of the prevailing party.

By the Court, RHODES, C. J.:

This is an action of ejectment. The defendant appeals from the judgment, and the cause comes before us on the judgment roll. The Court found for the plaintiff, and ordered

judgment accordingly. No objection was taken to the findings that, in any respect or upon any issue, they were defective. The presumption therefore is, as has repeatedly been announced (see *Henry v. Everts*, 30 Cal. 425; *James v. Williams*, 31 Cal. 211; *Sears v. Dixon*, 33 Cal. 326; *Emmal v. Webb*, 36 Cal. 197), that the Court found all the facts in issue for the plaintiff, unless the contrary appears from the findings themselves.

When the complaint states facts sufficient to entitle the plaintiff to a recovery, and the Court orders judgment for the plaintiff, whether any findings are filed or not, and if filed, whether or not they cover all the issues tendered in the action, the defendant cannot maintain the position that the facts, as found, do not sustain the judgment, unless he can show that such facts, or some of them, are opposed to, or inconsistent with, the judgment. This brings up the only question which is necessary to be considered on this appeal.

The defendants contend, that the findings show an abandonment of the premises, by the plaintiff, and reliance is placed upon the eighth finding, which is as follows: "That subsequently to said auction sale, neither the plaintiff, nor his grantor, had inclosed the subdivisions or lots described in the complaint as cultivated or improved, or put the same to any actual use, except to hold the same as town or city lots." The Court had already found the possession of the plaintiff's grantor, beginning in 1851, and extending to the auction sale in 1861, when the plaintiff purchased. The eighth finding does not find the ultimate fact of abandonment; nor does it find all the probative facts, necessary to constitute that ultimate fact. The probative facts there stated, were competent evidence in support of the issue of abandonment, but were not sufficient, of themselves, to sustain that issue. It is not found among those probative facts, that the plaintiff left the premises vacant without the intention of reclaiming the possession, nor that he intended to

Argument for Appellant.

leave the premises open, for the occupation of any one who might choose to enter. The essential elements of abandonment have so frequently been mentioned by this Court, and *abandonment* has so often been defined, that it is unnecessary at this time to renew the discussion. There is nothing in that finding, as it now stands, which is repugnant to the judgment.

Judgment affirmed.

Mr. Justice SPRAGUE did not express an opinion.

[No. 2,858.]

CHARLES B. DAVENPORT v. J. W. TURPIN ET AL.

SALE ON FORECLOSURE OF MORTGAGE.— If the mortgagor conveys the legal title to another person, whose deed is recorded before the decree of foreclosure is entered, and this grantee is not made a party to the suit foreclosing the mortgage, the purchaser at the Sheriff's sale does not acquire the legal title.

MORTGAGE OF LAND IN POSSESSION.— If the owner of a mortgage on an undivided interest in land is also the owner of another undivided interest in the same tract of land, his entry into possession of the whole tract does not constitute him a mortgagee in possession.

APPEAL from the District Court of the Sixth Judicial District, Sacramento County.

Judgment was rendered for the defendant; plaintiff moved for a new trial, the Court overruled the motion, and plaintiff appealed from the judgment and the order denying the motion for a new trial.

The other facts are stated in the opinion.

P. Dunlap, and Beatty & Denson, for Appellant.

Even if the foreclosure and sale were valid as to John S. Fowler, it did not affect the legal title of the one undivided half of the property, which was then vested in McCracken:

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First — Because McCracken had his title before suit brought.

Second — That title was duly recorded before the records of the District Court showed any action pending in the name of *Talbot H. Green v. John S. Fowler*.

(See *Carpentier v. Williamson*, 25 Cal. 154, and the California cases therein cited; 23 Barb. 90; 6 Abb. 120; 14 How. Pr. 32; *Bloodworth v. Lake*, 33 Cal. 255; *Skinner v. Buck*, 29 Cal. 253; *Dutton v. Warschauer*, 21 Cal. 609; 5 Cal. 334.)

It is not shown that McCracken was on the premises, or knew anything about Green's taking possession as the mortgagee.

A. P. Catlin, for Respondents.

The mortgagee, in possession by consent of the mortgagor, cannot be evicted until the debt is paid. (*Waring v. Smyth*, 2 Barb. Ch. 135; *Frische v. Kramer*, 16 Ohio, 125; *Watson v. Spence*, 20 Wend. 260; *Dutton v. Warschauer*, 21 Cal. 626.)

By the Court, WALLACE, J.:

This is an action of ejectment in which Davenport, as the grantee of one McCracken, seeks to recover of Turpin and others, who are tenants of one Howard, an undivided half of that lot in Sacramento which was owned in 1849 by one John S. Fowler and Samuel Brannan, and upon which Fowler then kept the City Hotel.

That Howard, the landlord of the defendants, is the owner of one undivided half of the premises is conceded. The controversy here concerns the other undivided half.

It appears that in September, 1849, Brannan leased his undivided half to Fowler, to hold until October 1, 1850, at a monthly rent of upward of two thousand dollars. To secure the payment of this rent Fowler gave Brannan a mortgage

upon the other undivided half of the premises. In August, 1850, Brannan, having previously sold to Green his undivided half, assigned to him the lease thereon and the rents to grow due, and also the mortgage upon the Fowler half, made to secure the payment of those rents. On the 10th of September, 1850, Fowler conveyed his undivided half of the premises to one McCracken, under whom the plaintiff claims title. This conveyance was recorded on the fifth of the following December.

In October, 1850, an action was instituted on behalf of Green (but in the name of Brannan, and for the use of Green) to foreclose this mortgage, because of the non-payment of rent due by Fowler; but no notice of the pendency of the action was filed. In January, 1851, the complaint in the action of foreclosure was, by leave of Court, amended by striking out the name of Brannan as a plaintiff, leaving the action to proceed in the name of Green as plaintiff. Fowler was the sole defendant, and a decree having passed against him in the usual form, Green purchased at the sale; and having received a sheriff's deed, he "took possession of the whole of the said demanded premises without any opposition from the said McCracken, or those in possession" (as found by the Court below). Green subsequently conveyed to Howard, the landlord of the defendants.

Upon this statement of facts it is clear that the legal title to the Fowler half of the premises did not pass to Green by the Sheriff's deed. At the time that the action was instituted against Fowler he had already conveyed that title to McCracken, who was not made a party defendant, and whose deed had been delivered and was of record before the decree of foreclosure was entered against Fowler. It results that the legal title to this half is in the plaintiff, Davenport. This was the conclusion reached by the Court below on the trial of the cause. Judgment, however, was rendered for the defendants below, because "Green took possession of

Points decided.

the whole of the demanded premises without any opposition from the said McCracken or those in possession," the Court being of opinion that this fact constituted Green and those claiming under him "mortgagees in possession," who cannot be evicted without payment of the mortgage debt being first made to them. When Green took possession he was, irrespective of his purchase at Sheriff's sale, a tenant in common of the premises, and as such had a right to enter upon them. McCracken, his co-tenant, therefore, could not have lawfully prevented his entry thereon, even if he had desired to do so. The mere fact of his acquiescence in the entry of Green, who owned one undivided half of the premises, is not, therefore, at all inconsistent with his own claim of title to the other undivided half. Besides, it is not found, in this connection, that McCracken was in possession when Green entered, or that the latter turned him out of possession, or that McCracken even had knowledge that Green had entered at all. The facts found by the Court in this respect go but a little way toward constituting the defendants, or those under whom they hold, "mortgagees in possession."

Judgment and order denying new trial reversed, and cause remanded.

Mr. Justice SPRAGUE did not express an opinion.

[No. 2511.]**EMELINE R. EVANS v. ALVARO EVANS.**

EVIDENCE IN DIVORCE CASES.—In an action to obtain a divorce, the confessions or admissions of the defendant can be given in evidence.

IDEM.—The eighth section of the Act of 1851, concerning divorces, does not prohibit evidence of such admissions from being received in evidence. It only prohibits a divorce from being granted on admissions of the defendant without any other proofs.

PROOF OF ADULTERY.—The act of adultery, like any other fact, may be established by circumstantial proof.

Argument for Appellant.

ENTERING HOUSE OF PROSTITUTION.—The fact that a married man enters a house of prostitution in the evening and remains all night raises a strong presumption of adulterous intercourse, and casts the burden on the party who does so of showing that he is innocent.

By CROCKETT, J., TEMPLE, J., *concurring*:

CORROBORATING EVIDENCE IN DIVORCE SUIT.—If the wife, when plaintiff in an action for a divorce, testifies that she detected her husband in the act of adulterous intercourse, her testimony is sufficiently corroborated, under the second section of the Act concerning divorces, if it appears that the other party to such adulterous intercourse was of a doubtful character for chastity, and that the husband was in the habit of associating with women of bad character, and that this woman had been the only female inmate of his house for a long time.

APPEAL from the District Court of the Second Judicial District, Lassen County.

The facts are stated in the opinion.

H. L. Gear, and *E. V. Spencer*, for Appellant.

A married man going to a brothel, knowing it to be a house of that description, raises a suspicion of adultery necessary to be rebutted by the very best evidence. (Shelford on Marriage and Divorce, 410; *Astley v. Astley*, 1 Hagg. Ecc. R. 720; *Van Epps v. Van Epps*, 6 Barb. 322.)

"It is a fundamental rule," says Lord Stowell, in the great leading case of *Loveden v. Loveden*, upon the subject of evidence of adultery, "that it is not necessary to prove the direct fact of adultery; because, if it were otherwise, there is not one case in a hundred in which that proof would be attainable. In every case, almost, the fact is inferred from circumstances that lead to it by fair inference as a necessary conclusion; and, unless this were so held, no protection whatever could be given to marital rights. * * * The only general rule that can be laid down upon the subject is, that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion. * * * The facts are not of a technical nature;

Argument for Respondent.

they are facts determinable upon common grounds of reason. Upon such subjects the rational and the legal interpretation must be the same. (*Loveden v. Loveden*, 4 Eng. Ecc. R. 461; Paynter on Marriage and Divorce, 187, et seq.; *Jeter v. Jeter*, 36 Ala. 391; *State v. Potest*, 8 Iredell, 23; *Day v. Day*, 3 Green Ch. 444.)

By definition, "to corroborate" is simply "to strengthen," "to confirm;" and any evidence, circumstantial or direct, which tends to strengthen or confirm the evidence of a witness, in respect to any material element in his or her testimony, is corroborative thereof; and where, from all the evidence taken together, there is no good reason to doubt the veracity of the witness, or the truth of his or her narrative, and such narrative is rendered *probable* and *credible* in view of other testimony, the ends of justice can require nothing further.

"The presumption that the criminal act had been committed," says the Supreme Court of Alabama, "would be strengthened by proof that the general reputation of the female was that of a woman who was not disinclined to yield to the temptations and improve the opportunities established by such evidence." (*Blockman v. The State*, 36 Ala. 296.)

J. Lambert, for Respondent.

The admission or confession of a party, in cases like the one at bar, must be attended with certain requisites to render it legally admissible. Such confession or admission must be "full, confidential, relevant, free from suspicion of collusion, and corroborated by circumstances." (*Matchin v. Matchin*, 6 Barb. 332.) Again, such admissions require: First, undoubted proof that they were made; second, that the expressions were clear and distinct; and third, that the

admissions were sincere. (Bishop, Marriage and Divorce, Vol. 2, note under Sec. 242, and authorities there cited.)

"With respect to going to houses of ill-fame, the mere going there, unconnected with other circumstances, does not necessarily create an inference of guilt." (1 Adams, 411, et seq. Appeal to the Court of Arches, 1 Adams, 68, note.)

We submit that the cases cited by appellant are in strict accord with this principle, and the expression used by Lord Stowell in *Loveden v. Loveden*, 4 Eng. Ecc. R. 472, quoted by appellant's counsel, was used in connection with the *facts and circumstances* of that case, and those facts and circumstances were such as to lead the mind to the irresistible conclusion of guilt on the part of the defendant. So, too, in *Astley v. Astley*, 1 Hagg. Ecc. 720, and in *Van Epps v. Van Epps*, 6 Barb. 322. In the former of these cases the circumstances were conclusive of adultery with a prostitute, and the *particeps criminis* was a prostitute.

"There must be something more than opportunity. There must be some overt act, or some circumstances to show that he was disposed to avail himself of the opportunity to commit adultery."

By the Court, CROCKETT, J.:

This is an action by the wife for a divorce, on the ground of adultery, alleged to have been committed by the husband; and the judgment having been for the defendant, the plaintiff has appealed, assigning as error: First, the exclusion by the Court of certain declarations and admissions of the defendant, offered to be proved by the plaintiff on the trial; and second, that the judgment is not supported by the evidence.

The evidence which was excluded was of admissions of the defendant, that he had had adulterous intercourse with prostitutes. The eighth section of the Act of 1851, concerning

Opinion of the Court — Crockett, J.

divorces, which provides that a divorce shall not be granted on the confession or admission of the defendant, was intended to prevent collusive divorces, and requires other proof of the facts alleged, but does not prohibit such admissions from being given in evidence in connection with other proofs. Standing alone, and unsupported by other evidence, they would not be sufficient to authorize the divorce. Nevertheless, they are competent evidence, and are to be weighed in connection with the other proofs. This was the construction given to the statute in *Baker v. Baker*, 13 Cal. 87, and is, doubtless, the correct one. The Court, therefore, erred in excluding the evidence.

On the proofs in this cause I am at a loss to comprehend on what theory the Court could have arrived at the conclusion that the charge of adultery was not proven. It was shown by the testimony of a witness, who was neither contradicted nor impeached, that on one occasion the defendant entered a house of prostitution in Marysville, and was seen to emerge from it on the following morning. No explanation whatever was given or attempted by the defendant of the purpose of his visit to this house; and in the absence of all proof to the contrary, the natural and reasonable presumption is that he went there for the purpose indicated by the character of the house. If the object of his visit and his conduct whilst there were innocent, the *onus probandi* was on him to show it. The mere fact that a married man enters a house of prostitution in the evening and remains all night, raises so strong a presumption of adulterous intercourse as to require the most satisfactory evidence to rebut it. The act of adultery, like any other fact, may be established by circumstantial proof; and it would shock the moral sense of the community to hold that such proof as this, if unexplained, would not raise a strong presumption of adulterous intercourse. This was the view of Lord

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Stowell, an eminent Judge in this class of cases. (See *Loveden v. Loveden*, 4 Eng. Ecc. R. 472.)

But, in addition to this proof, the plaintiff, who was examined as a witness on her own behalf, testified that on one occasion, just prior to her separation from her husband, she detected him in *flagrante delictu*—in the very act of adulterous intercourse—with one Mary Wall. There is no rebutting testimony whatever on this point. The said Mary Wall, though called as a witness for the defense, was not examined in respect to the adulterous act testified to by Mrs. Evans; and the defendant did not offer himself as a witness to contradict her. Her testimony on this point stands wholly uncontradicted and unimpeached. But it is said that by the second section of the Act of March 12th, 1870 (Stats. 1869-70, p. 291), it is provided that no divorce shall be granted on the testimony of either husband or wife, “unless corroborated by other evidence;” and it is claimed that, in respect to this particular transaction, Mrs. Evans was not corroborated by other evidence. The statute does not define to what extent the corroboration must go. In the very nature of the case it would be impossible to lay down any general rule as to the degree of corroboration which will be requisite. Hence the statute only requires that there shall be some corroborating evidence; and there was sufficient evidence of that character in this case to satisfy the statute. The more than doubtful character of Mary Wall for chastity, the fact that for some years she was the sole female inmate of the defendant’s house, and the proclivity of the defendant to associate with women of that class, all tend strongly to fortify the testimony of Mrs. Evans in respect to this particular transaction. But without attempting a further analysis of the testimony, it will suffice to say, on this point, that if the act of adultery was not sufficiently proved in this case it will be in vain for injured wives to appeal to the Courts for a redress of this class of grievances.

Points decided.

Nor did the evidence establish that these offenses of the defendant had been condoned by the plaintiff after she was aware of their existence.

Judgment reversed, and cause remanded for a new trial.

RHODES, C. J., concurring specially:

I concur in the judgment on the grounds discussed by Mr. Justice CROCKETT, except in respect to the corroboration of the plaintiff.

WALLACE, J., concurring specially:

I concur in the judgment on the first ground discussed; upon the others I express no opinion.

[No. 2,276.]

LOUIS SEIGEL v. FRANCIS F. EISEN AND GEORGE
EISEN, DOING BUSINESS UNDER FIRM NAME OF "EISEN
BROTHERS."

NEGLECT, CONTRIBUTING TO INJURY.—The fact that plaintiff was standing on the rear platform of a street car, with his hand on the railing, when his hand was injured by defendant's dray, as it passed the rear of the car, is not, as a matter of law, such negligence as contributes to the injury.

QUESTION FOR THE JURY.—The question whether the collision by which the injury was caused could have been avoided by proper care, is question of fact for the jury.

COLLISION CAUSED BY NEGLIGENCE.—In an action to recover damages caused by defendant's dray running against a street car, the fact that the collision would not have occurred except for the slipping of the wheels of the dray on the iron track does not conclusively repel the imputation of negligence.

APPEAL from the District Court of the Twelfth Judicial District, City and County of San Francisco.

Argument for Respondent.

Action brought to recover damages for injury to the person of plaintiff, alleged to have been caused by the agent of defendants, while engaged in defendants' business, by carelessly and negligently driving defendants' dray against the person of the plaintiff, who at that time was standing on the platform of a street car, as a passenger. Judgment was rendered for plaintiff. Defendants moved for a new trial, the Court denied the motion, and defendants appealed from the judgment and from the order of the Court denying the motion for a new trial.

The other facts are stated in the opinion.

Henry E. Highton, for Appellants.

The complaint itself, and the evidence on the part of the respondent, show that the respondent's negligence caused, or at least contributed to the injury complained of, and the allegation of negligence upon the part of the servant of appellants was not only unsustained by testimony, but was completely disproved when the case for respondent was closed. The motion for a nonsuit, therefore, should have been granted. (*Kelly v. Cunningham*, 1 Cal. 366, 367; *Innis v. The Steamer Senator*, 1 Cal. 460, 461; *Richmond v. Sac. Valley R. R. Co.*, 18 Cal. 353; *Richardson v. Kier*, 34 Cal. 75; *Gray v. White*, 34 Cal. 163, 164.)

James Nichols, for Respondent.

The defendants are liable in law for injuries sustained by the negligence of their servant. Thus, if a servant, in the course of his master's business, negligently drive his cart against the carriage of another person, by which he is injured in his person or his property, the master is liable. A very slight degree of negligence is sufficient. (Cowen's Treatise, 4th ed., 1861, Secs. 383-486.)

By the Court, RHODES, C. J.:

The Court cannot pronounce, as matter of law, that the conduct of the plaintiff, in standing on the rear platform of the street car and steadying himself by holding the rail of the platform, was contributory negligence—that it contributed proximately to the injury inflicted on his hand by the wheel of the defendants' dray, which was passing along the rear of the car.

The question whether the defendants' drayman could, by proper care, have avoided the collision between the dray and car, is a question of fact for the jury. His testimony that the collision would not have occurred, except for the slipping of the wheels of the dray on the track, does not conclusively repel the imputation of negligence. The railroad track was higher than the street, and in crossing the track in the manner he did the wheels of his dray would almost necessarily slip on the track; and if the jury believed from the evidence, that he knew or could readily have seen the condition of the track, and that he did not take proper precaution in crossing the track with his dray, they were justified in finding the negligence imputed to him.

We see no substantial error in the charge to the jury.

Judgment affirmed.

Mr. Justice SPRAGUE did not express an opinion.

[No. 2,533.]

LEOPOLD GROSS v. WILLIAM KIERSKI.

EXPRESS WARRANTY OF TITLE TO CHATTELS.—There is no breach of an express warranty of title to chattels sold until the vendee's possession is disturbed by the true owner.

IMPLIED WARRANTY OF TITLE TO CHATTELS.—When goods are in possession of the vendor, who, dealing with them as owner, sells and delivers

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them to the purchaser, nothing being said as to the title, the law implies that he warrants the title to the property sold.

LIMITATION OF ACTIONS.—The Statute of Limitations, upon an implied warranty of title to chattels sold by one in possession, does not commence running until the vendee is disturbed in his possession by the true owner.

APPEAL from the District Court of the Fifth Judicial District, San Joaquin County.

The facts are stated in the opinion of the Court.

W. L. Dudley, for the Appellant, argued that under the fourth subdivision of section seventeen of the Act concerning limitations, which provides that actions shall be commenced within two years "upon a contract, obligation, or liability not founded upon an instrument of writing," the Statute of Limitations commenced to run from the date of the sale and delivery of the chattel; and cited *Chitty on Cont.* 10th Am. ed. 920, 921; *Howard v. Young*, 5 B. & C. 259; *Bishop v. Little*, 3 Me. 371; *Angell on Limitations*, 5th ed. 191, 192; *Wilcox v. Plummer's Exr.*, 4 Pet. U. S. 172; *Hilliard on Sales*, 2d ed. 295.

J. H. Budd, and *Barna McKinne*, for Respondent.

In an action of breach of warranty, express or implied, in the sale of personal property, the Statute of Limitations begins to run against the plaintiff in the action from the time of the recovery of the property in an action against him by the real owner. (*Long v. Hickingbottom*, 28 Miss. Reps. 778, 789; *Case v. Hall and Van Elken*, 24 Wend. 103; *Vibbard and Abbott v. Johnson*, 19 John. 77; 1 John. 274, 517; *Ang. Lims.* 123, Note 1; *id.* 115, 116, 117; 2 Kent, 621, 632, *478, 11th Am. ed.)

By the Court, WALLACE, J.:

The defendant, a dealer in musical instruments, sold and delivered to the plaintiff a pianoforte, nothing being said

at the time concerning the title to the chattel. This was in February, 1867. In August, 1869, certain persons, claiming and ultimately showing themselves to be the owners of the chattel, commenced an action against Gross for its recovery. The latter thereupon gave notice to his vendor, the defendant, of the bringing of the action. In September following judgment passed against Gross. In October the pianoforte was taken from his possession, and in November, 1869, he brought the present action against Kierski for breach of the warranty of title to the chattel. The Court below gave judgment for the plaintiff, and to reverse that judgment this appeal is brought.

The vendor of goods and chattels in possession is held, by implication of law, to warrant the title. This rule was recognized by this Court in the case of *Miller v. Van Tassel*, 24 Cal. 458, and may be said to have become firmly ingrafted in the jurisprudence of this country, whatever may be the doubts at present surrounding it in England, as indicated in the recent cases of *Morley v. Attenborough*, 3 Welsby, Hurlstone & Gordon Exch. R. 507, and *Sims v. Marryat*, 17 Q. B. 290, where it was said by Lord CAMPBELL, C. J., that "on that point the law is not in a satisfactory state."

In the case at bar this general rule is not questioned by the defendant, but it is claimed that the action here was not brought within two years next after the breach of the warranty, and is therefore barred by the Statute of Limitations, which was pleaded below, and is insisted upon in this Court; and this presents the only question to be determined.

The statute undoubtedly commenced to run from the earliest time at which the plaintiff might have sued. This would, of course, be that period at which the breach must be considered to have happened. And this is the precise question upon which the parties are at issue here—the de-

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fendant claiming that his warranty was broken in February, 1867, when he sold and delivered the chattel, and the plaintiff insisting that the breach did not occur until October, 1869, when the property was taken by the true owner.

In an action brought against the vendor of chattels upon an *express* warranty of title, the authorities are believed to be uniform upon the point that there is no breach in contemplation of law until the vendee's possession of the goods is in some way disturbed, by reason of the title of the true owner.

No substantial difference in this respect is perceived between an express warranty of title made by a vendor upon sale of chattels out of possession and the warranty of title implied by law upon a sale of goods in possession. The fact of the goods being out of the possession of the vendor may well be considered to put the vendee upon his guard, and it is his own folly if, under such circumstances, he will not protect himself by exacting an express agreement to warrant the title. The doctrine of *caveat emptor* would apply to such a case.

But when the goods are at the time in the possession of the vendor, who deals with them as owner, and under such circumstances sells and delivers them to the purchaser, the law will imply against the vendor that he warrants the title to the property sold. This implication is indulged for the protection of the purchaser against what would otherwise be the fraud of the vendor, practiced upon him when he is himself not chargeable with negligence; for it is unreasonable to exact of the purchaser of goods that he is in every case to institute an inquiry into the title of his merchant, upon pain of losing both the goods and their price. The purpose of the law in implying the warranty is the protection of the purchaser; it determines that the vendor did warrant the title to the goods, because it considers that, under the circumstances, he ought to have done so. It

declares that his silence shall be taken to be a warranty of the soundness of his title. The sale and delivery of the goods in possession, where nothing is said about the title, is, therefore, precisely equivalent to an express warranty of title, and, the facts being ascertained, the rights and liabilities of the parties are exactly the same.

It is true that the Court of Appeals of Kentucky hold that there is a distinction between an express warranty of title to chattels and the warranty of title implied by law. The express warranty is likened to a covenant to warrant and defend the title, when inserted in a deed of conveyance of lands, and is, therefore, said to be unbroken until an eviction by the true owner, under paramount title, has taken place. The implied warranty is, however, compared to a covenant of seisin, which is said to be broken, if at all, at the instant that it is entered into. As a consequence, it is the settled rule in that State that the Statute of Limitations upon breach of an express warranty of title to personal property commences to run from the time when the vendee is disturbed; while in case of implied warranty it is set in motion instantly upon the sale and delivery of the goods. (4 Bibb, 304; 2 Marsh. 217; 4 B. Monroe, 201; 1 Metc. Ky. R. 572.) For the distinction thus made I think that no good reason can be shown. Its operation would, in many instances, deprive the purchaser of the very protection which it is the purpose of the implication to afford. Nor is it clear that the analogy supposed to exist between the covenant of seisin and the implied warranty of chattels can be maintained. Mr. Rawle, in his treatise on the covenant of seisin (Rawle on Cov. 3d ed. 50), assumes that the implied warranty of title to chattels is understood to be "a title sufficient to retain the possession in the vendee of the chattels," and in illustration of the distinction between seisin in fact and seisin in law, as to real property, he says: "An analogy may be found in the rule with respect to chattels.

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In the sale of these a warranty of title is implied by the civil and the common law. * * * Yet a subsequent loss of possession by title paramount will be a breach of this warranty, because the vendor is understood to have agreed lawfully to transfer a possession which can be retained," etc.

The doctrine of the Court of Appeals of Kentucky is believed to be unsupported either by text writers upon the law or the adjudications of the Courts of other States of the Union.

In *Word v. Cavin*, 1 Head, 507, the Supreme Court of Tennessee held that, upon breach of the implied warranty of title to chattels the Statute of Limitations commenced to run upon the possession of the chattel being lost, or upon voluntary offer by the vendee to restore it to the seller.

Linton v. Porter, 31 Ill. 107, was an action upon a promissory note given upon the purchase of a chattel with implied warranty of title. The Supreme Court of Illinois held that it was no defense to say that the vendor had no title while the possession of the vendee remained undisturbed by the true owner.

In *Case v. Hall*, 24 Wend. 102, upon a state of facts substantially similar to those in *Linton v. Porter*, the defense was overruled on the ground that where the vendee relies upon the warranty of title, express or implied, there must be a recovery by the real owner before an action can be maintained. (See, also, *Vibbard et al. v. Johnson*, 19 Johns. 77; Story on Sales, Sec. 203; Parsons Merc. Law, 2d ed. 50, and cases there cited in note; Hilliard on Sales, 3d ed. 391, and cases cited in note.)

It results from these views that the plaintiff's cause of action accrued upon the loss of the chattel in October, 1869, and the Statute of Limitations will not avail the defendant.

Judgment affirmed.

Mr. Justice SPRAGUE expressed no opinion.

Argument for Respondents.

[No. 1,690.]

PHILIP L. WEAVER ET AL. v. LUTHER HAYWARD.

AFFIDAVIT FOR ATTACHMENT.—The affidavit for an attachment need not state the facts out of which the indebtedness of the defendant to the plaintiff arose.

APPEAL from the District Court of the Fifteenth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

Crockett, Whiting & Naphtaly, for Appellant.

An attachment is the creature of the statute, and the statute must be construed as being in derogation of the defendant's common law right to the enjoyment of his property until the termination of the litigation. (*Roberts v. Landecker*, 9 Cal. 265.) An insufficient affidavit confers no jurisdiction to issue the writ. (1 Selden, 164.) The statute requires that the affidavit should show:

First — That the defendant is indebted to the plaintiff upon a contract expressed or implied, etc.

Second — That the indebtedness over all legal set-offs and counter claims should be specified.

Third — That the sum for which attachment is asked is an actual and bona fide existing debt, etc.

The affidavit in this case simply sets forth the requirements of the statute *in hæc verba*, without detailing a single fact upon which the mind of the Clerk could act. (In the Matter of Falkner, 4 Hill, 601; 5 How. Pr. 387; 6 Hill, 288; 1 Barb. 247; 7 Hill. 153.)

Hambleton & Gordon, for Respondents.

Although the creditor is required to set forth the statutory grounds in an affidavit, and file the same with the Clerk, yet it can not be for the purpose of having them

Opinion of the Court—Rhodes, C. J.

adjudicated upon by him; for who has or can constitute a Clerk of the county a Judge, in the legal acceptance of the term? (6 Dana, 324.) We say the right of the Clerk to refuse the writ exists only when the creditor will not swear to the existence of all the causes enumerated in section one hundred and twenty-one of the Practice Act, why the debtor's property should be seized before he has a hearing in Court. If he does so swear, the Clerk shall issue it. (7 Barb. 661; 3 Jones, 295; 16 Ohio, Griswold, 304.)

By the Court, RHODES, C. J.:

Appeal from an order refusing to dissolve an attachment. The ground of the motion is, that the affidavit does not state the facts showing that the defendant is indebted to the plaintiff, but merely states the conclusion that the defendant is indebted to the plaintiff. In other words, the objection is that the plaintiff did not restate his complaint in the affidavit, but only stated that the express contract upon which the defendant was indebted to him was a promissory note. The practice, since the adoption of the statute, has generally been in accordance with the form employed in this case; and we can conceive of no useful purpose that would be subserved, by setting out in the affidavit all the facts in respect to the contract, which are necessary to be stated in the complaint.

Order affirmed.

Mr. Justice SPRAGUE did not express an opinion.

Mr. Justice CROCKETT, being disqualified, did not sit in the case.

[No. 2,427.]

J. W. CLARK ET AL. v. G. W. GRIDLEY.

PARTNERSHIP ACCOUNTS.—Where the complaint, in an action for the dissolution of a partnership and a settlement of the accounts, avers a loss in the transactions of the firm, borne exclusively by the plaintiff, and asks for a judgment against the defendant for his proportion of such loss, the plaintiff may prove a loss resulting from his own act, done in violation of the partnership agreement.

NOTE.—In such case the plaintiff is entitled to a settlement of the partnership accounts, on such terms as may be equitable; and the defendant may show, as a matter of defense, that he suffered loss by such violation of the contract, and may charge the plaintiff with it.

NOTE.—The plaintiff in such action need not aver in his complaint that the act from which the loss resulted was in violation of the partnership agreement, in order to let in the testimony as to the loss.

JUDGMENT IN ACTION TO DISSOLVE PARTNERSHIP.—If the complaint, in an action to dissolve a partnership and settle its accounts, avers a loss, borne exclusively by plaintiff, and asks for judgment for defendant's proportion, and the evidence shows a profit realized by plaintiff in one transaction, as well as a loss borne by him in another, the account taken should credit the defendant with his part of the profit realized, as well as charge him with his proportion of the loss sustained.

NOTE.—In such case, if the plaintiff has settled with the defendant for his part of the profit realized, it is incumbent on the plaintiff to show that fact on the trial.

APPEAL from the District Court of the Fourth Judicial District, City and County of San Francisco.

The facts are stated in the opinion.

Tully R. Wise, for Appellant.

If the defendant's consent was necessary to enable the plaintiff to forward the wool to suitable Eastern markets, then, if forwarded without his consent, the transaction did not bind him. It is necessary, then, to allege and prove that he did consent to ship the wool to Boston. The *allegata* and *probata* must correspond.

It also appeared upon the trial that the plaintiffs received a large amount of wool, which they sold in San Francisco at

Argument for Respondent.

a profit, which they have never accounted for. This suit was for an account, and the Court, after hearing the evidence, ought to have directed the plaintiffs to account for sales in San Francisco. But instead of doing that, it took Clark and Perkins' statements of the account in the East, and ordered judgment for them for half of the supposed difference.

Barstow, Stetson & Houghton, for Respondent.

The express consent of the defendant to send the wool to Boston was not required by the contract—the only clause bearing upon this question being contained in folios six and seven; and the words “as may appear best to both parties” can require no more, at the most, than that Gridley should be kept informed of what was going on, and thus have the opportunity to object, if he wished, to any contemplated disposition of the wool. Section sixty of the Practice Act provides that it shall not be necessary to plead the facts showing the performance of conditions precedent in a contract, but that it shall be enough to allege due performance of all such conditions, and if such performance be controverted, then the facts showing such performance are to be established at the trial. The precise course marked out by this section of the Practice Act has been followed in this case. The contract was set out in full in the complaint; then followed the allegation of performance of all the terms of the contract that were to be performed by plaintiff; and, finally, at the trial, the facts showing the performance of the conditions were established. (See *California Steam Nav. Co. v. Wright*, 6 Cal. 258-263; *Stoddard v. Treadwell*, 26 Cal. 294-299.)

By the Court, CROCKETT, J.:

The plaintiffs and defendant entered into a partnership venture for the purchase and sale of wool; and the plaintiffs claim that the enterprise resulted in a considerable loss, which was borne by them exclusively; and this action is brought for a settlement of the partnership accounts, and to enforce payment by the defendant of his share of the loss. The answer denies that the venture resulted in a loss. On the contrary, it claims that there was a large profit, which the plaintiffs received, and for which they have not accounted. It appears, from the written agreement between the parties, that the wool was to be sold by the plaintiffs in the San Francisco market, or to be forwarded "to suitable Eastern markets for sale, as may appear best to both parties to this agreement." On the trial the plaintiffs offered to prove that a large portion of the wool was shipped by them to Boston, and sold in that market, and that these sales resulted in a loss. The defendant objected to this proof, on the ground that there was no allegation in the complaint that the wool was shipped to Boston for sale with his consent; and he claimed that without such an averment the proof was inadmissible, inasmuch as it appeared by the agreement that the plaintiffs had no right to ship the wool to an Eastern market, except with the consent of both parties. I discover no force in this objection. Even though it had been expressly admitted on the face of the complaint that the wool was shipped to Boston without the consent of the defendant, and in violation of the contract, the plaintiffs would, nevertheless, have been entitled to a settlement of the partnership accounts, on such terms as might be just and equitable; but the defendant, in that event, would have been entitled, as a matter of defense, to show that he had suffered loss by reason of this violation of the

Opinion of the Court — Crockett, J.

contract, and to charge the plaintiffs with it. But it certainly was not necessary to aver in the complaint that the plaintiffs had violated the contract in this respect; but that was a proper matter of defense to be set up by the defendant. The Court, therefore, did not err in admitting the proof. The only other error assigned is that the evidence does not support the judgment in favor of the plaintiffs. There was included within the issues the settlement of the entire partnership accounts between the parties, including all the sales and disbursements during the venture. It appears clearly from the evidence, which is in no respect contradictory on this point, that a portion of the wool was sold by the plaintiffs in San Francisco at a profit, and there is no proof whatever in the cause that the plaintiffs at any time, or in any manner, accounted to the defendant for his share of this profit. The judgment appears to ignore entirely this portion of the partnership transaction; and the judgment against the defendant is for his share of the losses incurred by reason of the sales made in the Boston market, without crediting him with any sum on account of the profits realized from the sales at San Francisco. If the San Francisco sales had been accounted for by the plaintiffs to the defendant, leaving nothing to be settled in respect to that part of the transaction, it was incumbent on the plaintiffs to show that fact at the trial; and this they failed to do. The attention of the District Court was explicitly called to this point by the defendant, on his motion for a new trial—this having been assigned as one of the grounds on which the evidence was insufficient to support the judgment—and the defendant's answer notified the plaintiffs that this ground of defense would be relied upon at the trial. The Court, therefore, erred in denying the motion for a new trial.

Judgment reversed, and cause remanded for a new trial.

Neither Mr. Chief Justice RHODES nor Mr. Justice SPRAGUE expressed any opinion.

Points decided.

[No. 2,012.]

**LLOYD TEVIS v. WILLIAM HICKS, H. C. SWAIN,
D. O. MILLS, EDGAR MILLS, HENRY MILLER,
AND JAMES LANSING.**

TESTIMONY, WHEN PART OF THE RES GESTÆ.— In an action by the creditor of the husband to set aside a deed of gift made by a third person to the wife, on the ground that the land was purchased with the husband's money, and that the deed to the wife was a fraud, evidence of conversations at the time of the creditor sale, between the grantor and one who negotiated the sale, are admissible as a part of the *res gestæ*.

IDEM.— The admissibility of such testimony does not depend on the question whether the conversation was brought home to the husband, as it does not affect him unless the negotiator was his agent.

IDEM.— In such action, evidence of a sale of land, held by an agent of the debtor in trust for him, is not admissible unless averred in the complaint.

EVIDENCE TO CORRESPOND WITH ALLEGATIONS.— Where a party in an action to set aside a sale as fraudulent, pleads that he was indebted to the person to whom the sale was made, in consideration of which he delivered the property in litigation to that person, evidence that the indebtedness was to the wife of the person designated is inadmissible.

FACTS ADMITTED IN PLEADINGS.— The question as to what facts are admitted by the pleadings is one for the Court and not for the jury; and the Court should not submit such a question to a jury.

IDEM — ALLEGATION NOT DENIED.— In a case where a fact is alleged in the complaint and not denied in the answer, the jury should be instructed that the fact is admitted in the pleadings.

VERDICT INCONSISTENT WITH PLEADINGS.— The jury have no right to find a fact in favor of a party which is contrary to or inconsistent with the pleadings.

MOTION FOR JUDGMENT ON PLEADINGS.— If the allegations of the complaint are not denied in the answer, the plaintiff, if he desires judgment on the pleadings, should move for it before introducing evidence to support the complaint.

FRAUD IN INSOLVENT PROCEEDINGS.— In an action to set aside a discharge in insolvency, because fraudulently obtained, a verdict, which finds that the insolvent did not turn over all his property to his assignee, does not necessarily establish that the property was fraudulently or purposely omitted from the schedule.

APPEAL from the District Court of the Sixth Judicial District, County of Sacramento.

Statement of Facts.

This was an action brought in October, 1867, to set aside an alleged fraudulent conveyance of twelve hundred and eighty sheep from William Hicks to H. C. Swain, and of some horses, cattle, and hogs to D. O. Mills & Co., and to set aside as fraudulent and void a discharge in insolvency granted by the County Court of Sacramento County to William Hicks, in May, 1867.

The complaint alleged that the sheep, which were claimed by Swain, a stepson of Hicks, as a gift from Hicks, were conveyed by Hicks when he was insolvent, and without consideration, Swain being largely indebted to Hicks. In his answer, Hicks denied that Swain was ever indebted to him; averred that he was indebted to Swain in the sum of one thousand six hundred and seventy-five dollars, and that the sheep were delivered in payment of that indebtedness; but he did not deny that the delivery was made when he was insolvent.

The complaint also averred that in June, 1866, the defendant Hicks purchased a tract of land from one Bandeen, for six hundred dollars, and caused it to be conveyed by deed of gift to his wife, in order to conceal it from his creditors. On the trial, Bandeen was called as a witness to show what took place at the time of the conveyance, and his testimony was, on defendant's objection, ruled out by the Court as hearsay.

Another averment in the complaint was that Hicks, at the time he applied for a decree of insolvency, was in possession of eight hundred and twenty acres of valuable swamp lands, obtained by entries in the names of other parties; that he had five thousand dollars in money; and that he did not include this property in his schedule of indebtedness. A witness was introduced at the trial to prove the sale of the land for the benefit of Hicks, shortly before he applied for a discharge from his debts; and the testimony was ruled

Argument for Appellant.

out because the matter had not been alleged in the complaint.

The following instructions to the jury, asked by the plaintiff, were refused by the Court:

First—That all the material allegations of the complaint, not denied by the answer, must be considered by you as true, irrespective of the question whether they are sustained by the evidence or disproved.

Third—That the transfer of the sheep from Hicks to Swain was a mere colorable contrivance, to enable said Hicks to create the same from his creditors.

The jury found a verdict in favor of Hicks and D. O. Mills & Co. as against the charge of fraud, and found specially that Swain was entitled to five hundred and fifty-seven of the sheep, and that the plaintiff was entitled to the remainder—seven hundred and twenty-three. The plaintiff appealed, asking a new trial as to D. O. Mills & Co., and also asking that the court below be directed to enter a decree declaring the discharge of Hicks in insolvency void.

The other facts are stated in the opinion.

George Cadwalader, for the Appellant, argued that what passed between Spaulding and Bandeen relative to the deed of gift to Mrs. Hicks was a part of the *res gestæ*, and no rule of law made it hearsay, or required the calling of Spaulding. The plaintiff was trying to establish the allegation of the complaint, that the purchase was made by Hicks, through Spaulding. Hicks made Spaulding his agent for the purpose of completing the purchase of the two hundred acres of land. The conveyance took the form of a deed of gift; the consideration, love and affection. He also argued that the Court should have permitted plaintiff to show the sale of the swamp lands before Hicks applied for a discharge in insolvency.

Opinion of the Court — Rhodes, C. J.

Coffroth & Spaulding, for the Respondents, argued that the testimony of Banteen, in regard to the conversation between himself and Spaulding, concerning the deed of gift, was irrelevant, for the reason that Spaulding was not proved to be the agent or attorney of Hicks at the time the deed of gift was made. They argued, further, that Spaulding's testimony relative to the proceeds of the sale of the swamp lands, was inadmissible, because the fact proposed to be proved had not been alleged in the complaint.

By the Court, RHODES, C. J.:

I see no valid objection to the question asked of Banteen, as to what passed between him and Spaulding, in respect to the sale and conveyance of the land, about which the witness was testifying. The complaint charged that Hicks bargained for the land, paid the purchase money, and caused it to be conveyed to his wife by a deed of gift. It was shown that the land was conveyed by a deed of gift to Mrs. Hicks; that the purchase was negotiated by Spaulding, at his office, and that Hicks was present a portion of the time pending the negotiation. The answer to the question asked of the witness would show what took place at the time of the sale and conveyance; and the general rule is that such matters are admissible as a part of the *res gestæ*. Their admissibility does not depend on the question whether they were brought home to Hicks. If he did not know, or, knowing, did not assent to, what was said or done at that transaction, the evidence would not affect him, unless Spaulding was, in fact, his agent.

Second — The plaintiff's second point is not well taken. The matter to which the inquiry related was not averred in the complaint.

Third — The Court should have excluded the testimony of Hicks, to the effect that his indebtedness, in consideration

of which the sheep were delivered, was to Mrs. Swain, instead of Mr. Swain, her husband; because it is averred, in the answer of Hicks and of Swain, that Hicks was indebted, in a specified amount, to Swain.

Fourth — The first instruction requested by the plaintiff was properly refused, for it, in effect, submitted to the jury the question as to what facts were admitted by the pleadings. That question is for the Court.

Fifth — The plaintiff's third instruction should have been given, for the fact therein stated was expressly alleged in the complaint, and was not specifically denied in the answer of Hicks or Swain. The jury should be instructed, in such case, that the fact mentioned in the instruction was admitted by the pleadings. The oral instruction given by the court, when refusing to give that instruction, is erroneous in one particular. The jury were instructed that they might consider the testimony in respect to the sheep, in connection with the pleadings, and that if they believed the pleadings were erroneous in that regard — that Hicks did actually surrender all his property to his assignee in insolvency — they might "give him the benefit of it." The jury have no right to find a fact in favor of a party, which is contrary to, or inconsistent with, his pleadings. If a pleading does not correctly state the facts, application should be made to amend.

Sixth — The plaintiff's eighth instruction is only a repetition of facts stated in the complaint, and not denied in the answers. It should have been given, together with the statement, that those facts were admitted by the pleadings. These remarks are applicable to certain other of the instructions requested by the plaintiff, which need not be particularly noticed. It is sufficiently indicated by what has already been said that several of the denials in the answer of Hicks are not specific, within the meaning of the code.

Opinion of the Court — Rhodes, C. J.

The record does not disclose any error materially affecting the judgment in favor of D. O. Mills & Co.

Seventh — The plaintiff renews here the motion, made after judgment in the Court below, for a judgment, declaring the discharge in insolvency of Hicks void. The motion was heard on the pleadings and verdict. Several of the material allegations of the complaint are not sufficiently denied in the answer of Hicks; but neither the plaintiff nor the Court below treated the facts which were stated in those allegations as admitted, and the plaintiff adduced evidence to prove them. Had the opposite course been taken, Hicks doubtless would have asked leave to amend his answer. The verdict, by finding for the plaintiff as to a certain number of the sheep, determine that Hicks did not surrender all his property to his assignee; but it does not necessarily establish that the property was fraudulently or purposely omitted from his schedule. Under these circumstances, the motion was properly denied. The plaintiff should not have delayed the making of the motion, until after the cause had proceeded to such a stage, that Hicks could not amend his answer when its defects were pointed out.

Judgment as to D. O. Mills, Edgar Mills, and Henry Miller affirmed, and the judgment in favor of the defendants, Hicks and Lansing, reversed, and cause remanded for a new trial.

Mr. Justice SPRAGUE expressed no opinion.

[No. 2,606.]

THE PEOPLE OF THE STATE OF CALIFORNIA v.
JOHN NYLAND.**CONSTITUTIONAL CONSTRUCTION — MUNICIPAL COURT OF SAN FRANCISCO.**

The Municipal Criminal Court of San Francisco, established by Act of the Legislature March 31st, 1870, is a constitutional Court. (*Ex Parte John Stratman*, 39 Cal. 517, affirmed on this point.)

IDEM — COUNTY COURT — RIGHT OF APPEAL.—The provision in section eight, Article VI, of the Constitution, giving to the County Courts appellate jurisdiction in cases arising in such inferior Courts as may be established in pursuance of section one, of the same Article, is not a guaranty of individual right; but either confers the absolute right of appeal from the Municipal Court to the County Court, or confers upon the latter the capacity to exercise the jurisdiction, when the Legislature shall provide the mode and means of doing so.

IDEM.—The question whether the Constitution confers upon the County Court appellate jurisdiction in cases transferred from the County Court to the Municipal Court for trial is reversed.

CRIMINAL PRACTICE — EVIDENCE.—In a criminal case the prosecution may show, by other witnesses, that a witness for defendant had given a different account of what occurred at the time the offense was committed, from that testified to by the witness on the stand.

APPEAL from the Municipal Criminal Court of the City and County of San Francisco.

Defendant was tried and convicted, on an indictment for robbery, in the Municipal Criminal Court of the City and County of San Francisco. Defendant then moved the Court for a new trial; the Court denied the motion; the defendant moved for an arrest of judgment; the Court denied the motion, and entered judgment; and the defendant appealed.

The other facts are stated in the opinion.

George W. Tyler, for Appellant.

First — Article VI, section one, of the Constitution, provides for the organization of courts inferior in jurisdiction to the County Court in any incorporated city or town.

Argument for Respondent.

Second — Section one, of Article VI, is the only section of the Constitution permitting the organization of any Court other than Supreme, District, County, and Probate Courts, and Justices of the Peace, and therefore the Municipal Criminal Court of San Francisco must be organized under that section of the Constitution.

Third — Every citizen is entitled to all the rights guaranteed to him by the Constitution of the State.

Fourth — Section eight, of Article VI, of the Constitution, provides that an appeal shall lie, to the County Courts from all inferior Courts, organized pursuant to Article VI, section one.

Fifth — The Act organizing the Municipal Criminal Court does not provide for an appeal to the County Court, but does provide for an appeal direct to the Supreme Court.

Sixth — That the act organizing the Municipal Criminal Court, being the later statute, repeals the first subdivision of section four hundred and eighty-one of the Criminal Practice Act, and therefore no appeal lies, from that Court to the County Court, unless the section of the Constitution, *ex proprio vigore*, gives such appeal.

Seventh — That the Constitution is not self-executing in that respect, but requires legislation to carry the right of appeal guaranteed by the Constitution into effect.

Eighth — The Legislature has no power to impair or take away the appellate jurisdiction of the County Court (*Haight v. Gay*, 8 Cal. 297), and therefore, inasmuch as an appeal to the County Court is not provided for by law, the Act organizing the Court is unconstitutional.

Jo Hamilton, Attorney General, for Respondent.

The Municipal Court of San Francisco, created by Act approved March 31st, 1870, is but an arm of the County Court. No cases originate or arise in that Court; the cases are merely transferred to it from the County Court, and its

existence does not conflict with section eight, Article VI, of the Constitution.

By the Court, TEMPLE, J.:

The first question raised on this appeal is as to the constitutionality of the Act of the Legislature which organizes the Municipal Criminal Court of the City and County of San Francisco (Stats. 1869-70, p. 528), and which confers on that Court jurisdiction to try cases of felony, and provides for no appeal to the County Court. The main question was discussed by Mr. Justice WALLACE *In Re John Stratman*; and the conclusion there arrived at, declaring the Court constitutional, we fully indorse and approve.

In this case it is claimed that, although the Legislature has the power to establish such a Court, and confer upon it jurisdiction to try such cases, yet, in doing so, it must provide for an appeal to the County Court from its judgments; that the Court was organized by virtue of the power conferred upon the Legislature by section one, Article VI of the Constitution, and that section eight of the same Article gives to the County Courts appellate jurisdiction of all cases arising in the Courts authorized by section one; that the defendant is entitled to all the rights guaranteed to him by the Constitution, one of which is, that if convicted in one of the Courts organized under section one, he shall have the right to appeal to the County Court, and there have a trial *de novo*; that the Act in question provides for trials and convictions in the Municipal Court, but has not provided for an appeal to the County Court; that in this it attempts to deprive the County Court of some portion of its constitutional jurisdiction, and denies to parties tried and convicted in the Municipal Court a right secured by the Constitution, and is, therefore, void.

Admitting all the premises of counsel, I fail to see the

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logical necessity of the conclusion. If the clause of the Constitution is self-executing, there is no foundation for the argument for the right of appeal, and the power of the Court to entertain it exists under the law. If the constitutional provision is not self-executing, then it merely confers upon the County Court the capacity to exercise the jurisdiction when the Legislature shall provide the means of exercising it. The provision is in no sense a guaranty of individual right. It is a grant of power to the Court, which possibly creates a corresponding duty upon the part of the Legislature to provide the mode and means of its exercise.

The question whether the Constitution confers upon the County Court appellate jurisdiction in cases transferred from the County Court to the Municipal Court for trial does not necessarily arise; and, as very little discussion has been had upon that part of the case, the question is reserved.

All the evidence given by the witness Harmon appears to be set out in the record. Upon an examination we fail to find anything which could have been of the slightest benefit to the defendant. It, therefore, could not have injured him to allow the witness to be impeached. The witness was called by the prosecution, and simply proved that he knew nothing whatever concerning the case.

There was no error in allowing the prosecution to show by other witnesses that Mrs. Nyland, the wife of defendant, had given a different account of what occurred at the time of the robbery from that testified to by her while on the stand. There is no question as to the relevancy of such testimony. (1 Greenl. Ev., Sec. 462.)

Judgment affirmed.

Neither Mr. Chief Justice RHODES nor Mr. Justice SPRAGUE expressed an opinion.

Statement of Facts.

[No. 2,575.]

DAVID W. PATTERSON, WILLIAM L. SPENCER,
AND FERDINAND SPENCER v. WILLIAM H.
SHARP, JOHN M. BYRNE, AND TOWNSEND BAG-
LEY.

PRACTICE ON APPEAL—JUDGMENT ROLL.—When a judgment is rendered on facts, alleged in the complaint, and not denied in the answer, the question, whether the judgment ordered the payment of too large a sum of money, arises on the judgment roll without bringing up the evidence.

TENDER—INTEREST.—A tender of the principal sum due, with the stipulated interest up to the time of the tender, puts a stop to the accruing of interest from the date of the tender.

EVIDENCE.—Evidence is not admissible to controvert facts admitted by the pleadings.

APPEAL from the District Court of the Fourth Judicial District, City and County of San Francisco.

The questions presented and decided in this case sufficiently appear from the following extract from the notice of appeal, and from the opinion of the Court:

“The plaintiffs hereby appeal to the Supreme Court of this State from so much of the judgment of the District Court as is in favor of defendants or either of them, and against the plaintiffs; that is to say, from so much of said judgment as in effect orders, adjudges, and decrees that said plaintiffs shall pay to said defendant Byrne, the sum of seven thousand eight hundred and thirty-six dollars, in United States gold coin, instead of six thousand two hundred and twenty-four dollars, in like coin; the said amount so required by said judgment to be paid, being in excess of the amount justly due in the sum of one thousand six hundred and twelve dollars. And the said plaintiffs will ask said Supreme Court to so modify the said judgment as to require the plaintiffs to pay to said defendants the sum of six thousand dollars, in United States gold coin, with such interest

Argument for Respondents.

thereon as to such Supreme Court may seem just and proper."

Currey & Evans, for Appellants.

The District Court erred in rendering judgment requiring the plaintiff to pay the defendant, Byrne, the sum of seven thousand eight hundred and thirty-six dollars, in United States gold coin, instead of six thousand two hundred and twenty-four dollars in like gold coin — being an excess of one thousand six hundred and twelve dollars of the amount justly due.

1. The complaint contains an allegation that six thousand two hundred and twenty-four dollars was tendered on the 11th day of June, 1869, by the plaintiffs to the defendant, Sharp, in payment of the sum specified in the written contract set forth in the complaint, with the interest due thereon. This allegation stands admitted for want of a denial of it in the defendant's answer. (Practice Act, Sec. 65; *Landers v. Bolton*, 26 Cal. 416, 417; *Lay v. Neville*, 25 Cal. 545.)

2. The amount due being tendered on the 11th of June, 1869, interest thereon should cease from that time. (*Hill v. Place*, 5 Abbott's Pr. R. [N. S.], 18; s. c., 36 How. Pr. R. 26; *Kortright v. Cady*, 21 N. Y. R. 343, and cases there cited.) The plaintiffs alleged that they had, from the time of the tender, continued ready to pay the amount due. (*Kortright v. Cady*, 23 Barb. 490.)

G. F. & W. H. Sharp, for Respondents.

1. The appellants cannot attack the judgment, upon the ground that it was excessive, or for more than was due, because the decree shows that the action was tried, and as the evidence is not before the Court, and no motion for new trial made, the appellants cannot urge this objection, because the evidence must be presumed sufficient to justify the deci-

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sion. This argument also disposes of the point in reference to the tender. (*Hihn v. Peck*, 30 Cal. 280.)

2. The appellants assume that the record established the relation of mortgagor and mortgagee between the parties; but the material allegations of the complaint, in this particular, were all denied by the answer; and the decree, expressly assuming that the legal title to the premises was in the defendant Byrne, gave the appellants a certain period of time wherein to pay the sum of money awarded. This Court cannot, without the evidence presented below, say that this decree was erroneous in fact; and that it was not erroneous in form is established by the decision of this tribunal in *Tyler v. Granger* (No. 2,280), July Term, 1870 (not reported).

By the Court, RHODES, C. J.:

It is alleged in the complaint that the plaintiffs tendered to Sharp, and also to Byrne, six thousand dollars, the money advanced, together with interest thereon at two per cent per month — the stipulated rate — at a specified time; that they refused to accept the money; and that the plaintiffs, from the time of the tender, have continued ready to pay that amount of money. These facts, not being denied by the answer, are admitted; and as evidence would not be admissible for the purpose of controverting facts thus established, the question whether the judgment ordered the payment by the plaintiffs, of too large a sum of money, arises upon the judgment roll without bringing up the evidence, if any, that may have been offered on that point. The amount of money tendered by the plaintiffs — six thousand two hundred and twenty-four dollars — was the amount due at the time of the tender, and the tender put a stop to the accruing of interest. (3 Para. on Cont. 150, and cases cited.)

Case remanded, with directions to modify the judgment

Argument for Appellant.

by striking out the sum of seven thousand eight hundred and thirty-six dollars wherever it occurs in the judgment, and inserting in the place thereof, the sum of six thousand two hundred and twenty-four dollars, and ordering said sum to be paid within ten days from the entry of the judgment.

Mr. Justice SPRAGUE expressed no opinion.

[No. 2,629.]

ALEXANDER McABEE v. CHARLES W. RANDALL.

APPEAL FROM JUDGMENT.—On an appeal from a judgment, without a statement or bill of exceptions, the Court will review the judgment roll only.

REVIEW OF ORDER.—An order made by the Court below, denying a motion for judgment on the pleadings, will not be reviewed by the Supreme Court, unless presented by a statement or bill of exceptions.

AN ATTORNEY MUST STAND BY HIS DEFINITION OF HIS PLEADINGS.—If the defendant calls his answer a counter claim, and goes to trial in the Court below on that theory, he will not be permitted for the first time, in the Supreme Court, to call it a cross complaint, to obtain a review of an order denying his motion for judgment on the pleadings.

APPEAL from the District Court of the Fourth Judicial District, City and County of San Francisco.

When the cause was called for trial in the Court below, the defendant's attorney moved for judgment on the pleadings. The Court denied the motion; the cause was then tried, and the plaintiff recovered judgment. The defendant appealed.

The other facts are stated in the opinion.

John L. Love, for Appellant.

It is true this defense was, in the hurry of the pleader, called a counter claim. We assert that under our system a pleading is not what an attorney may happen to call it, but

what it really is as shown by the facts alleged in the pleading. The calling it by another name is mere surplusage.

Botts & Wise, for Respondent.

By the Court, WALLACE, J.:

The appeal here is taken from the final judgment only. There being no statement on appeal, nor bill of exceptions, the record before us for review is limited to such papers as are declared by section two hundred and three to constitute the "judgment roll." It would seem from the minutes of the trial, which are found in the transcript, and from the argument of counsel, that the real purpose of the appeal from the judgment here taken is to review an order said to have been made by the Court below after the coming on of the cause for trial, by which order a motion of the defendant for judgment in her favor on the pleadings was denied.

If it properly appeared that such an order was really made, it would undoubtedly be examinable here by means of an appeal from the final judgment itself; in fact, it could be reviewed in no other way. The order which we are asked to review is not one disposing of a demurrer, nor relating to a change of parties, and, therefore, cannot be considered here, unless presented by bill of exceptions, or statement on appeal.

So far as the record discloses to us, then, it appears that the parties went to trial in the Court below without objection made upon the part of either to the pleadings of the other, as not permitting that other to be heard on the merits. The defendant's answer was there styled by himself a "counter claim," and not a "cross complaint," which he now says it is; and the trial proceeded on that idea.

Under repeated rulings in this Court, we will not hear the

Argument for Respondent.

defendant assert here, for the first time, that he made a mistake in this respect — that his answer was, after all, a “cross complaint;” that its allegations were not denied by plaintiff, and that, as a consequence, he is now entitled to judgment, over against the plaintiff on the pleadings.

Judgment affirmed.

Mr. Justice SPRAGUE did not express an opinion.

[No. 2,395.]

ANGELO LAVERONE v. G. MANGIANTI ET AL.

FEROCEOUS DOG.—The owner of a ferocious dog, knowing the vicious propensities of the animal, keeps it at his own risk, and is responsible for any injury inflicted by it upon a person who is free from fault.

By CROCKETT, J., dissenting:

IDEM.—The owner of a dangerous or ferocious dog is liable for such damages only as result from his negligence in keeping it.

APPEAL from the District Court of the Fourth Judicial District, City and County of San Francisco.

The facts are stated in the dissenting opinion of Mr. Justice CROCKETT.

Botts & Wise, for Appellants.

A man may lawfully keep a fierce dog for the protection of his house, knowing that he will bite, provided he keeps him under proper restraint, and with due care. (*Sarch v. Blackburn*, 4 Carr. & Payne, 287.)

Quint & Hardy, for Respondent.

It is admitted that the dog was a ferocious animal, and accustomed to bite mankind, and, further, that the defendants knew it. The scienter being established, the law cre-

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ates a liability on the part of the owners. (1 Abbott's Forms, 442, Note 1; *Buckley v. Leonard*, 4 Denio, 500; *Auchmutz v. Ham*, 1 id. 495; *Smith v. Pelah*, 2 Str. 1264; *McCoskill v. Elliott*, 5 Strob. 198; *Loomis v. Terry*, 17 Wend. 496; *Jones v. Perry*, 2 Esp. R. 482; *Norris v. Peak*, 487 S. C.; *Blackman v. Simmons*, 3 Carr. & Payne, 138; *Popperell v. Rine*, 10 Cush. 509.)

There are three, and but three, allegations necessary to be made and proved in this case:

First—That the dog was vicious and in the habit of biting mankind.

Second—That the owners (defendants) knew it.

Third—That he bit and injured the plaintiff.

By the Court, RHODES, C. J.:

It is insisted, on behalf of the defendants, that a person may lawfully keep a ferocious dog—one that is accustomed to bite mankind. That position may be conceded, and it may also be conceded that he has the same right to keep a tiger. The danger to mankind and the injury, if any is suffered, comes from the same source—the ferocity of the animal. In determining the responsibility of the keeper for an injury inflicted by either animal, the only difference I can see between the two cases is, that in case of an injury caused by a dog, the knowledge of the keeper that the dog was ferocious, must be alleged and proven, for all dogs are not ferocious; while in the case of a tiger, such knowledge will be presumed from the nature of the animal. This knowledge, however established, whether by evidence or by presumption, is the same in substance, and works the same results. When the facts in two or more cases are alike, the law will pronounce similar judgments. It will not be doubted that for an injury inflicted by a tiger, his owner will be responsible, and in my opinion there is as little reason to

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doubt that the owner of a dog, which he knows to be ferocious, is equally liable for a similar injury occasioned by it. In either case, the owner, knowing the vicious propensities and ferocious nature of the animal, keeps it at his own risk, and he should bear the responsibility for any injury inflicted by it upon a person who is free from fault.

In my opinion the judgment should be affirmed, and it is so ordered.

CROCKETT, J., delivered the following dissenting opinion:

The plaintiff was bitten by the defendants' dog, and sues to recover damages for the injury, and having obtained a judgment for five hundred dollars, the defendants moved for a new trial, which was denied, and they appealed to this Court. The proof shows that the dog was chained under the steps leading to the defendants' house, in such manner that he could not reach any one ascending the steps; that the plaintiff, in entering the house upon a lawful business, was ascending the steps, when one of the steps which was loose, slipped from its position, and the plaintiff's leg went through the opening, when it was seized and bitten by the dog under the steps. If any negligence can be imputed to the defendants, it was in keeping the dog under the steps so loosely covered as to expose persons ascending the steps to accidents of this character. But no negligence is averred in the complaint and the action is based on the theory that the owner of a dog, which he knows to be vicious and inclined to bite human beings, is bound, at his peril, so to keep him that no one shall be bitten by him, unless it be through the culpable negligence of the party who suffers the injury. On the other hand, the defendants claim that the owner is not responsible, if he takes reasonable precautions to prevent damage from the vicious qualities of the dog; and they claim that such precautions were taken in this case; that the

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defendants were guilty of no negligence, and, consequently, are not responsible for the injury to the plaintiff. If the defendants' proposition is correct, that the defendants were not responsible, except for negligence in the manner of keeping the dog, it is evident the complaint is not good, inasmuch as it avers no negligence on the part of the defendants. The only legal proposition, therefore, which was involved in the action was, whether or not, conceding that the defendants were free from negligence, they were liable to the plaintiff for the damage which he suffered, and to which he did not contribute by his own negligence. The authorities are not uniform on this point, some of them holding that he who keeps a ferocious dog, knowing that he is accustomed to bite mankind, does so at his peril, and is responsible to any person who, without any fault on his part, is bitten by the dog, whether he was negligently kept or not. The following cases appear to support this proposition, or, at least, to lend some countenance to it: (*Buckley v. Leonard*, 4 Den. 500; *Auchmutz v. Ham*, 1 Den. 495; *Smith v. Pelah*, 2 Str. 1264; *McCoskill v. Elliott*, 5 Strob. 198; *Loomis v. Terry*, 17 Wend. 496; *Jones v. Perry*, 2 Esp. 482; *Norris v. Peak*, 487 S. C.; *Blackman v. Simmons*, 3 Carr. & Payne, 138; *Popperell v. Rine*, 10 Cush. 509.)

On the other hand, there are very respectable authorities which hold that every one has a right to keep a watch dog for the protection of his premises, and that he is only responsible for such damages as shall result from the negligent keeping of the dog, and is not an insurer against injuries which may happen, notwithstanding all reasonable and proper care was used to guard against them. (*Sarch v. Blackburn*, 4 Carr. & Payne, 207; *Curtis v. Mills*, 5 id. 489.) In *Ficken v. Jones*, 28 Cal. 618, the action was for damages caused by a steer which was being driven through the streets of San Francisco, and the Court held that the defendants were not liable unless they were guilty of negligence in the mode of

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driving and managing the steer. I think the more reasonable rule is announced in *Sarch v. Blackburn*, supra, to the effect that every one has a right to keep a watch dog for the protection of his premises, and is only responsible for injuries resulting from negligence in the keeping. It may be conceded that no one has a right to keep upon his premises wild beasts of such strength and ferocity that no reasonable care or prudence would be a safeguard against injury from them. If one should see fit to keep upon his premises a tiger or a lion, or a dog known to be mad, he would doubtless be responsible for injuries caused by them, however carefully he might guard them. Such beasts are too dangerous to human life to be kept under the pretense of guarding the premises of the keeper from the intrusion of marauders. But dogs are not ordinarily of a dangerous and ferocious nature, and with reasonable care and prudence may be so kept as to render them usually harmless, and should not be subject to the same rule which applies to savage and ferocious beasts of an untamable nature. In modern times they have become so domesticated, and are so subservient to the use of man, as to exclude them from the general rule, which is applicable to beasts of so savage and ferocious a nature that they can be devoted to no useful purpose, and cannot be kept except at the imminent risk of human life. Whilst the majority of all domestic animals are usually tractable, docile, and harmless, a few of them are, nevertheless, vicious and dangerous. It is a well-known fact that some of the most valuable horses for breeding and the turf have been extremely vicious, dangerous, and unmanageable. It would be a harsh rule to hold that the owner of such animals must destroy them, on pain of being held responsible for any damage they may cause, however cautiously they may have been guarded to prevent the injury. If the owner of a savage and dangerous bull should have him in a perfectly secure inclosure, where he could do no possible harm, and if a

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thoughtless or mischievous boy, without the knowledge or consent of the owner, should open the gate and turn him loose into a crowded thoroughfare, from which damage ensued, it would be a great hardship to hold the owner responsible for it. Whilst savage dogs may be somewhat more dangerous than vicious horses or cattle, they are nevertheless useful domestic animals, which every one has a right to keep; and whilst they may demand greater vigilance to prevent harm, this only involves the question of the degree of caution to be used, and does not affect the question of their right to keep them, provided they use the proper care. If the earlier cases establish a different rule, the interests of society demand that it should now be abrogated, considering the various useful purposes for which such animals are now employed.

On the trial, the Court ignored this view of the law in its instructions to the jury, and for this reason the judgment should be reversed. But inasmuch as the defendants were possibly guilty of negligence in keeping the dog under steps covered with boards either entirely loose, or so insecurely fastened as to be easily displaced by an accidental cause, from which negligence in so keeping the dog the injury to the plaintiff may have resulted, the plaintiff should be allowed to amend his complaint. I think, therefore, the judgment should be reversed and the cause remanded for a new trial, with leave to the plaintiff to amend his complaint.

Mr. Justice SPRAGUE did not express an opinion.

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APRIL TERM, 1871.

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REPORTS OF CASES

DETERMINED BY

THE SUPREME COURT

APRIL TERM, 1871.

[No. 2,492.]

THE STOCKTON AND VISALIA RAILROAD COMPANY v. THE COMMON COUNCIL OF THE CITY OF STOCKTON.

STATUTORY CONSTRUCTION — POLICY OF LAW NOT TO BE CONSIDERED.— In the consideration of a statute, duly passed by the Legislature, the Supreme Court will not inquire into the motives of its author, or entertain the question whether it be a wise or a foolish law.

POWER OF JUDICIARY TO DECLARE STATUTE UNCONSTITUTIONAL.— The power of the judiciary to declare a statute unconstitutional should never be exerted, except where the conflict between it and the Constitution is palpable, and incapable of reconciliation.

CONSTITUTIONAL POWER OF TAXATION — LEGISLATIVE DISCRETION.— The principle upon which taxation is to be imposed by the State Government is pointed out by the Constitution; but the extent to which it may be carried is left unlimited, except by legislative discretion.

"PUBLIC USE" A MATTER OF LEGISLATIVE DETERMINATION.— The "public use," mentioned in the Constitution (Art. X, Sec. 8), upon which the power of eminent domain is to be exerted, is left in large measure to legislative determination; and the legislative resolve, by which a tax is

Statement of Facts.

imposed or private property taken, is such a legislative determination that the public use is to be promoted by the tax or the taking directed.

NAPA VALLEY RAILROAD Co. v. NAPA COUNTY, 30 Cal. 437, on the point that railroads concern the public interest as a matter of legal judgment, and that legislative action to that effect is not open to review by the judicial department, cited as controlling authority.

"PUBLIC USE" TO SUPPORT TAXATION FOR RAILROAD PURPOSES.—The same kind of "public use" which will authorize the taking of private property in aid of a particular railroad, in the exercise of the power of eminent domain, will support the laying of a tax in aid of the same road, under the taxing power.

RAILROADS MAY BE OF "PUBLIC USE," THOUGH ALSO FOR PRIVATE PROFIT.—The mere fact that a railroad is owned and operated by a private corporation, and for private profit, does not prevent it from being also of "public use."

MEANS OF AID TO RAILROADS.—Aid, as fostering a public use, may be extended to the construction of a railroad, by means of the power of eminent domain, or of subscription to capital stock, and by donation made by cities and other political subdivisions of the State, under the authority of the Legislature.

STOCKTON CITY RAILROAD—SUBSIDY ACT CONSTITUTIONAL—MANDAMUS.—The Act of April 1, 1870, empowering the City of Stockton to aid in the construction of the Stockton and Visalia Railroad (Stats. 1869-70, p. 551), declared constitutional; and the Common Council of Stockton required by mandamus to levy a tax to pay interest accruing under its provisions.

THIS was an original application in the Supreme Court for a writ of mandate to require the Common Council of the City of Stockton to levy a tax sufficient to raise the sum of twenty-one thousand dollars, in gold coin, being the interest for the first year (1870) on the bonds issued under and by virtue of "An Act to empower the City of Stockton to aid in the construction of the Stockton and Visalia Railroad," approved April 1, 1870 (Stats. 1869-70, p. 551). The petition set forth the facts, and, among other things, that the defendant, in response to a written demand made upon it by the petitioner, refused to levy such tax "then, or at any other time," assigning as a reason that the statute was unconstitutional and void. The same ground substantially was taken by the answer in this proceeding.

Argument for Petitioner.

J. B. McConnell, and J. B. Hall, for Petitioner.

The Act in question is constitutional and valid, as a law emanating from the supreme legislative power. In the absence of constitutional restrictions, the legislative authority is, to all intents, supreme, and, humanly speaking, omnipotent. (See 1 Black. 160; Smith's Stat. and Const. Construction, 243-258; Sedgwick's Stat. Const. 243, 475; 1 Kent, 448; Cooley on Limitations, 83-92; *Commonwealth v. McCloskey*, 2 Rawle, 374; *Beebe v. The State*, 6 Ind. 528; *Johnson v. The Commonwealth*, 1 Bibb, 602; *People v. Draper*, 15 N. Y. 543; *Fletcher v. Peck*, 6 Cranch, 136; *Winehamer v. The People*, 13 N. Y. 391; Cooley on Limitations, 87, 168, notes; *Sharpless v. The Mayor of Philadelphia*, 21 Pa. St. 162.)

The taxing power is left by the Constitution unlimited, both as to its objects and to the amount imposed. (Cooley on Limitations, 479; *McCullough v. Maryland*, 4 Wheaton, 428; *Providence Bank v. Billings*, 4 Peters, 661; *Booth v. The Town of Woodbury*, 32 Conn. 124; *Broadhead v. Milwaukee*, 19 Wis. 624; *Dinehart v. Town of Lafayette*, 19 Wis. 677.) In California the only limitation upon the taxing power is the constitutional provision requiring "taxation to be equal and uniform." Subject to this restriction, the authority to impose taxes is with us as unlimited as in any other sovereign community on the globe. (*Nougues v. Douglass*, 7 Cal. 85; *McCauley v. Brooks*, 16 Cal. 11; *People v. Seymour*, 18 Cal. 332; *Taylor v. Palmer*, 31 Cal. 251.)

The statute in question provides for a case of taxation—not of eminent domain. The City of Stockton is a municipal body, fully competent to tax its citizens within legitimate bounds; and the Act does not empower or attempt to empower it to exceed those bounds; nor does it conflict with any clause of the Constitution relating to taxation. (*Town of Guilford v. Supervisors*, 18 Barb. 616; *People v. Coleman*,

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4 Cal. 46; *High v. Shoemaker*, 22 Cal. 363; *Blanding v. Burr*, 13 Cal. 343; *Burnett v. Mayor of Sacramento*, 12 Cal. 72; *Taylor v. Palmer*, 31 Cal. 251; *People v. McCreery*, 34 Cal. 432; *Beals v. Amador County*, 35 Cal. 630; *People v. Alameda County*, 26 Cal. 647; *Napa Valley R. R. Co. v. Napa County*, 30 Cal. 435; *People v. Mayor of Brooklyn*, 4 Comst. 420; *Prettyman v. Sup. of Tazewell Co.*, 19 Ill. 411; *Bank of Rome v. Village of Rome*, 18 N. Y. 38.)

We admit that the Legislature cannot take one man's property from him and give it to another, for this would be to deprive him of his property without due process of law. Nor can the Legislature, under pretense of taxation, do [indirectly] what it cannot do directly. A tax, therefore, imposed purely and singly for the purpose of paying money to a man for his *sole* benefit, would come within the category of void legislation. But such is not the case with railroads, and particularly with the railroad intended by this Act. It is of such a public character as to justify taxation in its behalf. The mere fact of its ownership being individuals does not prevent its use from being public and even wholly public. There is abundant and conclusive authority to show that railroads in general are now regarded as of public concern. (Constitution, Art. IV, Sec. 37; Hittell's Gen. Laws, 826; Thompson on Highways; *Rex v. The Severn and Wye R. R. Co.*, 2 Barn. & Ald. 647; *People v. Kerr*, 27 N. Y. 189; *Contra Costa R. R. Co. v. Moss*, 23 Cal. 324; Vattell, Lib. 1, Chap. 9, Secs. 100-103; *Bloodgood v. Mohawk and Hudson River R. R. Co.*, 18 Wend. 10; *Beekman v. Saratoga and Schenectady R. R. Co.*, 3 Paige, 45; *Sharpless v. Mayor of Philadelphia*, 21 Pa. St. 149; *Moers v. City of Reading*, 21 Pa. St. 189; *Commonwealth v. McWilliams*, 11 Pa. St. 61; *Shaw v. Dennis*, 5 Gilman, 405; *Gibbons v. Mobile and G. R. R. Co.*, 36 Ala. 412; *Stein v. City of Mobile*, 24 Ala. 612; *Bank of Augusta v. Augusta*, 49 Maine, 508; *Goddin v. Crump*, 8 Leigh, 120; *City of Bridgeport v. Housatonic*

Argument for Petitioner.

B. R. Co., 15 Conn. 475; *Nichol v. Mayor of Nashville*, 9 Humphreys, 252; *Clark v. Town of Janesville*, 10 Wis. 170; *Bushnell v. Beloit*, 10 Wis. 195; *Cin. R. R. Co. v. Clinton County*, 1 Ohio, 77; *Cass v. Dillon*, 2 Ohio, 607; *Fosdick v. Perrysburg*, 14 Ohio, 472; *V. S. and Texas Railway v. Parish of Ouachita*, 11 La. An. 649; *Parker v. Scoggin*, 11 La. An. 629; *N. O. O. & G. W. R. R. v. Estate of McDonough*, 8 La. An. 341; 21 Miss. 209; *Talbot v. Dent*, 9 B. Monroe, 526; *Slack v. Maysville B. R. Co.*, 13 id. 1; *Copes v. City of Charleston*, 10 Richardson, 491; *Clark v. Rochester*, 24 Barb. 446; *Dubuque County v. D. & P. R. B. Co.*, 4 Green, 1; *State v. Bissell*, 4 Green, 328; *Clapp v. Cedar County*, 5 Iowa, 15; *Ring v. Johnson County*, 6 Iowa, 265; *McMiller v. Boyles*, 6 Iowa, 304; *Games v. Robb*, 8 Iowa, 193; *State v. Board of Equalization of Johnson County*, 10 Iowa, 157; *City of St. Louis v. Alexander*, 23 Mo. 483; 2 Jones' Eq. 141; *City of Aurora v. West*, 9 Ind. 74; *Redfield on Railways*, Sec. 230, Note 1; *County of Knox v. Aspinwall*, 21 How. 539; *Same v. Wallace*, 21 How. 547; *Zabriskie v. Cleveland R. R. Co.*, 23 How. 381; *Amoy v. Mayor of Alleghany*, 24 How. 305; *Commonwealth v. Aspinwall*, 24 How. 376; *Gelpecke v. Dubuque*, 1 Wallace, 176; *Low v. Marysville*, 5 Cal. 214; *Patterson v. Marysville*, 13 Cal. 182; *Hobart v. Supervisors of Butte*, 17 Cal. 29; *French v. Teschemaker*, 24 Cal. 641; *People v. Coon*, 25 Cal. 641; *People v. Supervisors of San Francisco*, 27 Cal. 667; *Robinson v. Bidwell*, 22 Cal. 394; *Napa Valley R. R. Co. v. Napa County*, 30 Cal. 435; *Contra Costa B. R. Co. v. Moss*, 23 Cal. 324; *People v. Pacheco*, 27 Cal. 209; *Redfield on Railroads*, Sec. 230, Note 1; *Pierce on Am. Railroad Law*, 108-115, notes.) Indeed, it is not saying too much to assert that no question has been mooted in the Courts of these States, upon which a doubt at all could hinge, in the determination of which there has been so remarkable a concurrence of opinion.

There are several cases, such as *State v. County of*

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Wapello, 13 Iowa, 390; *Whiting v. Sheboygan Railway Co.*, in Wisconsin; and *People v. Township of Salem*, in Michigan, which hold a contrary doctrine, proceeding upon the idea that because a railroad is owned by what they term a private corporation, its use is therefore private; but we may, with perfect safety to our argument, leave these cases to the rebuke of the U. S. Supreme Court, in *Gelpecke v. Dubuque*, 1 Wallace, 206, that they stand in unenviable solitude and notoriety.

It may, however, be objected that in this case the city does not become a stockholder in the company, nor acquire an interest in the road in exchange for her bonds; that, therefore, such bonds are what they may choose to call a pure "donation," and that the act in question, not being founded upon a proper consideration, is null and void. But assuredly, if the Legislature can authorize a city to take stock in a railroad company, and levy a tax to pay the principal and interest of the bonds issued in exchange for such stock, it may, by a like exercise of power, authorize it to advance its bonds by way of direct aid to the road, without receiving stock therefor. The existence of the taxing power being conceded, the Legislature is the sole judge of the occasion of its exercise. All the authorities admit this, including Judge Cooley and the Iowa and Wisconsin Courts. In fact, many of the decisions cited by us are cases of the absolute advance of the bonds, or other securities—no stock being received in exchange. (See *Bank of Augusta v. City of Augusta*, 49 Maine, 508; *Stein v. City of Mobile*, 24 Alabama, 612; *People v. Supervisors of S. F.*, 27 Cal. 667; *Contra Costa R. R. Company v. Moss*, 23 Cal. 324; *Napa Valley R. R. Co. v. Napa County*, 30 Cal. 435; and especially *People v. Alameda County*, 26 Cal. 647; and *Beals v. Amador County*, 35 Cal. 630, in respect to the finality of the legislative judgment relative to the occasion for exercising the taxing power.)

Argument for Respondents.

Jo Hamilton, Attorney General, for Respondents.

The issue in this case is whether a municipal corporation can be compelled to levy a tax upon its citizens and property to raise a subsidy to a private corporation. As an original proposition, I have no doubt that the true principle is with respondents. It is true that years ago, during the internal improvement mania which existed all over the country, the early decisions of many of the States upon this power of taxation went too far; but even those decisions, I think, will be found not to have gone to the extent asked for in this case. In most, if not all of them, the discussions grew out of cases in which the corporations were stockholders, and not like the present case, where the municipal corporation is asked to pay without being interested in the enterprise, except by that incidental interest which would be expected to inure from increase of business. The most, if not all, of these States have seen the impolicy, improvidence, and unconstitutionality of their former course, and have recently, by a series of able and convincing decisions, proven the error of their earlier opinions. The Courts of New York, Wisconsin, Pennsylvania, Michigan, and those of other States have recently had this question under consideration; and it is gratifying to every lover of constitutional law to observe that they are all returning to the old landmarks, admitting, as they all do, the danger of abandoning, for any cause, the rule of strict construction and rigid adherence.

I admit, if the Act be within the powers granted by the Constitution, that we are not permitted to discuss its propriety or advisability; but I deny that the Legislature is the sole judge of the legality or constitutionality of its acts, and that the Act in question is constitutional and valid, as a law, because it emanates from the law making-power—the

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Legislature. I deny, also, that the restriction or inhibition upon legislative action must be found within the letter of the Constitution; that the negative must be averred in the instrument. On the contrary, I insist that we are at liberty to take the whole instrument, and, construing it as we would any other law, determine from it whether an Act be repugnant to it, even when we can find no absolute negative in the letter, nor any single word or sentence which contains any such negative. (See *Nougues v. Douglas*, 7 Cal. 65; *French v. Teschemaker*, 24 Cal. 518; *Bourland v. Hildreth*, 26 Cal. 161; *Ferris v. Coover*, 11 Cal. 175.)

Upon examining the Constitution—and particularly Article I, sections eight, eleven, and twenty-one; Article IV, section thirty-seven; and Article XI, sections ten and thirteen—it will be found that freedom of person, of speech, of action, of property, freedom for the masses, protection to the people, is the utterance of every line, is the expression of every sentence, of the instrument; and, to make the proposition beyond contradiction, the instrument in express words declares that “this enumeration of rights shall not be construed to impair or deny others retained by the people.” While, therefore, it is admitted that the Legislature, being the supreme law-making power of the State, has discretion in legitimate taxation, it is insisted that its power extends no further, and that, in going beyond legitimate taxation, its action becomes usurpation, just as much as if it were assuming to do acts wholly without its constitutional power.

All the writers upon the subject of taxation agree in confining its objects to public uses and purposes. (See Webster, Bouvier, Burrill, Story on Const. 472; Blackwell on Tax Titles, 1.) The right and power of taxation, from its very nature, must exist in the sovereign power. The consideration going to the citizen for the taxes he pays is protection to himself, his family, and his property; and if he gets none of this consideration for the money he pays, there

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is no mutuality of benefit, and his substance is taken without any corresponding advantage to him in return. In the very nature of things, he can get this protection from none but the supreme, the sovereign, power; hence, it follows that the power of taxation is a sovereign power, and cannot exist in any but the sovereign. If exercised by any other than the sovereign, its delegates or agents, it is a usurpation. Now, for what purposes may taxation be imposed? Clearly, for only such purposes as are contemplated in the contract between the Government and the citizens; for only such public uses as bring about the result intended — the support and maintenance of the Government, the sovereign, whose protection is earned by the taxpayer. There is a mutuality, a dependence, the one upon the other. This creates harmony; and outside of this, there is neither harmony nor community of interest. If the power of taxation goes further than this, it ceases to be taxation, and becomes plunder. (*Lumston v. Cross*, 19 Wis. 284; *Soens v. Racine*, 10 Wis. 250; *Foster v. Kenosha*, 12 Wis. 620; *Hosbrook v. Milwaukee*, 13 Wis. 134; *Brown's Legal Maxims*, 3, and note.)

The Legislature cannot levy a tax for merely private and individual purposes, neither can they authorize a municipal corporation to do so — but only for some object of public or common interest. (*Soens v. Racine*, 10 Wis. 271; *Broadhead v. Milwaukee*, 19 Wis. 624; *Sharpless v. Mayor of Philadelphia*, 21 Pa. St. 108; *Whiting v. Sheboygan R. R. Co.*, 25 Wis. 167; *Detroit and Howell R. R. Co. v. Town of Salem*, — Mich. [not yet reported]; *Hanson v. Vernon*, 27 Iowa, 28.

Again, if the consideration averred in the petition, that the contemplated railroad in an enterprise of great utility to the people of the State at large; and especially to Stockton and the surrounding towns and counties, is sufficient to render this enterprise such as to entitle it to have taxes levied and given for its support, then the surrounding towns and counties and the people of the whole State should share

Opinion of the Court — WALLACE, J.

equally in the burden of taxation. (Const., Art. XI, Sec. 15.) But this is not a sufficient consideration; it is not such *public use* as is the legitimate subject of taxation. So far as the public is concerned the incidental advantage to be derived from this enterprise is not a *public use*. The railroad company is a private corporation just as much as any other. (Angell & Ames on Cor., Sections 14, 30, 36.) The respondent is not a stockholder, and will not be benefited by the *gains* of the enterprise — these go into the pockets of private citizens, while the taxpayer foots the bills. I can see neither law nor justice in forcing one man to give his money to another, or to a corporation, who desires to use it for the purpose of building a railroad, any more than any other enterprise. To my mind the later and better authorities clearly establish the proposition, that a municipal corporation has no authority to donate the money of its taxpayers to a private corporation, and that a corporation for building railroads for its own private gain is a private corporation. The Legislature has no constitutional power to apply or to loan the money of such municipal corporation or of its citizens to any such use; and the Act under which the petitioner claims is unconstitutional and void.

[The briefs of counsel in this case were numerous and lengthy. On the part of the petitioner, Messrs. McConnell and Hall filed three, and S. W. Sanderson filed two, one of them containing also a certified copy of the late opinion of the Supreme Court of Iowa in the case of *J. R. Stewart v. The Board of Supervisors of Polk County*. On the part of the respondents, Jo Hamilton, Attorney General, filed three briefs, and Messrs. Hale & Edmonds one.]

By the Court, WALLACE, J.:

An act was passed by the Legislature at its late session, and approved on the first day of April, 1870, which is en-

titled "An Act to empower the City of Stockton to aid in the construction of the Stockton and Visalia Railroad." (Acts 1869-70, p. 551.)

In substance it directs the municipal authorities of the City of Stockton to donate three hundred thousand dollars to a company who propose to build a certain railroad, having a permanent terminus in the city itself, at its water front. Under the provisions of the Act the bonds of the city for the entire sum are to be placed in the hands of three gentlemen named in the Act, who are thereby created a Disbursing Board, and who are to deliver the bonds to the company in designated sums, from time to time, as the work shall progress. These bonds are to bear annual interest, accruing at a fixed rate; and to pay this interest as well as to discharge the principal sum mentioned in the bonds, the Act directs the municipal authorities of the city to levy an annual tax, in the same manner in which city taxes for general municipal purposes are collected, etc. The authorities of the city have pursued the directions given them by the legislature, so far as to prepare and deliver the bonds to the Disbursing Board; but they now refuse to levy the tax to pay the accruing interest thereon.

To compel them to do this the present application for a mandamus is made by the railroad company.

The application is resisted by the city upon a single ground—"that said Act of April 1, 1870, and all the provisions thereof, are, and ever have been, repugnant to, and in violation of the Constitution of the State of California."

It is thus made apparent that the case here must turn wholly upon the question of constitutional power in the Legislature to enact the statute, and that our duty begins and ends with a consideration of the mere point of law presented.

This is so obvious that no one will controvert it. It is so plain of itself that no reasoning nor process of demonstration

could make it clearer. But, self-evident as it is, a perusal of the voluminous printed arguments on file admonishes us that it is not so plain but that it may easily be forgotten. Surely we are not here to pass upon the motives of the authors of the statute. Though "corruption may invade the halls of legislation, and the interests of the people be betrayed by their chosen representatives," and though "the Executive may prove faithless to his trust," the constitutional authority of these functionaries to enact this statute would, nevertheless, be precisely as broad and deep in its measure as though the Act in question were admitted to have found its inspiration in the wisest statesmanship and the purest public virtue.

It is unavailing, therefore, that the counsel for respondents should come here to complain that "it is notorious that the facility of influencing legislative bodies is such that the passage of any measure can be secured through the usual appliances; for even if, unfortunately, this be true, it is also true that we have no authority to reform these "legislative bodies," nor to call them to account for the manner in which they may have conducted the public business intrusted to their hands. Questions, too, which regard the mere policy of the statute — inquiries as to whether it is in itself a wise law or a foolish law; whether its anticipated operation will be to promote or to retard the true prosperity of the people — are not for us to consider; for these, and other questions cognate to these, involve the field of mere political inquiry, which it does not become us to enter, and which we cannot enter, except we overleap the barriers by which the limits of our rightful authority are plainly defined.

We have deemed it proper to say thus much *in limine*, in order that our purposed silence in regard to these matters, concerning which it is our duty to be silent here, may not be misconstrued or misunderstood.

The case before us requires an examination at our hands

into the authority of the Legislature to enact the statute in question.

The authority of the judiciary in this country to consider of the extent of the legislative power in the enactment of laws was formerly denied *in toto*, and it will be remembered that in the early days of the Federal Constitution some of the most distinguished public men, among whom was Mr. Jefferson, maintained the opinion that no Court had the rightful authority to declare a statute unconstitutional which had received the sanction of the popular will, acting through its chosen representatives. It is known, too, that an impeachment of a Judge of a State Court of the highest grade was, at a later period, instituted for an attempt upon his part to uphold this power, admitted to be anomalous, and that upon his trial but a single vote was wanting to his conviction of the charge of usurpation of authority in his office.

Though the power itself is now admitted, it is, nevertheless, conceded to be always one of the utmost delicacy in its exercise, and never to be exerted except when the conflict between the statute and the Constitution is palpable and incapable of reconciliation. To this effect the authorities are substantially uniform.

In *Santo v. The State of Iowa*, 2 Iowa R. 208, Mr. Justice WOODWARD, in delivering the opinion of the Supreme Court of Iowa, unanimous on this point, said:

“For some time after the establishment of the State Government, it was doubted whether the judiciary possessed authority to declare and hold an Act of the Legislature unconstitutional and void, and the exercise of the power was declined by some Courts. And now, although the power is universally admitted, its exercise is considered of the most delicate and responsible nature, and is not resorted to unless the case be clear, decisive, and unavoidable.”

And said the Supreme Court of Indiana (4 Ind. 344). “Such questions (involving the constitutionality of statutes)

are always regarded by the Courts as of serious importance. The judiciary look to the Acts of the Legislature with great respect, and reconcile and sustain them if possible. The General Assembly is the immediate exponent of the popular will — expressly delegated to clothe that will with the forms of law. The presumption that such a body has sanctioned enactments in violation of the Constitution is not to be lightly indulged. That the Act is imperfect or impolitic is not enough. These defects subsequent legislation can remove by amendment or repeal. To bring its validity within the control of the Courts, it must be clearly subversive of the Constitution."

See, also, *Rice v. Foster*, 4 Harrington, 479; *Fisher v. McGier*, 1 Gray, 1; *Commonwealth v. William*, 11 Penn. 61, where the Supreme Court of Pennsylvania say: "Of late years it has been much the fashion to impeach the action of the legislative bodies as unconstitutional, when it happened not to accord with the party's notion of propriety and abstract right. This is very frequently done in sheer oblivion of the doctrine that express prohibition or necessary implication is essential to oust the State Legislature of authority."

We think that the adjudications in this court give the correct definition of the judicial power to declare a statute unconstitutional, as now maintained by the general current of authority. It is said (12 Cal. 384) that it "should never be exercised unless there be a clear repugnancy between the inferior and the organic law."

Again (17 Cal. 30): "But the legislative department, representing the mass of political powers, is no further controlled, as to its powers, or the mode of their exercise, than by the restrictions of the Constitution. Such restriction must be shown, before the action of the Legislature, as to fact or mode, can be held invalid."

Again (17 Cal. 551): "But it is equally well settled that this power (to declare an Act of the Legislature unconstitu-

tional) is not to be exercised in doubtful cases, but that a just deference for the legislative department enjoins upon the Courts the duty to respect its will, unless the Act declaring it be clearly inconsistent with the fundamental law, which all members of the several departments of the Government are sworn to obey."

The law-making power is, in its essence and nature, the supreme power in the State, and the Legislature, in its exercise, impersonates the aggregated sovereignty of the people themselves.

Hence it results that the Legislature is politically omnipotent, except in those particulars in which its power has been limited, qualified, or absolutely withdrawn by the provisions of the Federal or the State Constitution. Said Chief Justice Black, in speaking of this feature of our organized political system: "If the people of Pennsylvania had given all the authority which they themselves possessed to a single person, they would have created a despotism as absolute in its control over life, liberty, and property as that of the Russian Autocrat. But they gave a portion of it to the United States, specifying what they gave, and withholding the rest. The power not given to the Government of the Union was bestowed on the Government of the State, with certain limitations and exceptions expressly set down in the State Constitution. The federal Constitution confers powers expressly enumerated; that of the State contains a general grant of all powers not excepted. The construction of the former instrument is strict against those who claim under it; the interpretation of the latter is strict against those who stand upon the exceptions, and liberal in favor of the Government itself. The Federal Government can do nothing but what is authorized expressly or by clear implication; the State may do whatever is not prohibited." (*Sharpless v. Mayor of Philadelphia*, 21 Penn. St. R. 160.)

These general views found early expression in this Court (*People v. Coleman*, 4 Cal. 46; *Thorne v. San Francisco*, id. 157), and have since been steadily maintained here. (6 Cal. 89; 13 Cal. 159; 17 Cal. 547; 26 Cal. 183.)

Whenever, therefore, it is alleged that a statute which has been enacted in due form by the legislative department of the Government of this State is, indeed, in excess of its authority to enact, it is necessarily the allegation of an exception to the contrary of an admitted general rule; and, therefore, the construction is "strict against those who stand upon the exception, and liberal in favor of the Government itself."

Hence, when we are called upon to declare that there was no authority for the Legislature to enact a particular statute, it is necessary that we be pointed to the clause or clauses of one or the other, or both, of these Constitutions, supposed to have taken away the power entirely, or limited it to something else than the subject to which the Legislature has applied it. It will not do to talk about the "spirit of the Constitution" as imposing a limitation upon the legislative power. The limitation ought to be something definite in itself—as definite as a sum to be subtracted from a larger one, in order to ascertain a balance.

The "spirit of the Constitution" as an interdiction upon legislative power was repudiated by this Court, in *Patterson v. Board of Supervisors of Yuba County*, 13 Cal. 182, in which Mr. Justice DANIEL, of the Supreme Court of the United States, is mentioned as having said that "if Judges were to adopt the notion that a law might be declared unconstitutional because of its supposed repugnance to the spirit of the Constitution, they ought to employ a rapping medium to procure authentic revelations from that spirit." The "spirit of the Constitution," as a means to ascertain the powers of other departments, would partake too much of the personal spirit of the individual Judges chosen for the

time being to interpret that instrument, and, chameleon-like, it would be apt to prove white, or gray, or red, or bluish, or bottle green, as the peculiar views of those having the spirit in their keeping might give it color. However it may be urged upon a Court as a standard by which legislative power is to be measured in a particular case, such as that now at bar for instance, we think that even those who so urge it would hesitate long before they could be brought to inscribe it upon the Constitution itself, that the powers of each of the departments of the Government should actually be limited by the "spirit of the Constitution," as from time to time declared by the Courts.

The rule which requires that an alleged limitation upon the powers of the State Government should appear either by the words which the people have employed for that purpose, or by an implication necessarily flowing from those words, and without which the words themselves cannot have their natural force and fair import, is firmly established.

It assumes, and correctly assumes, that it was the intention of the people that their representatives should exercise all political power, except such as the people themselves have singled out, and have either forbidden to be exercised at all, or permitted to be exercised only upon certain conditions, and under stated circumstances.

If, however, there be among the great powers of government a single one upon which, more than upon any other, we would anticipate that the intended limitation of the power would have found exact and careful expression upon the face of the Constitution itself, that one would be the power involved in the case at bar — the power of taxation; for it is notorious that in this country and elsewhere (everywhere that government has found an organized existence among men), it has, more than any other, perhaps more than all other powers together, proven to be the exhaustless source of political disquiet and disturbance in the body politic. Its

general history has been much the same in all countries where the people have aspired to be free, and have sought to obtain guarantees for the safety and the protection of their property against the unreasonable or irregular exactions of Government.

To go back somewhat less than three hundred years in the history of the country from whose political polity many of the most important features of our own system have been derived, we find an important tax controversy pending upon the point of the power to impose taxes upon the people, and the particular inquiry was, whether that power belonged to the King, by virtue of the royal prerogative, or was only to be exercised by the people themselves, through their representatives in Parliament.

It was in 1606 that Bates' case arose, upon an information in the Exchequer, in which the question was distinctly presented. It was recognized as one of surpassing importance to the English people, and in his argument against the asserted power of the Crown in that case, Mr. Yelverton gave expression to the popular view of the day when he said: "It is not what we shall be called, or how we shall divide what we have, but whether we shall have anything or nothing."

Bates' case was determined by the Court in favor of the Crown, as were other like cases which followed — among them the celebrated case of Hampden concerning the ship money. The controversy thus waged in the Courts led at last to the long and disastrous struggle which culminated in the overthrow of the Government and the establishment of the Protectorate. That all taxes must be laid by the people, through their representatives in Parliament, has been since firmly maintained in England. At the Restoration, even, amid the general national joy at the welcome event, it was not forgotten to resolve, that to tax in any other manner than "in Parliament is against the law of the land." The House

of Commons alone has authority to originate bills of supply, and the upper branch of Parliament has no power to even amend such a bill, for the House of Commons only is composed of the representatives of the people.

In this country the Revolution, as is well known, originated in the same idea, so firmly fixed on the popular mind, that taxation should be imposed on the people only through their chosen representatives. Hence, in organizing the Federal Government, the House of Representatives was given the sole power of originating bills for taxation (Const. U. S., Art. I, Sec. 7); and various constitutional provisions upon this particular subject are to be found in the State Constitutions of some thirty-three of the States, in some of which the rule, that measures of taxation must originate only in the popular branch of the Legislature, is preserved, and in the others qualified or abrogated altogether.

It would be somewhat strange, in view of this history, if it should, after all, appear that those who framed the Constitutions of the State Governments in this country, and especially that of the State of California, should have, through mere inattention, failed to limit the power of taxation in every respect which was deemed practicable. We accordingly find in the Constitution of California, in section thirteen, Article II, an important limitation, not, indeed, upon the extent of the power itself, but upon the mere mode upon which it is to be exerted. Taxation is thereby required to operate equally and uniformly, and upon the *ad valorem* principle. No attempt was made to limit the *power* itself in the hands of the State Government. The Convention at Monterey knew very well that such an attempt would be an attempt upon the safety of the government which it was their purpose to establish — not imperil.

Taxation originates in the financial necessities of government. Those necessities are in themselves illimitable by human agency. The means of the supply, to be adequate,

must be illimitable too. It cannot be foreseen by the framers of the Constitution, who would limit the power of taxation, what may be the necessities of the Government, at a given time, or under the pressure of attack from without or insubordination within its borders, or what pecuniary means it may need in its possible struggle with those difficulties which it is the very purpose of organized government to meet and overcome. To assure the public safety, therefore, dictates that the State be clothed with power to command its entire material resources.

Hamilton, in elaboration of this truth, says: "Money is with propriety considered as the vital principle of the body politic—as that which sustains its life and motion, and enables it to perform its most essential functions. A complete power, therefore, to procure a regular and adequate supply of it, as far as the resources of the community will permit, may be regarded as an indispensable ingredient in every Constitution. From a deficiency in this particular, one of two evils must ensue; either the people must be subjected to continual plunder as a substitute for a more eligible mode of supplying the public wants, or the Government must sink into a fatal atrophy, and in a short course of time perish." (Federalist, No. XXIX.)

The possible financial necessity of the Government may require all the wealth within its limits. The extent of the actual necessity is for the Legislature to determine in all cases; this is political power. It is the power to exhaust the substance of the people by a levy equal in amount to their aggregate wealth. Hence it was aptly said by Chief Justice MARSHALL, more than fifty years ago, in speaking of the power of taxation, as it existed under the American Constitutions in his day, that "the power to tax involves the power to destroy." (*McCulloch v. The State of Maryland*, 4 Wheaton, 316.)

In the same case, the same great authority adds (p. 428):

"The only security against the abuse of the power is found in the structure of the Government itself. In imposing a tax, the Legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation. The people of a State, therefore, give to their Government a right of taxing themselves and their property, and as the exigencies of Government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislators, and on the influence of the constituents over their representatives to guard them against its abuse."

The Convention at Monterey understood well that they had not limited the power of taxation in the State Government, and they understood, too, the reason why they could not venture upon the experiment. This is seen by section thirty-seven, Article IV, where they provide for restricting the power of municipal corporations to impose taxes. This restriction of the power of taxation in the hands of municipal corporations could be safely imposed, because the safety of the State was not supposed to be committed to the municipalities, in general charged with duties of a mere local and police character. That the Convention would have imposed a similar or some limitation upon the taxing power of the State, had it been considered advisable that day, cannot be doubted, for they limited the public indebtedness to a fixed sum, except under peculiar and named circumstances (Article VIII); and they utterly prohibited the loaning of the public credit for private purposes under any circumstances whatever (section ten, Article XI); but they omitted, and evidently *ex industria*, to place any limitation upon the mere power of the State to impose taxes. The principle upon which taxation is to be imposed by the State Government is pointed out by the Constitution, but the extent to which it may be carried is left unlimited, except by legisla-

tive discretion. It is to be exerted to raise money for public use.

The "public use," though mentioned in the Constitution, is not mentioned with reference to the power of taxation, or in connection with any limitation upon that power contained in that instrument.

It is declared (section eight, Article X) that private property shall not be taken for "public use" without just compensation. No constitutional definition of the words "public use" is, however, given in that instrument.

For much the same reason as that already mentioned, concerning limitation upon the power of taxation in the hands of the State Government, the "public use," upon which the power of eminent domain was to be exerted, seems to have been left, in large measure, to the determination of those who were clothed with its exercise, in view of possible contingencies with which they might be called to deal, rather than to attempt its restriction by anticipation.

"Public use," "public purpose," and "public policy" are much the same in import. "Public policy" — the policy upon which governmental affairs are conducted for the time being — is legislative policy in the main, and "public use" and "public purpose" are largely dependent upon this policy — notoriously varying in our country, from time to time, with the accession to power of political parties, differing from each other as to the system of measures best adapted to promote the interest of the State. The resolve of a legislative body, by which a tax is imposed, or private property taken, is, therefore, necessarily a legislative determination, that a public use is to be promoted by the tax, or the taking directed; and such a determination is the determination of a merely political question by the political department of the Government.

The Legislature, in the case before us, having determined the construction of the contemplated road from Stockton to

Visalia to be a matter of public concern, and as such authorized taxation to aid in the work, the question arises as to how far that determination is open to review in Courts. That question was answered by this Court in the case of *Napa Valley Railroad Company v. Napa County*, 30 Cal. 437: "Railroads concern the public interest as matter of legal judgment, and however that conclusion may be opposed to the fact in the case at bar makes no difference, the action of the Legislature on the question not being open to review by the judicial department of the Government."

If we could review the legislative determination upon that point at all, a question would necessarily arise as to the extent to which that review could be carried here. Could we substitute our judgment upon the point for that of the legislative department absolutely, as we sometimes substitute our judgment for that of a Court from whose judgment an appeal has been prosecuted to this Court? If it was the intention that we should do so, it would seem that the law should have pointed out some mode by which we could get before us, in an authentic form, the facts and circumstances upon which the legislative department proceeded in the particular case. In the absence of a knowledge of these facts and circumstances we would ordinarily be unable to say that an error had been committed at all. A case might, indeed, be presented in which it might appear, beyond the possibility of a question, that a tax had been imposed, or the property of a citizen had been taken for a use or purpose in no sense public; or, in the language of Chancellor WALWORTH (5 Paige, 159), "where there was no foundation for a pretense that the public was to be benefited thereby," and in such case it would be our duty to interfere and afford relief. But should we interfere in any other than such a case, we would but substitute a policy of our own for the

legislative policy in the conduct of the affairs of the State, and substitute our will for that of the representatives of the people. The legislative judgment may have discovered a public use and a public benefit in the encouragement of a particular class of improvements in the State; it may be a public use in the building of a bridge, a road, or a mill, and may, in that view, aid its construction by giving the public funds towards that end. We may be ourselves unable to see why the particular work thus selected for Government aid should be preferred to another work of equal, or, perhaps, in our judgment, of even greater public importance, but which has, nevertheless, been wholly overlooked; but we cannot, upon such a view, forbid the Government aid to the work selected, any more than we could direct a similar bounty to the other work, in our opinion unreasonably omitted. In Tennessee, for instance, a statute declared, at an early day, when grist mills were probably scarce, that every grist mill which should thereafter be built, and should at any time grind for toll, should be held and deemed, "and is hereby declared, to be a public mill." It is further provided that the miller should grind according to turn; that he should grind the grain well, if water would permit; that he should take no more than one eighth of the grain for grinding; that he should keep a certain description of grain measures, and then follows a penalty for keeping false measures or violating the other provisions of the statute. Under this statute one Goodlett applied, in 1832, to condemn the lands of one Harding, for the purpose of erecting a grist mill, sawmill, and paper mill thereon. The Supreme Court of Tennessee, upon this application, said: "The grist mill is a public mill. The miller is a public servant. He is allowed a compensation for grinding, etc. * * * It will appear, from what has been said, that when an acre of land is taken from any citizen for the purpose of erecting a grist mill, though the title be vested

in another citizen, yet that vestiture is for a public use, and is wholly different from the case of taking property from one man and giving it to another for his private benefit only. * * * The petitioners say they are desirous to build a grist mill, sawmill, and paper mill. For these purposes they ask to have Harding's land vested in them. The sawmill and paper mill will have no public character; the erection of these mills would be wholly for the private use of these petitioners. To take Harding's land for such use would be unconstitutional." (*Harding v. Goodlett*, 3 Yerger, 53.)

The Legislature of Tennessee, in pursuance of a policy of its own, had seen fit to declare that a grist mill, grinding for toll, was a mill for public use — therefore the Court held it to be such. But the Legislature had not declared that a sawmill or a paper mill, however conducted, should be considered a public mill — therefore the Court could not hold them to be other than private in character. This case arose and was decided nearly forty years ago. The Court did not, at that day, undertake to announce a policy of its own and set it up against the policy of the legislative branch of the Government. It did not argue, either that the circumstance that the miller operated the mill for his "private profit," and received one eighth of the grist for grinding, necessarily made the mill private, and not public, in point of constitutional law; nor did it stop to inquire whether, if a grist mill operated in that way was indeed to be considered a public mill, it ought not to follow that a paper mill or a sawmill, working on the same terms, would also be public. The Court seems to have been of opinion that legislative policy has something to do with determining "public use" and "public purpose," and that it was just possible that Tennessee legislative policy might determine that the erection of grist mills in that State would promote a public purpose there, which would not be pro-

moted by the erection of sawmills or paper mills. The Court seems to have been of opinion that this was a matter for legislative determination, and it accordingly upheld the authority of the Legislature to declare grist mills, though grinding for the "private profit" of the miller, to be public mills; it has not been suggested, either, that at that time the grist mill interest controlled the Legislature of the State of Tennessee or the decisions of her Courts. The true rule to be extracted from the cases, and which is applicable to the case at bar, is that if it is possible that the work or object selected by the Legislature for aid concerns the public use we must consider that it does in fact do so. If it is possible, therefore, that the City of Stockton may have a public interest in this railroad, then the legislative action is conclusive here that the city does, in fact, have such a public interest therein.

In the *Sharpless case*, *supra*, Chief Justice BLACK (speaking of the Acts under which Philadelphia aided in the construction of certain railroads), expressed this view when he said: "But it is not our business to determine what amount of interest Philadelphia has in either of these improvements. That has been settled by her own officers and by the Legislature. For us it is enough to know that the city may have a public interest in them, and that there is not a palpable and clear absence of all possible interest perceptible by every mind at the first blush. All beyond that is a question of expediency — not of law — much less of constitutional law." In Connecticut the rule by which the Court interprets the legislative action in such a case was declared in *Booth v. Town of Woodbury*, 32 Conn. R. 128. The Town of Woodbury was supposed to be bound to furnish thirty-two men to serve in the Federal army, under the call of the President during the late civil war. The Selectmen of the town, under instructions of a town meeting, proceeded to raise, on account of the town, some six thou-

sand dollars, to be applied towards hiring substitutes for such citizens of the town as might be drafted thereafter, and the Legislature of the State subsequently ratified these proceedings by which this gratuity was given by the town. The Court say: "In the first place, if it be conceded that it is not competent for the legislative power to make a gift of the common property, or of a sum of money to be raised by taxation, where no possible public benefit, direct or indirect, can be derived therefrom, such action of the legislative power must be of an extraordinary character to justify the interference of the judiciary, and this is not that case. Second, if there be the least possibility that making the gift will be promotive in any degree of the public welfare, it becomes a question of policy * * * and the determination of the Legislature is conclusive. And such is this case. Such gifts to unfortunate classes of society, as the indigent blind, the deaf and dumb, or insane, or grants to particular colleges or schools, or grants of pensions, swords, or other mementoes for past services, involving the general good indirectly and in slight degree, are frequently made and never questioned."

Upon a similar question before it, the Supreme Court of Wisconsin expresses substantially the same views. It said: "To justify the Court in arresting the proceedings and declaring the tax void, the absence of all possible public interest in the purposes for which funds are raised must be clear and palpable—so clear and palpable as to be perceptible by every mind at first blush." (*Broadhead v. The City of Milwaukee*, 19 Wis. R. 652.)

In *Schenley v. City of Alleghany*, 25 Penn. R. 130, the Supreme Court of Pennsylvania say "that the exercise of the taxing power by the Legislature must become wanton and unjust—be so grossly perverted as to lose the character of a legislative function—before the judiciary will feel themselves entitled to interpose on constitutional grounds.

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step the mere actual necessities of the public administration. The popular understanding of the legislative power in this respect, derived from the known habits of the Government, must be found to be in accord with the learning of the books which treat of it. In California, for instance, did any one seriously question the authority of the Legislature to appropriate the public moneys to meet the personal wants of the overland emigration of 1852? Yet, in the absence of the legislative discretion involved, who could maintain that in point of mere constitutional law the overland emigrants had any right to be fed and clothed out of the public treasury more than other people?

Again: who has come to deny the validity of the legislative appropriation by which thousands of dollars have been and are being annually paid to General Sutter for his "private profit," as the respondent's counsel would express it? It is no answer to say that the appropriation of 1852 was prompted by a commendable sentiment of humanity, and that the pension to General Sutter is but the expression of the public gratitude towards a distinguished citizen whose personal kindness and generous conduct have justly won for him the popular esteem. These motives, however worthy in themselves, cannot be made to supply the requisite constitutional authority to give away the public moneys.

If the three hundred thousand dollars claimed by this railroad company be regarded as a mere gift of that much of the public moneys, it must, nevertheless, be upheld by the same construction of legislative power which would support the pension to Sutter. There is no provision of the Constitution which will authorize the gift to Sutter and deny it to the railroad company. The power to select the object of legislative bounty belongs to the Legislature itself, as well as the power to fix the amount to be given away. It will be difficult to draw the line of constitutional distinction between the legislative gratuity to Sutter for reasons of a

public nature looking to the past, and the like gratuity to the railroad company for reasons of a public nature looking to the future.

We have mentioned the pension to Sutter, and the aid to the overland emigration of 1852, because they are prominent, but at the same time not exceptional instances of the exercise of legislative authority in the general history of the State Government under its present Constitution. Many other and similar instances may be mentioned. Premiums payable out of the public moneys have been habitually offered for the encouragement of mere private industry. The production of sugar from sorghum, the manufacture of molasses, the production of flax, hemp, cotton, tobacco, hops, raw silk, and the manufacture and production of various other articles by private parties and for "private profit," were stimulated by the offer of large sums from the public treasury, by the "Act for the encouragement of agriculture and manufactures in California." (Acts 1862, p. 415.) This policy is further maintained by the Act of April, 1866 (p. 660), "for the encouragement of silk culture in California," by which premiums are offered by the State for the growing of mulberry trees and production of silk cocoons, and the constitutionality of the Act was not even questioned here in *The Attorney General v. The State Board of Judges*, 38 Cal. R. 291, but the statute was substantially re-enacted in 1868 (p. 699); and an examination of the legislative Acts will disclose other like instances of the habitual expenditure of the public moneys, the validity of which no one has undertaken to call in question. In view of this public history, it cannot surely be claimed in any quarter that legislative authority to expend public moneys in the State was ever understood to be confined to merely keeping the Government in motion.

It has, indeed, habitually and notoriously overstepped that limit to find uses of a public character to be fostered by the expenditure of public moneys, and having done so, it is the legislative judgment which must determine whether or not the public interests are concerned in promoting any particular aim or object to a sufficient degree to justify the expenditure. This makes up legislative policy, for it is legislative policy which selects the objects to be aided, and determines the extent to which that aid should be carried.

In the case at bar, it determined the Stockton and Visalia Railroad to be a road for public use, and that, as such, the City of Stockton might donate three hundred thousand dollars towards its construction.

As we have already said, under the rule laid down by this Court in *Napa Valley Railroad Co. v. Napa County*, 30 Cal. 437, this legislative determination is conclusive upon this Court. It was there held that "railroads concern the public interest as matter of legal judgment," and that when the Legislature had determined that a particular road in fact concerns the public interest, its determination in that respect is not open to be reviewed by this Court.

Upon that authority we are precluded from any examination into the principal question which the respondent has argued here.

But even if the rule were otherwise the result would be the same. Should we undertake to review the legislative determination that this road concerns the public interest we could not disturb it, unless we are prepared to say that there is absolutely no possibility that the proposed road from Stockton to Visalia could in any degree promote the public welfare, and that there is an utter absence of all possible public interest in the enterprise, and that all this is so palpable as to be perceptible to every mind at the first blush.

We are to say this of a highway traversing a considerable portion of the State, and connecting two important com-

mercial points. It is conceded by the respondent that the road in itself is one which the State might have lawfully constructed at the public expense. It is said in *Blodgett v. The Mohawk and Hudson Railroad Company*, 18 Wend. R. 1, "That the Government have not only the power, but that it is emphatically their duty and interest to construct railroads where the public interest and convenience demand them, cannot admit of a doubt; for such purposes they are authorized to take private property upon rendering just compensation; and they are, in like manner, justified in exacting tolls from those who travel on them as a means to reimburse the State for their construction and reparation. * * *

If, however, the State shall not deem it wise or expedient at its own expense to construct a railroad, can there be any doubt of its power to impart this authority to others?" The case involved the exercise of the power of eminent domain in behalf of a railroad company—the power of eminent domain, which is only to be exerted in aid of a "public use;" but, in our opinion, it is not the less an authority that taxation might have been imposed for the same purpose. There can be no difference between a "public use" which will authorize the taking of a private property, in aid of a particular road, and a "public use" which will support the laying of a tax in aid of the same road. We do not say that the power of taxation and that of eminent domain are the same in all respects—they both, however, proceed *in invitum*—both proceed, too, upon compensation real or supposed. That of taxation upon the idea that the Government protection to the citizen is his compensation; that of eminent domain upon the money compensation provided by the Constitution.

In either case, however, the power must rest for support upon the public use to be promoted; and a quasi public use will not be sufficient in the one case more than in the other. Such a use as a quasi public use is unknown to the Consti-

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tution, and is only an invention of those who, being driven to admit that the power of eminent domain may be exercised in aid of this road, are desirous, at the same time, to deny that taxation may be resorted to for the same purpose. The question as to whether taxation may be imposed in aid of such a road as this, has arisen and been directly decided under a Constitution not differing from ours in any point involved in the decision. Nearly twenty years ago the Supreme Court of Alabama had under consideration the validity of a statute to authorize the City of Mobile to donate three hundred thousand dollars to the Mobile and Ohio Railroad Company, who were building a road to run from the city toward the mouth of the Ohio River. The company building the road was, in the language of the counsel resisting the Alabama statute, "a private corporation composed of private individuals, who, to promote private fortunes, and to reap the advantage of private enterprise, had associated themselves together," etc. The Supreme Court, however, decided that the donation might be constitutionally made through the exercise of the taxing power. It said that the power of taxation "extends to the employment of all those measures and appliances ordinarily adopted, or which may be calculated to develop the resources of the State and add to the aggregate wealth and prosperity of the citizens; such, for example, as sundry outlets for commerce, opening of channels of intercommunication between different parts of the State," etc. (*Stein v. Mayor of Mobile*, 24 Alabama R. 614.)

That Court accordingly upheld the validity of a tax imposed upon the real estate in the City of Mobile for the purpose of raising three hundred thousand dollars, and donating it to a railroad company who were constructing a railroad to run from the city in the direction of the mouth of the Ohio River.

In fact, we think that it may be said that the entire cur-

rent of authority supports the constitutional validity of taxation imposed for such a purpose as that here in question.

It is not denied, for instance, that the State may, in the exercise of the power of eminent domain, take from the unwilling proprietor the lands necessary for the building of this road — a road to be operated by a corporation for its “private profit;” that is conceded by all the authorities. Yet such a taking can only be supported upon the theory of a “public use” to be promoted by building the contemplated road.

Can there be a “use” which is sufficient, in a constitutional point of view, to seize the property of one, and at the same time insufficient to authorize taxation upon the property of all? If so, we have not found it.

In 1851 the Court of Appeals of the State of New York held that the public use which would support the exercise of the power of eminent domain would also uphold the power of taxation, and that really the power of taxation was in itself only one mode of taking private property for public use.

Upon this point the court said: “Private property may be constitutionally taken for public use in two modes: that is to say, by taxation and by right of eminent domain. * * * The right of taxation and the right of eminent domain rest substantially upon the same foundation. * * * Taxation exacts money or services from individuals as and for their respective shares of contribution to any public burden. Private property taken for public use by right of eminent domain is taken, not as the owner’s share of contribution to a public burden, but as so much beyond his share.”

We know that a distinction has, of late, been attempted between “public use” for purposes of eminent domain, and “public use” for purposes of taxation. In order to maintain the distinction, its authors have invented a new use, which is not exactly a public use, nor yet a private use, but

a quasi public use. This quasi public use is of course something essentially different from the true "public use" named in the Constitution, otherwise there would have been no necessity for the invention of a new use at all; for in this instance as in others, necessity has proven to be the mother of invention. A quasi public use is therefore intended to be something more or something less than the "public use," pure and simple, mentioned in the Constitution, for that was found to be insufficient to maintain the desired distinction.

Those who have originated the phrase "quasi public use," have, however, omitted to give it a definition. Quasi, we understand to mean "as if," "as though," "as it were," etc. A quasi public use may be said, therefore, to be a use "as if" a public use, "as it were" a public use, "as though" a public use, but of course in reality not a public use at all. In fact, the term is employed for the sole purpose of distinguishing a mere fictitious public use from a real public use, and thereupon it is argued that the unbroken line of authority which concedes that the power of eminent domain may be exerted in favor of the road as being for public use, does not establish that the power of taxation may be exercised for the same purpose, because it is said that the public use which will support the former is not actual, but merely feigned—only quasi—but that the public use which is requisite to authorize taxation must be something more.

The result is that the license by which a citizen holds his money is of a higher and better character than the license by which he holds his land—reversing the rule by which the law is supposed to regard things real rather than things personal, and a "public use" to which one may lawfully refuse to contribute his money to-day is nevertheless one to which he may be compelled to surrender his house to-morrow.

But two or three of the Courts in the United States have in fact attempted to maintain a proposition so absurd in

itself. Those Courts were lately characterized by the Supreme Court of the United States as "standing out in unenviable solitude and notoriety." (1 Wallace R. 206.) Among them at that time was the Supreme Court of Iowa. Since the submission of the case at bar we have, however, seen the opinion of that Court rendered in *Stewart v. The Board of Supervisors of Polk County*, and not yet reported [since reported in 30 Iowa, 9], in which the distinction is exploded in the following language:

"The right to exercise the power of eminent domain in behalf of railroads and other improvements of public utility is recognized by all Courts, and denied by no one. While admitting the right it is said that the Legislature has no constitutional power to levy a tax on the property of the citizen in aid of a railroad corporation, because it is a mere private enterprise.

"It has been abundantly shown that the object for which the right of eminent domain is exercised is a public one, for public utility, for 'public use,' within the meaning of the Constitution; and that this right can be exercised in behalf of these corporations on no other grounds. If, then, the building of a railroad is a public object, so as to authorize the taking of the private real property of the citizen — the highest species of property — for a right of way, is it any less a public object for the purpose of receiving aid, through the medium of taxation, to assist in building the road upon such right of way? The right of eminent domain and the taxing power are both sovereign powers. The former is limited to public use by express words in the Constitution. The latter is not, nor is it limited at all. * * * Conceding, however, that the taxing power ought not to be exercised except in behalf of a public object, it is unquestionable that it may be exercised for public purposes — for any object that will justify the exercise of the right of eminent domain.

"If the State can, for any purpose, take the land of a

The history of the question in Iowa illustrates, too, that powers political are for the political representatives of the people, and not for the Courts, to exercise; for the authority of the Legislature in the premises, now conceded by the Supreme Court of that State, had been repeatedly asserted by the Legislature, and as often denied by the Court for several years preceding the late decision in *Stewart v. Board of Supervisors of Polk County*.

It is said, however, that in the case at bar the act is not "taxation" within the meaning of the Constitution, because it is "simply taking the money of one man and giving it to another," and that therefore it is not the raising of money to meet "the public consumption or expenditure," nor to provide "for the use of the State, nor for the use or benefit of the State Government." This proposition is based upon the alleged fact that the corporation which is to receive this money is a private and not a public corporation, and that the road itself, when built, is to be operated by the corporation for its own benefit and profit.

The general power of the State Government to build such a road as this one is admitted. The authority to build it upon the basis here adopted is denied; it is claimed that the power to construct the road cannot be exercised through the agency of the railroad corporation. It is not the power to construct, but the mode of its exercise, which is thus questioned. We might put this objection at rest by simply repeating the language of Judge Baldwin in delivering the unanimous opinion of this Court in a case already cited (17 Cal. 30): "But the legislative department, representing the mass of political powers, is no further controlled as to its powers, or the mode of their exercise, than by the restriction." What provision of the Constitution has declared that the Legislature, in the prosecution of an enterprise *per se* of an admitted public character, shall employ no private agency, or shall take care that no private

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person shall derive pecuniary profit thereby? or in what clause is there to be found a constitutional inhibition of the "mode" here adopted?

Too much prominence in argument here has, however, been imparted to this view to justify us in thus passing it by, conclusive as we deem the answer already given. At every step in the discussion upon the part of the city, we meet the multifarious proposition that "public use" and "private profit" cannot go hand in hand in the prosecution of this enterprise; that there is a fatal antagonism between the two; and that the moment that "private profit" lifts itself into view upon one side of the proposed work, "public use" must disappear from the other. In a case involving the same objection, the Supreme Court of Massachusetts said: "But it is said that this grant was made upon the petition and for the sole benefit of an individual, and was not needed for the accommodation of the public. It is doubtless true that the leading motive of the defendant in erecting the bridge was private profit, and so almost all other enterprises, many of which have resulted in great public improvements, have originated in motives of private gain." To our minds, however, the fallacy involved is so apparent that neither illustration nor argument can set it in a clearer light. It is exposed by a mere reference to the usual and ordinary mode of conducting the public business. Government habitually moves through the agency of employees in executing its purposes; these employees must be compensated in some way; and here we come, unavoidably in every instance, upon the spectre of "private profit," which must, upon this view, frighten the Government from the prosecution of any public enterprise whatever.

If an incorporated stage company, for instance, should put in a bid for carrying the mails at a fixed compensation, would any one doubt that it was the sole purpose of the company to obtain for itself a portion of the public moneys? Would

any one attribute to it a motive of a less selfish character, or claim that a consideration of the public good had in the slightest degree actuated it in making its bid? Surely not. But, upon the other hand, if Government should accept the bid at the proposed price, would not its known purpose be to promote a public service of recognized importance? Could any one claim that its object in providing for carrying the mail was less public in its character because the prosecution of that purpose incidentally afforded "private profit" to the stage company? Surely not; yet the case we have supposed has been of constant occurrence from the earliest organization of the Government, in providing for the mail service.

We have instanced a familiar case by way of illustration. It might be indefinitely extended into all the varied circumstances in which Government is to be supplied—to public printing, army stores, etc.—in all which private profit is the avowed motive on the one side, and the "public service" the true object on the other.

In 1831, the case of *Beekman v. Saratoga and Schenectady Railroad Company*, 3 Paige, 73, was decided by Chancellor WALWORTH. In that case it appeared that a railroad company, in constructing their road from Saratoga Springs to Schenectady, had seized upon certain real estate in the exercise of the power of eminent domain. There, as here, no question was made but that the State of New York might have built the proposed road itself, and might have appropriated the land in question, and applied the public moneys also for that purpose. The objection of Van Vechter, for the complainant (whose pleasure grounds around his country residence had been invaded), was that "the defendants are a private corporation, and the road when made will be private property; it will not be for public use, but for the private use and emolument of the company, etc. In fact, the argument of the counsel for the complaint upon

that point presented it with a force never surpassed in any case falling under our notice. The Chancellor, in deciding the case, assumed, for the purpose of the decision, that the company was in truth a private company, in the exact sense claimed by counsel. He declares, however, that it belongs to the Legislature to determine if the public interest will in any way be promoted by the taking of private property for such a purpose. He states that it is upon this principle that lands of one private individual are permitted to be overflowed and condemned in order that another may obtain a mill site; and that not only agents of the Government "but also individuals and corporate bodies have been authorized to take private property for the purpose of making public highways, turnpike roads, and canals; of erecting and constructing wharves and basins; of establishing ferries; of draining swamps and marshes," etc. In all such cases the object of the legislative grant of power is the public benefit derived from the contemplated improvement, whether such improvement is to be effected directly by the agent of the Government, or through the medium of corporate bodies, or of individual enterprise. And, according to the opinion of Chief Justice MARSHALL, in the case of *Wilson v. The Blackbird Creek Marsh Company*, 2 Peters R. 251, "measures calculated to produce such benefits to the public, though effected through the medium of private incorporations, are undoubtedly within the powers reserved to the States," etc. It must be observed that the Chancellor in this case, following the view of the Chief Justice of the United States — each of them distinguished for learning and ability — holds that public improvements of this nature may be effected by the State Government, "through the medium of corporate bodies or of individual enterprise." But how is this power to be availed of, if the corporation or individual selected for the purpose is to derive no "private profit" thereby? Can such service be obtained without

pecuniary compensation in some way awarded? The counsel has not suggested in this connection that it would be possible to find a corporation or an individual so public-spirited as to undertake an agency in effecting the proposed public improvement without the expectation of "private profit" to accrue, nor is it believed that even in the earlier day in which the Chancellor and the Chief Justice lived private agencies of such a wholly disinterested character were to be readily found. When it is said, therefore, that the Government possesses the power to prosecute a public enterprise through an agency private in its character, the power to compensate such an agency is at the same time necessarily conceded, for otherwise the power to make the employment would be practically incapable of execution, and a power incapable of execution is no power at all.

The power to compensate the private agency thus employed is therefore clear enough, and if this be so it must be admitted that the measure of that compensation and the mode in which it is to be afforded are mere details which will vary with the prevailing habits of the public service, the condition of the public treasury, or the mere policy which would seem to recommend one plan of making compensation as preferable to another plan. Suppose, for instance, that the entire gross proceeds of the business are to be paid into the treasury of the State, and the "private agency" by which the road was built and is operated is to receive from the State a sum equal to a fixed per centum of the ascertained cost of the road, with or without allowance for deterioration by use, as the case may be, or that the net profits earned by the road are to be equally divided between the State and the "private agency," or that the gross proceeds paid into the treasury shall be returned to the agency after certain deductions are there made; or suppose that the State is to have the authority to require that sufficient means of transportation for all persons and prop-

erty to be carried shall be kept in readiness on the road that so many trains of cars, of a designated character, shall regularly at stated times pass over the road; that the road shall be kept in repair at the expense of the corporation operating it, and without any expense to the State, and that as its "private profit" for rendering this service the "private agency" by which it is performed shall receive compensation from those who use the road at a rate not exceeding that which the State itself may from time to time prescribe. These, and an infinite variety of other methods which might be suggested, would be but different ways of effecting compensation for services rendered by a private agency in operating and maintaining a work of public use. Of the propriety of the mode of compensation adopted in a particular case it is for the Legislature to judge, and we know no provision of the Constitution which is violated in the mode adopted here.

The legislative and executive departments of the Government seem to have deliberately reached the conclusion that a "public use" was to be promoted by the construction and operation of a railroad such as the Stockton and Visalia road is designed to be, and, even if in so doing they have abused or mismanaged the constitutional authority over the subject, that circumstance would afford no justification to us for the assumption of unauthorized powers for the correction of such abuses.

No amount of supposed public good to follow would excuse us for the usurpation of powers not belonging to the judicial department of the Government. "There is always some plausible reason (says BRONSON, J.) for the latitudinarian constructions which are resorted to for the purpose of acquiring power—some evil to be avoided, or some good to be attained by pushing the powers of Government beyond their legitimate boundary. It is by yielding to such influences that Constitutions are gradually undermined and

finally overthrown. One step taken by the Legislature or the judiciary in enlarging the powers of the Government, opens the door for another that will be sure to follow; and so the process goes on until all respect for the fundamental law is lost and the powers of the Government become just what those in authority choose to call them." (3 Coms. 568.)

The power of the State Government to foster and regulate internal improvements is unquestionable. Should we, in this instance, deny to the legislative department the possession of this power, or should we attempt to narrow its clear constitutional scope by applying to it the arbitrary measure of our own view of wise policy in the conduct of public affairs, we would, in the hope of accomplishing a temporary good, permanently mar the symmetry of the structure of the Government itself, so far at least as a decision of ours could be permitted to work such an unfortunate consequence to the State. Though late events have awakened the general public attention to an anxious consideration of the extent of the legislative power upon this subject, those events have not as yet fixed a new limit to the power itself as it has heretofore existed, nor would they justify us in stepping aside from the well beaten track which we follow to tread upon the new and strange paths into which some, though few, of our brethren of the bench have, we hope but temporarily, wandered.

No proposition in the case can be affirmed with greater confidence than that, under Constitutions substantially like ours, railroads, though operated by private companies, are by mere legal conclusion, for "public use;" that the power of eminent domain, confessedly exercisable only in behalf of "public use," may therefore be exerted in behalf of railroads under legislative permission; that as fostering the "public use," aid may be extended to the construction of such roads by means of the power of eminent domain, or of

Opinion of Crockett, J., concurring.

subscription to capital stock, and by donations made by cities and other political subdivisions of the State, under the authority of the Legislature first given (or subsequently obtained, as was held in 1848 by the Supreme Court of Connecticut in *City of Bridgeport v. Housatonic Railroad*, 15 Conn. R. 475), and such is the purport of the judicial decisions of the highest Courts of Virginia, Connecticut, Pennsylvania, Ohio, Indiana, Tennessee, Illinois, Kentucky, New York, Georgia, Florida, Texas, Mississippi, Missouri, South Carolina and other States. These decisions cover a period of little less than half a century of time; and they embody the views of constitutional law with reference to the question before us which were entertained by some of the most distinguished jurists who have shed luster upon the American bench. They are cited in the briefs, and will be found to be not the mere expression of conclusions reached upon the points involved, but, in many instances, elucidated by a learning and research absolutely exhaustive of the general principle of the law of taxation as applied to the system of Government under which we live.

Upon authority, and upon principle as well, we think that the Act in question cannot be said by us to be, in any sense, unwarranted by the Constitution, or beyond the authority of the Legislature to enact.

It is ordered that the writ of mandamus issue as prayed for.

CROCKETT, J., concurring:

I concur with Mr. Justice WALLACE in the result at which he has arrived, and for the most part in his reasoning; but without attempting an elaborate investigation of the questions discussed by him, I propose, nevertheless, to state, very briefly, the points which, in my opinion, are decisive of the action.

Opinion of Crockett, J., concurring.

First— It is established by an unbroken current of decisions, by Courts of the highest authority in this country, that under the right of eminent domain lands held in private ownership may be taken for the use of private railroad corporations, on making compensation therefor; and that this is a *public* use, in the sense of that clause of the Constitution which permits private property to be taken by virtue of the right of eminent domain. This proposition is now too firmly established by a long and uniform series of decisions, to be overthrown or shaken, at this late day, except by an amendment of the Constitution; and if the taking of such lands for the use of a private railroad corporation is a *public* use, which justifies the exercise of the right of eminent domain on behalf of such corporations, I can perceive no reason whatever why taxation imposed to aid in the construction of the road is not for a *public* purpose. In the former case, though the land taken is devoted to the use of a private corporation, which owns and controls the road, and exclusively enjoys its emoluments, the use is, nevertheless, held to be public, in the sense of the Constitution, because one of the most important functions of government is to provide highways for the people, by which commerce is promoted and the general prosperity increased.

In the performance of this duty it is not doubted by any one that the State may itself construct these highways, and defray the cost of them out of the public treasury or by the imposition of a special tax for that purpose. No one questions that such a tax would be for a *public* purpose. But, instead of itself performing the work by its agents, employed and paid for that purpose, the State may avail itself of the aid, energy, and skill of private corporations, and construct highways which, in the opinion of the Legislature, will promote commerce, develop the resources of the country, and increase the general prosperity. It is on this theory only that the exercise of the right of eminent domain can

Opinion of Crockett, J., concurring.

be invoked or justified on behalf of private railroad corporations. In such cases the land is deemed to be taken for a public use only because it is the duty of the State to provide such highways for the people; and it is the peculiar province of the Legislature to determine when and where such highways are necessary.

From its decision on this point there can be no appeal to the Courts, and the only remedy for an abuse of its powers in this respect, must be found at the ballot box or in an amendment of the organic law. Assuming, therefore, that it is solely on this theory that the exercise of the right of eminent domain can be invoked on behalf of private railroad corporations (a proposition which I deem to be thoroughly well established both on reason and authority), I think it follows as a logical sequence that the same principle which enjoins upon the Legislature the duty of providing convenient highways for the people, and in furtherance of that end justifies the exercise of the right of eminent domain in behalf of private railway corporations, must, of necessity, authorize the imposition of taxes to aid in the construction of the road. If the use of the land taken is public, the purpose of the tax is also public, and for precisely the same reason, inasmuch as they both spring from and are founded on the duty of the State to provide highways for the public convenience, and are both intended solely to promote that object.

Both being designed to accomplish the same result, to wit, to promote the construction of a highway, which the Legislature, in the performance of its duty, has determined to be a work of public utility, and in furtherance of the public prosperity, if the use for which the land is taken is to be deemed a public use, I think it is impossible to resist the conclusion that the purpose for which the tax is levied is a public purpose. In respect to the question whether the use in the one case or the purpose in the other

Opinion of Crockett, J., concurring.

is public or private, they stand on precisely the same footing, inasmuch as they both spring from the same public duty, and are both intended to promote the same public work of general utility. Nor does the fact that the road is to be owned and controlled by a private corporation, for its own emolument, any the more prove, or tend to prove, that the purpose of the tax is private, than the same fact would prove, or tend to prove, that the land was taken for a private and not for a public use, for the obvious reason that inasmuch as the ownership and control of the road is not one of the elements which enter into the question whether the use is public or private, it can have no effect, for the same reason, in determining whether the purpose of the tax is public or private. The object of the Legislature in permitting the land to be taken is not to benefit the corporation, but to promote the construction of a highway, which it deems to be a work of public utility; and, in like manner, the purpose of the tax is not to enrich the corporation, but to secure the construction of the road. If the corporation is incidentally, or even directly, benefited by the use of the land and money, the Legislature has, nevertheless, performed a public duty in thus providing a highway designed to promote commerce, and increase the general prosperity. On no other theory can the exercise of the right of eminent domain, in behalf of private railway corporations, be justified or defended, and a tax levied to promote the work stands on precisely the same footing.

Second — If any question of constitutional construction can be said to be settled by the weight of authority, it is, that under State Constitutions almost identical, in this respect, with our own, the Legislature has the constitutional power to authorize municipal corporations to subscribe for stock in private railroad corporations, organized to construct a road passing through, or terminating within, the territorial limits of the municipality; and to levy a tax to pay for such

Opinion of Crockett, J., concurring.

subscriptions. The decisions on this point run through a period of nearly forty years, and are not only very numerous, but almost uniform. I shall not attempt to review or collate these authorities; and it is sufficient, on this point, to say that the power of the Legislature, under Constitutions similar to ours, in this respect, to authorize such subscriptions and tax, is now too firmly established in American jurisprudence to be either questioned or denied.

In very few of the States has this power been more broadly asserted, or more persistently maintained, than by the Courts of this State; and if the rule of *stare decisis* is to have any weight on such a subject, the question should be considered as no longer open to debate in this Court. With an unbroken line of decisions on this point, running through so long a period, and emanating from Courts of the highest authority in this country, it is now too late to inquire whether the question has been settled properly or otherwise. The repose and good order of society demand that when a question of this character has been firmly settled, by a long series of judicial decisions, it should not be opened to further discussion in the Courts. In such cases, if the interpretation of a clause of the Constitution by the judiciary, which has been long acquiesced in, and repeatedly reaffirmed, shall be found to operate injuriously, it would be better to obviate the difficulty by an amendment of the organic law rather than to encounter the evils, which invariably flow from sudden and frequent changes in the construction by the Courts of constitutional provisions. Assuming it, therefore, to be definitely settled, so far as judicial interpretation can settle such a question, that the Legislature has the constitutional power to authorize municipal corporations to subscribe for the stock of private railroad companies, and to levy a tax for the payment of such subscriptions, it only remains to be determined whether there is any difference in principle between a tax levied to pay for a sub-

Opinion of Crockett, J., concurring.

scription to such stock and a tax raised for the purpose of donating a sum of money to aid in the construction of the road. In the case of the subscription, the validity of the tax can be maintained, I think, on no other solid ground than that already indicated, to wit: that it is the duty, and within the power, of the Legislature, to provide highways for trade and travel; and, being the sole judge of the times and places at which such highways are needed, it may aid their construction, by means of subscription, by those municipal corporations through (and possibly near) whose territorial limits the road will pass. I am aware that in such cases the validity of the tax has frequently been upheld, partly on other grounds; and some of the decisions in support of the taxing power in that class of cases proceed on the theory that the tax is for a public purpose, because, by means of the subscription, the municipal corporation, and consequently all the people within its limits, acquire a proprietary interest in the road and its earnings, and are entitled to a voice in its management. But if the validity of the tax is to rest on this theory only I think it could not be maintained. If the fact that the municipality is to have a proprietary interest in the enterprise, and to participate in its management, is to be the sole test by which to determine whether the tax is for a public or private purpose, without reference to the nature of the enterprise, it needs no argument to prove that municipal corporations and their members—the people who compose them—are wholly at the mercy of the Legislature, and hold their estate only by its sufferance. If the Legislature should determine it to be necessary that a town or city should have a beet-sugar manufactory, a wholesale clothing store, a dozen iron foundries, and several pianoforte manufactories, and should direct the corporation to subscribe for stock in private companies, organized to accomplish these enterprises, and to levy a tax on all the people of the municipality to pay for

Opinion of Crockett, J., concurring.

the stock, it is obvious that the people might thus be compelled, against their will, to embark their estates in purely commercial enterprises, on the plea that in the opinion of the Legislature the public would derive some incidental benefits therefrom. In such a case, if the question whether the tax is for a public or a private purpose is to be determined solely by the fact that the municipal corporation is to have a proprietary interest in the contemplated enterprise, and to participate in its management, irrespective of the public or private nature of the enterprise itself, it is obvious that under so broad a construction of the Constitution all restraint would be practically removed from the power of the Legislature over the property and estates of the people. It might compel the inhabitants of towns, cities or counties, without their consent, to invest their capital in commercial enterprises of perhaps more than doubtful expediency, and with a moral certainty that the investment would prove disastrous. I think the framers of the Constitution could not have intended to confer upon the Legislature, under the taxing power, a discretion so wholly devoid of restraint, and so capable of gross abuse. The extent of its power over municipal corporations, in respect to taxation, is not to be measured by the fact that the corporation is or is not to have a proprietary interest in the enterprise to be promoted by the tax, but depends on wholly different considerations, having no relation to that question.

If the work to be accomplished be confessedly of a public nature, as contradistinguished from a private enterprise, there can be no doubt of the constitutional power of the Legislature to promote its construction by contributions from the public treasury; or if the work be local, then by authorizing the particular municipality in which the proposed improvement is located, to aid it by subscriptions of stock, to be paid for by taxation; and, as already stated, this proposition is now too firmly established to admit of debate. But

Opinion of Crockett, J., concurring.

it proceeds on the theory that the subscription is intended, not simply as a profitable investment of the funds of the municipality, but solely for the purpose of promoting the construction of a highway for trade and travel. Though the subscription may directly benefit the railway corporation, and though the investment may possibly prove profitable, these are not the primary objects of the tax, but only incidental to the main purpose, which is to secure the construction of the road. If it were known in advance that the stock would be utterly valueless in the market, and that the road would never pay a dollar in dividends, this would in no degree impair the validity of the tax, the main object of which was to secure the construction of the road as a convenience for trade and travel, to enhance the value of contiguous property, and to increase the general prosperity. This being the primary object of the tax, the benefit to the railway company, and the investment of the funds of the municipality in the stock, are only incidents which in no wise affect the purpose of the tax, or prove it to be for a public or private purpose. The sole purpose of the tax being to secure the construction of the road, which is undeniably a public purpose, it is none the more so because the money raised by the tax is invested in stocks of the company, nor any the less so because the railway corporation derives a benefit from the investment. Neither of these considerations touches the question of the primary purpose for which the tax was raised, to wit: to promote the construction of the road. If these views be correct, it results as a logical sequence that if money be raised by taxation to be donated to the railroad company, for the sole purpose of securing the construction of the road, the purpose of the tax would be none the less public than if the same result was accomplished by an investment of the money in the stock of the company. My conclusion, thereafter, is that the

Opinion of Sprague, J., concurring.

Act of the Legislature in question does not violate the Constitution.

It cannot be denied that it is extremely difficult to define, with exact precision, the line which limits the constitutional power of the Legislature in authorizing the imposition of taxes by municipal corporations, to promote the construction of local improvements by private persons or corporations; and it is obviously a power which is capable of great abuse. That it has been frequently and grossly abused in some of the States of the Union is attested by the enormous debts which have thus been created, and the popular discontent which has ensued. In several of the States the evils resulting from legislation of this character had become so intolerable as to lead to amendments of their Constitutions, limiting or clearly defining the powers of the Legislature in this respect; and this is, manifestly, the only effective remedy. In a popular Government, like ours, where the tenures of office are short, and changes are constantly occurring in those who make and administer the laws, the only security against such abuses will be found in an amendment of the organic law. Under its existing provisions the courts are, in a great measure, powerless to remedy the evil.

SPRAGUE, J., concurring:

I concur in the order solely upon the ground that I cannot now regard the questions involved in this case as open questions in this State under our Constitution as it is. This Court having, by a uniform line of decisions, commencing with *Patterson v. Marysville*, 13 Cal. 175, sustained and sanctioned laws substantially obnoxious to the same constitutional objections as the statute involved in this case, the questions should be considered settled. Could I regard the questions involved as original in this State, I should not hesi-

Opinion of Temple, J., concurring.

tate in denying the order asked by the petitioner, notwithstanding the long array of authorities from other States to the contrary.

TEMPLE, J., concurring:

I concur in the order made in this case solely upon the ground that I regard the question as settled by the previous decisions of this Court, as well as by the almost unbroken current of authorities in other States. I differ from much of the reasoning of my associates, and if the question were new, should be inclined to agree with the respondent upon the main question discussed. To overturn the almost unbroken line of decisions now, however, would not establish a rule of decision, but would make an exception merely, in the current of authorities. It would shake the confidence of every one in the stability of judicial decisions, and would add nothing to the force of limitations upon legislative power. The people can readily circumscribe this power without doing violence to established precedents or destroying the confidence of the community in that branch of the Government which should be least influenced by popular pressure.

[No. 2,640.]

GEORGE TREAT, SAMUEL L. THELLER, AND JAMES
L. BLAKIE v. EULOGIO F. DE CELIS, ADMINISTRATOR
OF THE ESTATE OF EULOGIO DE CELIS, ET AL.

POWER OF ATTORNEY FOR SALE OF LAND.—A power of attorney, giving to the attorney in fact full authority to represent the person of the principal in all that concerns his interest in the State of California, and to annul any other power previously granted, and letters afterwards written by the principal to the attorney, speaking generally of the propriety of the sale of land in California belonging to the principal, and of the price and terms, and telling the attorney he can give

Statement of Facts.

a provisional writing of sale, and to make a sale and it will be approved, do not confer authority upon the attorney to bind the principal by a contract of sale.

JURISDICTION OF PROBATE COURT.—The question whether the Probate Court has jurisdiction to specifically enforce the performance of a contract for the sale of real estate, not decided.

APPEAL from the Probate Court, Los Angeles County.

Eulogio de Celis, who resided in Bilbao, in the Kingdom of Spain, owned an undivided one half of a tract of land in Los Angeles County, known as the ex-Mission of San Fernando. On the 4th day of November, 1864, he executed and sent to his son, Eulogio F. de Celis, who was living in said county, a power of attorney, written in alternate lines of Spanish and English, of which the following is a copy:

Sepan todos como yo Eulogio de Celis, residente en este villa

Know all men that I, Eulogio de Celis, of this Town of Bilbao, Espana, otorgo poder general a mi hijo Eulogio of Bilbao, Spain, grant general power to my son, Eulogio Fidencio de Celis, natural de Los Angeles, California, para que Fidencio de Celis, native of Los Angeles, California, to represente mi persona en todo lo concerniente a mis intereses, represent my person in all that concerning my interest, presentes y futuros, en el referido pais de California, como tambien present and future, in the said State of California, as well bien los de todo sus hermanos legitimos, coherederos, partícipes, as those of all his legitimate brothers, coheirs, copartners, estando ademas autorizado para anular cualquiera otra poder he being also authorized to annul any other power dado por me a favor decualquiera otra persona en California y granted by me to any other person in California and terretoriode America; dado el presente sobre todos los anteriores territory of America; the present being given upon all hasta esta f^o ha; reclamando cuentas, propiedades, intereses, previous powers to this date, claiming accounts, properties, exigiendo responsabilidades, pagos a los deudores y administra-

Opinion of the Court—Rhodes, C. J.

attorney. (General Laws, Sec. 669; Story on Agency, Sec. 76; Paley on Agency, by Lloyd, n. 179 and n. 198.)

Pringle & Pringle, for Respondents.

The power of attorney, if not sufficient to authorize a sale of lands, was yet the constitution of an agency to which the subsequent letters supplied the necessary power. Those letters were exhibited to the petitioners and relied on by them in making their contract. They were sufficient to empower the agent to make a contract of sale. The powers given were ample for that purpose (*McNeil v. Shirley*, 33 Cal. 202.) The father gives to his son every power except that of making the deed. He withholds that only to insure his compliance with the instructions given. The acts of the son, within those instructions, are certainly binding upon the father. "As regards the bill of sale, you can give a provisional obligation while the deed comes, that we may return it, signed by himself and your mother." "Sell property, and the sale will be approved."

By the Court, RHODES, C. J.:

The power of attorney and the letters of the principal were not sufficient authority to the attorney in fact to bind the principal by a contract of sale of the lands in controversy. The question whether the Probate Court has jurisdiction of a proceeding to specifically enforce the performance of a contract of sale of real estate is reserved.

Judgment reversed and cause remanded.

Mr. Justice CROCKETT did not express an opinion.

Opinion of the Court—Temple, J.

[No. 2,857.]

EX PARTE ELIZABETH JONES, AND ELLEN ELLWOOD.

RELEASE ON BAIL NOT IMPRISONMENT.—Within the meaning of the Criminal Practice Act, a prisoner released on bail is not imprisoned during such release.

ENFORCEMENT OF JUDGMENT IN CRIMINAL CASE.—When a certified copy of a judgment in an appellate Court is remitted to the Court from which the appeal is taken, the appellate Court loses all jurisdiction of the case; and all orders necessary to carry the judgment into effect must be made by the lower Court. This provision of the statute is not confined to judgments in the Supreme Court, but is applicable to proceedings in the County Court.

COMMITMENT AFTER APPEAL.—When a party is convicted of a criminal offense and appeals to the County Court, and, pending the appeal, is released on bail, and the judgment is affirmed, a second commitment need only recite the judgment of conviction, and state that defendant appealed and the judgment was affirmed. It need not recite the judgment of the County Court, or that a remittitur had been issued.

PETITION to be discharged on habeas corpus.

The facts are stated in the opinion.

George W. Tyler, for the Petitioners.

Attorney General Hamilton, for the People.

By the Court, **TEMPLE, J.:**

The petitioners were convicted in the Police Court of San Francisco on the 7th day of October, 1870, of the crime of petit larceny, and sentenced to be imprisoned in the County Jail for the period of four months. From this judgment an appeal was taken to the County Court of the City and County of San Francisco, and the appeal having been perfected, the petitioners were admitted to bail, which having been given, they were discharged from custody on the 26th day of October, 1870.

Opinion of the Court—Temple, J.

The petitioners are now held upon a commitment issued by the Police Court, which, after reciting the judgment in the same words as in the first commitment, proceeds as follows: "Said defendants having appealed from said judgments to the honorable County Court of said city and county, and said judgments having been affirmed by said County Court," etc.

It is claimed that the commitment should recite the judgment, and that the statement in regard to the appeal is no part of the judgment and should be stricken out. This would leave nothing but the original judgment of October, 1870, which being appealed from, does not authorize the imprisonment of the petitioners; or, if it does, that more than four months have expired since its date, and petitioners are therefore entitled to their discharge. That the fact that the petitioners were released on bail is an immaterial circumstance, for the reason that they were still, in contemplation of law, in custody—the effect of giving bail being merely to constitute their bail their jailors, in place of the Sheriff.

For some purposes it may be true that a person released on bail is still in the custody of the law. The same degree of certainty is supposed to be secured, that he will be forthcoming to receive the punishment pronounced upon him, or that he will render himself in satisfaction of the judgment. This is appropriate language in reference to a civil proceeding, where the bail undertake to pay the debt, or that the defendant will render himself in satisfaction of the judgment.

The very phrase, however, "released on bail," implies that a person so released is not imprisoned after such release; and such is manifestly the meaning of the provisions of the Criminal Practice Act.

Section five hundred and four provides that when judgment of an appellate Court is given it shall be entered in

Points decided.

the minutes and a certified copy remitted to the Court from which the appeal was taken. Section five hundred and six enacts, that upon remitting this certificate the appellate Court shall lose all jurisdiction of the case, and all orders necessary to carry the judgment into effect shall be made by the Court to which the case is remitted. This provision does not seem to be confined to judgments in this Court; on the contrary, the preceding section, which provides that the papers returned to the appellate Court shall not be returned to the Court below, seems particularly applicable to proceedings in the County Court.

The judgment of the appellate Court is required to be certified to the lower Court, in order that the original judgment may be carried into effect by the lower Court, as directed by the appellate tribunal. If the certificate had been remitted in this case—affirming the judgment—the order made by the Police Court would be a proper order to be made to carry the original judgment into effect. It asserts the facts necessary to authorize the Court to make it; and it is not shown, or even asserted, that it is incorrect in that particular. I think we are bound to presume in favor of the regularity of the proceedings to that extent.

It is ordered that the writ be discharged and the prisoners remanded to the custody of the Sheriff, to be held in pursuance of the commitment.

[No. 2,785.]

EX PARTE McLAUGHLIN.

DISCHARGE OF A JURY IN A CRIMINAL CASE.—The discharge of the jury, impaneled in a criminal case, without the consent of the defendant, because, after mature deliberation, they are unable to agree on a verdict, is not an acquittal of the defendant, and does not entitle him to immunity from further prosecution for the same offense.

Opinion of the Court—Sprague, J.

REVIEW OF CRIMINAL CASE IN APPELLATE COURT.—The action of the Court in discharging a jury in a criminal case, because of its inability to agree on a verdict, is subject to review by the appellate Court.

HABEAS CORPUS.—A prisoner, confined on a criminal charge, is not entitled to his discharge on habeas corpus, because a jury impaneled to try him was discharged by the Court, without his consent, by reason of its inability to agree on a verdict.

WHAT CANNOT BE TRIED ON HABEAS CORPUS.—Neither a Court nor Judge will, on habeas corpus, investigate or decide the question whether a jury impaneled to try the prisoner was properly or legally discharged by the Court, because of its inability to agree on a verdict.

ADMISSION TO BAIL.—Case stated why a prisoner charged with a capital offense was admitted to bail.

THE facts are stated in the opinion.

Coffroth & Spaulding, for Petitioner.

By the Court, SPRAGUE, J.:

Original writ of habeas corpus issued out of Supreme Court, and heard at chambers before Justices SPRAGUE, WALLACE, and TEMPLE.

The facts, as presented by the petition of the applicant and the return to the writ of the officer having him in custody, are substantially as follows: At the July, term, 1870, of the County Court for Sacramento County, the applicant was indicted, by a Grand Jury impaneled by said Court, for the alleged crime of murder. Upon the presentation of the indictment, a bench warrant was issued by the said County Court, upon which applicant was arrested, and by the Sheriff of Sacramento County held in custody to answer the indictment in the District Court of said County; and afterwards, on the seventh day of February, at the February term, 1871, of the District Court for Sacramento County, said indictment was called for hearing, and petitioner, under the same, was placed upon his trial before a legally organized trial jury, duly charged with his case. On the tenth day of February, the evidence on behalf of the State and the peti-

tioner having been fully presented to the Court and jury, and arguments of counsel on both sides closed, the cause was submitted to the jury at the hour of four o'clock P. M. of said day, and they retired to deliberate upon their verdict, in charge of an officer, and continued their deliberations until eleven o'clock A. M. of the twelfth of February, when the jury returned into court in charge of the officer—the petitioner, with his counsel, being present—stated their inability to agree, and asked to be discharged from further consideration of the case, to which the petitioner and his counsel objected, and insisted that the jury should again retire for further deliberation; and thereupon the Court caused an order to be entered in its minutes reciting the facts substantially as above; and further, that “the Court, being fully satisfied that there is no possibility of said jury agreeing upon a verdict,” discharged the jury and remanded the prisoner to the custody of the Sheriff, who now holds him in custody for retrial.

Upon this state of facts it is claimed for petitioner that he is illegally restrained of his liberty; that the discharge of the jury having his case in charge, against his objections, upon the sole ground of their inability to agree upon a verdict, is equivalent to an acquittal, and that he cannot legally be held to further answer this or any other indictment for the same offense. It is conceded on the part of counsel for petitioner (and such is the almost uniform current of authorities in England and the United States) that the discharge of the jury in a criminal case without verdict, from a legal necessity resulting from physical causes beyond the control of the Court, does not bar a retrial of the defendant upon the same indictment at the same or a subsequent term of the Court. But it is contended that the discharge of a jury without verdict, against the objections of defendant, any considerable time in advance of the close of the term of Court, upon the sole ground that the jury, after mature deliberation,

report their inability to agree upon a verdict, is a discharge without legal cause, and entitles petitioner to a release from custody and perpetual immunity from further prosecution for the same offense, by virtue of section eight, Article I, of our State Constitution.

The question thus presented is one of paramount importance in the practical administration of criminal law. It has been the uniform practice in this State, since the organization of our judicial system, in all our Courts of criminal jurisdiction, to recognize as valid the authority conferred upon the trial Court by the four hundred and thirty-ninth, four hundred and fortieth, and four hundred and forty-first sections of the Act of April 20th, 1850, "to regulate proceedings in criminal cases," which sections were verbatim incorporated as sections four hundred and nine, four hundred and ten, and four hundred and eleven of the Act of May 1st, 1851, "to regulate proceedings in criminal cases," and are still in force. (Stats. 1851, p. 256.)

These sections are as follows: Section four hundred and nine — "If, after the retirement of the jury, one of them be taken so sick as to prevent the continuance, or any other accident or cause occur to prevent their being kept for deliberation, the jury may be discharged." Section four hundred and ten — "Except as provided in the last section the jury shall not be discharged after the cause is submitted to them, until they have agreed upon their verdict, and rendered it in open Court, unless by consent of both parties, entered upon the minutes, or unless at the expiration of such time as the Court shall deem proper, it satisfactorily appear that there is no reasonable probability that the jury can agree." Section four hundred and eleven — "In all cases where a jury are discharged, or prevented from giving a verdict, by reason of any accident or other cause, except when the defendant is discharged from the indictment during the progress of the trial, or after the cause is submitted to

them, the cause may be again tried at the same or another term."

From these sections it is clearly manifest that the Legislature has conferred upon the trial Court the power to discharge a jury impaneled, sworn, and charged with the cause in a criminal prosecution, whenever it shall satisfactorily appear to the Court that such jury have deliberated upon a verdict a reasonable and proper length of time, without being able to agree, and the Court is satisfied that there is no reasonable probability that they can agree upon a verdict in the case, and has not recognized such discharge as a bar to further prosecution for the same offense.

This presents the grave question whether this statute and the uniform practice of our Courts for more than twenty years are in contravention of that provision of our State Constitution which protects a person from twice being put in jeopardy for the same offense.

A provision similar to this is contained in the organic law of nearly all the States of the Union, and in the Federal Constitution; and the question now under consideration has engaged the attention of the highest judicial tribunals of very many States, and of the Supreme Court of the United States, where the principles involved have been so thoroughly examined and discussed as to render it unnecessary for me to enter upon any reëxamination of the same, further than to refer to some of the more prominent cases, where the question has been decided, and state my conclusions therefrom.

Assuming, then, the position as stated in *People v. Webb*, 38 Cal. 467, that "a person once placed upon his trial before a competent Court and jury charged with his case, upon a valid indictment, is in jeopardy in the sense of our Constitution, unless such jury be discharged without rendering a verdict from a legal necessity, or for cause beyond the control of the Court," or with the consent of defendant, the

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point of inquiry is whether the inability of the jury to agree upon a verdict after deliberating thereon for such length of time as when considered with other circumstances surrounding the case within the knowledge of the Court, shall satisfy the Court "that there is no reasonable probability that the jury can agree," constitutes such "legal necessity" as that a discharge of the jury, by reason of its existence, will pre-termit the jeopardy as effectually as would a discharge from "legal necessity"—evidenced by physical facts alone, such as death of a juror, the serious illness or insanity of defendant, the Court, or some member of the jury.

Upon this point the authorities furnished by adjudicated cases in our sister States largely preponderate in the affirmative, among the most prominent of which are: *Commonwealth v. Purchase*, 2 Pick. 520; *People v. Goodwin*, 18 Johns. N. Y. 187; *Hoffman v. The State*, 20 Maryland R. 425; *State v. Upkeke*, 4 Harr. Del. 581; *State v. McKee*, 1 Bailey, S. C. 655; *Wellford v. State*, 23 Geo. R. 1; *State v. Barnett*, 35 Ala. R. 406, substantially overruling the case of *Ned v. State*, 7 Porter, 210, and other cases previously decided in the same State and holding the opposite view; *Price v. State*, 36 Miss. R. 533; *Dobbins v. State*, 14 Ohio St. R. 493; *State v. Walker*, 26 Ind. R. 346; and *State v. Nelson*, 26 Ind. R. 366, overruling the case of *State v. Miller*, 8 Ind. R. 326, and other cases in the same Court holding contrary doctrine upon this point.

Opposed to the above authorities upon the point in hand, I have been able to find but four States, viz: Pennsylvania, Virginia, North Carolina, and Tennessee; and the Courts of Pennsylvania and Virginia hold the affirmative in all criminal prosecutions for offenses less than capital felonies. (See *Commonwealth v. Cook*, 6 Serg. & R., Pa. 577; *Commonwealth v. Clin*, 3 Rawle, Pa. 498; *McCreery v. State*, 29 Pa. R. 383; *Williams v. Commonwealth*, 2 Gratt. Va. 567; *State v.*

Ephraim, 2 Dev. & Bat. N. C. 162; *Mahala v. State*, 10 Yerger, Tenn. 235.)

The necessity for a discharge of a jury, by reason of their inability to agree upon a verdict, may be as absolute and uncontrollable by the Court as a necessity arising from any physical cause, but the objections to a discharge of a jury for this cause are based upon the impossibility of determining the fact of the inability to agree upon further deliberation, and the liability to abuse of the power exercised by the trial Court to adjudge the existence of a fact upon evidence confessedly falling short of demonstrating its existence. It will, however, be observed that some of the causes of discharge, conceded to be sufficient to create an absolute legal necessity, are based upon physical facts, the existence of which the Court is authorized to find and act upon without requiring such evidence of their existence as to preclude the possibility of doubt. In case of the alleged inability of a juror to further discharge his duties as such, by reason of serious illness, the evidence of the existence of such fact most generally relied upon consists of the declarations of the invalid juror, the simple statements of his associates, and his appearance before the Court, without even the aid of such testimony as is required to judicially establish a controverted proposition. The Court, upon these statements of individual jurors, the personal appearance and conduct of the invalid in presence of the Court, is satisfied beyond a reasonable doubt of his physical or mental inability to further discharge the duties of a juror, so states and causes to be entered of record his convictions, and discharges the juror. Yet the fact of such sickness or mental inability as to disqualify the invalid juror from a further discharge of his duties as juror is not established or demonstrated beyond possibility of doubt, nor is any controverted ultimate fact in

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a judicial investigation, even the fact of the guilt of the accused in a criminal case, required to be established beyond the possibility of doubt. Such facts are only required to be established beyond a reasonable doubt. Why, then, should not the fact of the inability of a jury to agree upon a verdict, if compelled to protract their deliberations to the close of the term of Court, be considered as legally and sufficiently established on the presentation of evidence sufficient to satisfy the Court beyond a reasonable doubt? After a jury composed of honest, intelligent, and impartial men, as all jurors are presumed to be, have deliberated a reasonable length of time, and come into Court with a statement that they have not agreed upon a verdict, this statement is certainly conclusive of the fact that they have not agreed; and if such report is accompanied with a unanimous expression of the jurors that they cannot agree, and that further deliberation would not enable them to agree, I am not able to discover why such report and expression, in connection with the fact that the jury had already, in the judgment of the Court, deliberated a proper and reasonable length of time to enable them to arrive at an agreement, or enable them to arrive at an intelligent conclusion as to a rational probability of agreement upon further deliberation, together with surrounding circumstances of the case within the knowledge of the Court — such as the amount and character of the evidence presented for their consideration, the number of preliminary issues involved by the evidence as presented, the habits of thought and temperament of the individual members of the jury — should not enable the Court to arrive at a conclusion, beyond a reasonable doubt, that the jury would not agree upon further and continued deliberation. When such facts are shown to exist, a legal necessity, in my judgment, has arisen for the discharge of the jury.

The power of the Court to discharge a jury without the

consent of the prisoner is not an absolute, uncontrolled discretionary power. It must be exercised in accordance with established legal rules and a sound legal discretion in the application of such rules to the facts and circumstances of each particular case, and in this State is subject to review by an appellate Court.

The action of the Court in the discharge of the jury in the present case, and holding the petitioner for retrial, is sanctioned by our statute, by the uniform practice of all our Courts, and by a large preponderance of judicial authority from our sister States, and is, in my judgment, in accordance with enlightened principles of law and justice, not in contravention of any right secured by our Constitution, and should be sustained.

I have thus examined the questions presented by counsel on the argument, and stated the result of such examination, without reference to an important preliminary question which, upon the petition and return to the writ, presents itself in bar of any review of the proceedings of the Court in which the indictment against the prisoner is still pending. The facts presented by the petition and return show that the petitioner is in custody awaiting his trial under an indictment for murder still pending against him in the District Court. The jurisdiction of the Court to try and determine the case as presented by the indictment is not questioned, nor is the validity of the original process, by virtue of which the petitioner was arrested and held to answer, assailed. The case is still undisposed of; no final judgment has been entered therein, and no order of the Court has been made releasing the prisoner from custody. It is simply claimed that the order of the Court discharging the jury without the prisoner's consent, and the further order remanding the prisoner to the custody of the Sheriff, to await further proceedings against him on the indictment, are erroneous. It does not follow that the defendant is entitled to be discharged

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from custody on habeas corpus, even though his detention in custody is admitted to be the result of error of the Court by which he is held to answer. Although the writ may be demanded as of right by any one who deems himself illegally detained in custody, *non constat*, that the Court or Judge before whom the return to such writ is made can in all cases investigate the merits of such detention. This, in my judgment, presents a clear case in which no Court or Judge, upon habeas corpus, can properly or legally investigate the merits and wrest the prisoner from the hands of the Court in which his case is pending. (*Ex parte McCullough*, 35 Cal. 100, and authorities there cited; *Wright v. State*, 5 Ind. 290, 527, and cases cited.) If the petitioner is aggrieved by the action of the Court in which his case is pending, he has his remedy by motion or plea therein, and by appeal to the proper tribunal, where, if the proper steps are taken and a record of the proceedings of the trial Court are preserved and presented, a review of the action of such Court, of which he now complains, can be properly had, and his rights vindicated.

The application for the unconditional release of petitioner must, therefore, be denied.

His further application for an order admitting him to bail, I think, upon a careful examination of the evidence presented on the former trial, and in consideration of the inability of the jury to agree upon a verdict, and their discharge without his consent, thereby protracting his confinement, in addition to his long imprisonment before he was placed upon trial, should be granted.

It is therefore ordered that the petitioner be admitted to bail and released from custody, upon his filing an undertaking, with sureties as required by law, in the sum of ten thousand dollars, approved by the Judge of the Sixth Judicial District Court.

Points decided.

[No. 2,299.]

A. W. THOMPSON v. ANGUS MCKAY AND GEORGE PEARCE.

CONSTRUCTION OF CONTRACTS.—In construing a doubtful contract, the Court will ascertain the relation of the contracting parties to each other, and to the subject-matter of the contract, and if possible, so construe the instrument, however inartificially drawn, as to give effect to the intention of the parties, if it can be done without disregarding the language of the instrument.

CONSTRUCTION OF A DOUBTFUL CONTRACT.—G. owned a lot twenty feet front, and made a verbal agreement with M. that the latter should buy an adjoining strip five feet wide, and the two should erect a two-story brick building on the twenty-five feet, and G. should own the first story and M. the second. The building was erected, and G., by his tenant, entered into possession of the first story, and M., by his tenant, into possession of the second. Afterwards, G. executed to M. a writing, in which he gave up to M. "all right and title" to "the second story of the store, part of five feet for an entrance for the use of a passage up stairs, and as they are now in use and occupied," etc. *Held*, that the instrument was not void for uncertainty, and that it conveyed to M. all the title of G., legal or equitable.

JUDGMENT IN EJECTMENT AN ESTOPPEL.—When ejectment is brought to recover two parcels of realty, and the defendant denies the plaintiff's title, and on the trial the plaintiff puts in evidence in support of his title to both parcels, and the plaintiff recovers one parcel only, the plaintiff is estopped by the judgment from again litigating the title to the parcel he failed to recover, even if the judgment is silent as to the latter parcel.

SALE BY TRUSTEE.—A conveyance to one in trust, to rent or sell the property and apply the proceeds towards the payment of a debt of the grantor, conveys the fee, and the trustee has power to convey the legal title.

OBJECTION TO TESTIMONY.—If the plaintiff offers competent testimony to prove certain facts, and it is rejected by the Court on the objection of the defendant, the defendant will not afterwards be permitted to allege that the plaintiff failed to prove the facts embraced in the offer.

PURCHASER AT TRUSTEE SALE.—When property is conveyed to a trustee to rent and sell, and apply the proceeds to the payment of a debt of the grantor, a bona fide purchaser at the trust sale acquires a good title, even if the trustee, before the sale, had received sufficient money from the rents to pay the trust debt.

TITLE ACQUIRED PENDENTE LITE.—A defendant in ejectment cannot, on the trial, avail himself of a title acquired *pendente lite*, unless it is set up by supplemental answer.

APPEAL from the District Court of the Fifteenth Judicial District, City and County of San Francisco.

Statement of Facts.

This was an action of ejectment. The complaint contained two counts, one for the rooms of the second and third stories of the northerly section of the brick building mentioned in the opinion, fronting twenty feet on the street, and the other for the land on which said section of the brick building was erected.

The action was commenced January 10th, 1867.

On the 5th day of August, 1856, Alexander McKay conveyed to Angus McKay all his interest in the land and building mentioned in the opinion. In September, 1862, Angus McKay commenced an action of ejectment against the Petaluma Lodge and others to recover the two upper stories of the building and the strip of land five feet wide bought by Alexander McKay, and the stairway five feet in width. The defendants answered that Gowen owned the property, and that they had leased of him, and denied the plaintiff's title. The Court found that the plaintiff owned the strip of land five feet wide, and gave him judgment for that only. The judgment was silent as to the other premises described in the complaint. The plaintiff, in August, 1866, by means of a writ of restitution issued on his judgment, obtained possession of all the premises described in his complaint.

On the 25th day of February, 1862, Gowen executed and delivered to William Hill a trust deed of the five feet, and also the twenty feet, being the ground on which the building was erected. This deed, after the granting clause, which was a remise, release, and quitclaim reads as follows: "To rent or sell the before described property altogether or in such separate lots or parcels, and at such time or times, and at either public or private sale or sales, as he in his own judgment may deem most expedient, and to apply the proceeds thereof (after deducting therefrom a reasonable charge for his services, as well as the necessary expenses incurred in renting or making sale of said property) towards the pay-

Statement of Facts.

ment of a certain note of hand, made and executed by the said party of the first part, in favor of the said William Hill, party of the second part, or order, for the sum of seven hundred dollars, being dated at San Francisco, April 10th, 1861, and on which note there remains due and unpaid at this present date, the sum of seven hundred and fifty-one dollars and forty-eight cents, or thereabouts, 'as reference being thereunto had will more fully appear, and after said note is fully paid, as well as the expenses above referred to, the surplus, if any there be, is to be paid on demand to the said party of the second part, his heirs or assigns."

In August, 1856, the building erected by Alexander McKay and Gowen fell down, partially by reason of excavations made at the foundation. It was rebuilt in the Spring of 1857, with a third story, and Gowen then took possession of the whole building. This possession he and his grantees retained until ousted from the passage way, the five feet, and the upper stories, in 1866. Gowen died intestate March 14th, 1863, leaving a daughter, his sole heir; and on the 19th of August, 1867, the heir conveyed to Angus McKay one undivided one half of the same premises conveyed in trust to Hill. On the 25th day of April, 1865, Hill, the trustee, conveyed to Harrison Meacham the two upper stories of the building, and the right of way over the stairway to the rooms in the second and third stories; and on the 27th of October, 1866, Meacham conveyed the same premises to J. B. Southard, W. H. Patterson, and the plaintiff Thompson. The plaintiff claimed title under this deed, made by Hill. The answer set up that the trust debt had been paid to Hill before he made the sale, and that the plaintiff, and those through whom he claimed title, knew of this before they purchased. The plaintiff recovered judgment for the possession of the rooms of the second and third stories of the twenty feet of the building, being its northerly section. The defendants appealed.

Argument for Appellants.

The other facts are stated in the opinion.

George Pearce, for Appellants.

Appellant McKay had good title to the premises under the instrument executed by Gowen. (*Mulford v. LeFrank*, 26 Cal. 88; 4 Kent Com. 508; 1 Bouv. Inst. 343.) The respondent contends that appellants are estopped by the judgment of *McKay v. Petaluma Lodge*. We say this is error, mainly on two grounds:

1. The doctrine of *Caperton v. Smith*, 26 Cal. 479, had not been promulgated at the time *McKay v. Petaluma Lodge* was tried in the Court below; and McKay had a right to accept the judgment as it was, inasmuch as it gave him complete control of and dominion over the premises, and as the answer in that case did not ask that Gowen might be adjudged the owner, nor did the Court so determine. The doctrine of *Caperton v. Smith* has not been carried to the extent that a judgment in ejectment will divest a title to land, when there was no judgment to that effect in favor of an adversary. In *McKay v. Petaluma Lodge* there was no judgment in favor of Gowen, or those holding under him, for anything, nor was any asked by the defendants. The Court gave McKay judgment, but not for as much as was demanded in the complaint.

2. The respondent contended in the Court below that they had a trust deed. We contend they had only a mortgage. (*Kidd v. Teeple*, 22 Cal. 255; 2 Wash. on Real Property, 81; *Marion v. Titsworth*, 10 Wis. 320.) And that it gave no right of possession. (Prac. Act, Sec. 260; *McMillan v. Richards*, 9 Cal. 365; *Fogarty v. Sawyer*, 17 Cal. 589; *Bludworth v. Lake*, 33 Cal. 255.) And we contend that it was a mortgage of the accruing rents only. If the mortgage debt was paid before the conveyance to Meacham, April 25th, 1865, then the power to sell was extinguished. (1 Wash. on Real Property, 530; Marginal, 502, 503; *Chartar v. Stevens*, 3

Argument for Respondent.

Denio, 33; *Ormsby v. Tarascon*, 3 Litt. 404; *Ivy v. Gilbert*, 2 P. Wm. 13; *Mills v. Banks*, 3 P. Wm. 1; *Roarty v. Mitchell*, 7 Gray, 243; 5 Hill, 272.)

W. H. Patterson, for Respondent.

Appellants claim that, inasmuch as there was upon the former trial no finding or decree directly alleging that Gowen had the better title, the rule in *Caperton v. Smith* did not apply. The answer to this proposition is, that in ejectment, as in other actions, the judgment, where plaintiff fails, is simply for defendant, or that plaintiff have and recover nothing by his action; but as to the whole matter put in issue the judgment is a bar. (*Caperton v. Smith*, 26 Cal. 479; *Clark v. Boyreau*, 14 Cal. 434; *Flaundreau v. Downey*, 23 Cal. 354; *Marshall v. Shafter*, 32 Cal. 176; *Jones v. City of Petaluma*, 36 Cal. 230.) Defendant, if plaintiff succeeds, is estopped from questioning the title of plaintiff as it was when litigated; and the same rule must apply from plaintiff to defendant, especially when, as here, both parties deraign title from the same source. Where two parcels of land are sued for, and a recovery had for one, but not for the other, it is manifest that the failure to recover for the second lot, where, as here, the title thereto was at issue and tried, would have the same effect as though the action therefor had not been attached to an action for the other lot held under a different title.

Appellants claim that Gowen was the owner of the premises, and conveyed the same to Hill, in trust, however, for securing to him a means of collecting the amount of certain indebtedness; that the object of the trust had been accomplished before the deed (Hill to Meacham) under which plaintiff holds was made; that Gowen, had he been living, would have had, and that, as he is dead, his heirs have,

therefore, such an equitable estate as would control the legal title; and that, by deed from Gowen's heirs, the defendants have acquired this equitable estate.

First—This equitable title, if at all, was acquired *pendente lite*, and is not pleaded. (*Reilly v. Lancaster*, April Term, Case No. 2,015; *McMinn v. O'Conner*, 27 Cal. 238; *Moss v. Shear*, 30 Cal. 472.)

Second—The deed (Gowen to Hill) conveys the legal title in trust for the express purpose that the trustee should sell the property, at such time and manner as he may deem expedient.

We offered to show that Hill used the rents in paying off incumbrances; we offered to show how much was paid, etc.; but defendants objected, the Court sustained their objection, and they cannot now complain of our not doing so. These liens and incumbrances, as they controlled the possession and had to be provided for, were necessarily to be paid off before the object of the trust deed could be reached. In determining the relation of the parties, the Court would have allowed to Hill these advances, with interest, before entering upon a computation of the amount applicable as payment upon his note. (*Morrison v. Bowman*, 29 Cal. 337-353.) The power to Hill was of such a character, coupled with such an interest, as to be irrevocable, and not affected by the death of the donor. (*Barr v. Shroeder*, 32 Cal. 610; *Travers v. Gray*, 15 Cal. 12.)

By the Court, CROCKETT, J.:

The first point of inquiry is, whether the instrument from Gowen to Alexander McKay, of April 26th, 1856, was operative as a deed to convey the legal title of Gowen to the demanded premises; for if it had that effect it is evident the defendants are estopped by the judgment in the case of *McKay v. Petaluma Lodge and others*, from again litigating

the same title in this action. It is not pretended that the defendants have acquired any new title or right to the possession derived from or under Gowen since the commencement of that action, except the conveyance from his daughter, made after his death, during the pendency of the present action, and which will be hereafter noticed. But if McKay acquired the legal title of Gowen by means of the instrument of April 26th, 1856, that title was distinctly put in issue and tried in the action against Petaluma Lodge and others, and was decided against McKay. The judgment, it is true, does not, on its face, expressly and in terms, adjudicate the title in respect to the premises now in controversy. But the title to the premises was distinctly in issue, and McKay put in evidence oral and documentary proofs in support of his alleged title under Gowen. The judgment awarded to him the adjoining strip of land, five feet in width (which was also in contest in the action), but is wholly silent as to the premises now in controversy. The omission of the Court to award to him any relief in respect to these premises is, in its legal effect, an adjudication that he was not entitled to relief in that action. (*Marshall v. Shafter*, 32 Cal. 176; *Jones v. Petaluma*, 36 Cal. 230.) His title under Gowen was put in evidence, and the Court must have decided it to be insufficient to entitle him to a judgment for the possession, as against Gowen's tenants. If the Court had decided otherwise, it would have awarded to him the proper relief. But the plaintiff in ejectment must recover, if at all, on the legal title or right to the possession, and not on a mere equity; and a fruitless attempt to maintain ejectment on an equitable title would not debar him from asserting his equity in another and appropriate action in the proper forum. But if McKay, by means of the instrument referred to, had acquired Gowen's legal title before the commencement of that action, and put it in issue by the pleadings, and adduced evidence in support of it, he is obviously concluded by the

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judgment, and can not again litigate the same title in the present action. It therefore becomes material to determine the character and legal effect of that instrument. The rule is well established that, in construing doubtful instruments, they must be interpreted in the light of the surrounding circumstances. After ascertaining the relation of the contracting parties to each other, and the subject matter of the contract, the Court will, if possible, so construe the instrument, however, inartificially drawn, as to give effect to the intention of the parties, provided it can be done without disregarding the language of the instrument, when all its parts are considered. The proofs make it clear that in 1855 Gowen claimed to be the owner of a lot having a frontage of twenty feet, on which he desired to erect a building one story high, applied to Alexander McKay for that purpose; that McKay ascertained that the Masons in that vicinity desired to procure a large hall for their use, but a room over Gowen's lot would be too small for the purpose; and thereupon it was verbally agreed between Gowen and McKay that the latter should obtain the title to an additional strip of land five feet wide, and that there should be erected a house two stories high, covering the front of Gowen's lot, together with the strip of five feet, Gowen to furnish the material for the building, and McKay to do the work; and when completed Gowen was to own the first story and McKay the second; that the building was accordingly erected, and the outer wall occupied a portion of the five feet, and the stairway the remainder of it, together with a small strip from Gowen's lot; that when the building was complete Gowen leased the first story to a tenant, who entered into possession, and McKay leased the second story, by a written lease, for a term of three years, to the Masons, who entered and occupied under the lease. Whilst affairs were in this condition, in April, 1856, and when on the eve

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of a visit to the Eastern States, Gowen made and delivered to McKay an instrument in these words:

“Article of agreement made and entered this 26th day of April, A. D. 1856, between Heber Gowen of the first party and Alexander McKay of the second party, witnessed that said party of the first party, for and in consideration of the premises, and hereby covenants and agrees to give up all right and title of the party of the second party since all his assigns forever hereafter, all the following described property hereafter mentioned on Main street, Petaluma, California: The second story of the store part of five feet for an entrance for the use of a passage up stairs, and as they are now in use and occupied for the Odd Fellows and Masons.

“Hereunto the above agreement set my hand and seal this 26th day of April, in the year 1856.

[SEAL.]

(Signed,)

“HEBER GOWEN.”

Notwithstanding the very awkward, inaccurate, and obscure language of this instrument, I think it is capable of interpretation, when considered in the light of the surrounding facts. McKay owned the strip five feet wide; but the outer wall occupied about two feet of this space, and the stairway covered not only the remainder, but also a small portion of Gowen's lot. McKay, by his tenants, the Masons, was in the possession of the second story, in accordance with the parol agreement, and Gowen obviously intended by this instrument, made on the eve of his departure on a long journey, to define McKay's rights in the property. Hence he covenants and agrees to “give up” to him “all right and title” (to) “all the following described property hereinafter mentioned, on Main street, Petaluma, California: The second story of the store and part of five feet of ground for an entrance for use of a passage up stairs, and as they are now in use and occupied for the Odd Fellows and Masons.” By interpolating the word “and” between the words “store”

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and "part" in the last sentence, and correcting the punctuation, the meaning becomes obvious. The property intended to be conveyed was the second story, occupied by the Odd Fellows and Masons, above the store, together with a right of way over so much of Gowen's lot as was occupied by the stairway.

I am, therefore, of opinion that the instrument was not void for uncertainty, and that it was operative to convey, and did convey, to McKay all the title of Gowen, legal or equitable, in and to the second story and the stairway. From this view of the legal effect of the instrument, it results that McKay had the legal title of Gowen at the commencement of the action against Petaluma Lodge and others, and is, therefore, estopped by the judgment in that action from again litigating the title in the present action.

But the defendants claim that the deed from Gowen to Hill under which the plaintiff derails title, was a conveyance in trust, with a power of sale, for the purpose of satisfying the trust debt, but for no other purpose; and that the proofs show the trust debt was paid before the conveyance from Hill to Meachem, and this conveyance is void for want of authority in Hill to make it. That the deed from Gowen to Hill conveys the fee, and that Hill had the power, in execution of the trust, to transmit the legal title to a purchaser is too plain for debate.

As this record presents the facts, there is nothing to show that the conveyance to Meachem was not made in execution of the trust, and for payment of the trust debt. It appears on the face of the deed to Hill that the property was already incumbered, and the plaintiff offered to prove that he had been compelled to disburse large sums to remove prior incumbrances, and to preserve the trust fund for the security and satisfaction of the trust. On the objection of the defendants this proof was excluded by the Court, and it is not for them to complain that the plaintiff has failed to show how

he applied the rents and proceeds of sales. If they were applied for the extinguishment of prior incumbrances, and to preserve the trust fund, I think the trustee did not thereby exceed his powers; but it is unnecessary to express any decided opinion on that point. Under such a trust as this, it was not incumbent on the purchaser to institute an examination into the accounts of the trustee, on pain of losing the property, if it should ultimately appear, on a final settlement of the trust, that the trust debt had in fact been satisfied out of the rents before the sale. If the purchaser incurred this peril, there would be but a few sales under such deeds. The rule that a purchaser at a trust sale is bound, in certain cases, to see to the application of the proceeds of the sale, does not apply to a case like this; and if it did, it would concern only the *cestui que trust* and the purchaser.

The only remaining point is as to the effect of the conveyance from the heir at law of Gowen to the defendants *pendente lite*. It is sufficient, on this point, to say that it has been frequently decided by this Court that a defendant cannot avail himself of a title acquired during the pendency of the action, unless it is set up in a supplemental answer. If acquired after the original answer was filed, he should set it up in an amended answer, on leave of the Court. Otherwise it will not avail the defendant on the trial.

Judgment affirmed.

Neither Mr. Justice WALLACE nor Mr. Justice TEMPLE expressed an opinion.

Opinion of the Court — Wallace, J.

[No. 2,552.]

ROSA LYNCH v. WILLIAM KELLY.

JUDGMENT OF JUSTICE OF THE PEACE.—If, on a jury trial before a Justice of the Peace, the jury find a verdict for a sum certain for the plaintiff, and the Justice thereupon enters the verdict in his docket, but fails to enter up a judgment, it is an irregularity; but not such an one as renders a sale made upon an execution, which recites a judgment issued thereon, void.

JUSTICE'S JUDGMENT ON VERDICT OF JURY.—The formal entry of a judgment by a Justice of the Peace, upon the verdict of a jury, is a mere clerical duty, which he may be compelled to perform; and if he fails to do so a motion to set aside an execution should be sustained; but an execution issued by the Justice, which recites a judgment, is not void by reason of his failure to enter the judgment.

FORMER JUDGMENT IN BAR.—A plea of former judgment as a bar is sustained by proof of a former trial before a Justice, and the verdict of a jury entered on his docket, without any formal entry of judgment.

APPEAL from the District Court of the Third Judicial District, Santa Clara County.

Ejectment to recover the land sold under the execution, and described in the Sheriff's deed, mentioned in the opinion. The Court below rendered judgment in favor of the defendant. The plaintiff appealed.

The other facts are stated in the opinion.

Collins & Silent and *F. E. Spencer*, for Appellant.

Bodley & Rankin, for Respondent.

By the Court, WALLACE, J.:

Upon the trial had before him, the Justice of the Peace entered in his docket the verdict of the jury, as rendered, in the following words: "We, the undersigned, jurors in the case of *Rosa Lynch v. William Kelly*, find for the plaintiff one hundred and seventy-nine dollars in gold coin;" and subsequently, upon the application of the plaintiff, issued an execution which recited that a judgment had been rendered by him for that much money, and costs of suit.

Under a Sheriff's sale upon the execution, the plaintiff purchased the premises and received a Sheriff's deed therefor.

It is now claimed that the sale was void, and that the title did not pass thereby, because, as it is said, no judgment was ever entered in form upon this verdict.

The Justice, upon receiving the verdict, was required by statute to "immediately render judgment accordingly." (Section five hundred and ninety-four.) The formal entry of the judgment was, therefore, a mere clerical duty imposed upon him by the statute, and the performance of which he had no discretion to decline. He might have been compelled to make the proper entry in his docket by judicial proceedings instituted against him for that purpose by the plaintiff, and it may be conceded that to issue an execution before judgment entered in form upon the verdict would be bad practice, and that a timely motion by the defendant to set it aside for that reason should be supported. That would be so, however, not because such an execution would be void, but because it would be irregular, merely. And a failure to make the objection would, of course, amount to a waiver of the irregularity. As was said by the Supreme Court of the State of New York in *Felton v. Mulliner*, 2 Johns. 181: "We are to overlook matters of form, and to regard proceedings before Justices of the Peace according to the merits." Accordingly, in that case a plea of former judgment in favor of the defendant was held to be supported by proof of a verdict in his favor, upon which the Justice of the Peace ought to have rendered judgment, but had omitted to do so. In the case of *Gaines v. Betts*, 2 Douglas, 99, it appeared from the docket of the Justice of the Peace that the case was submitted to the jury on proofs, and that "the jury returned with a verdict for the plaintiff

Statement of Facts.

of eighteen dollars damages, and costs of suit taxed at five dollars." There was no further entry upon the docket, and no formal entry of judgment on the verdict. Of this record the Supreme Court of the State of Michigan said: "The verdict is itself the judgment of the law in the case, and the Justice is simply required so to make the entry on his docket. If he neglects to do so, still the verdict must be considered the final determination of the cause." (See also, *Overall v. Pero*, 7 Mich. 316.)

The circumstance that by the statute of this State a Justice of the Peace is authorized to grant new trials in cases before him does not, in my opinion, affect the question.

The judgment and order denying a new trial are reversed, and the cause remanded.

[No. 2,605.]

THE PEOPLE OF THE STATE OF CALIFORNIA v.
WILLIAM HUGHES.

IMMATERIAL VARIANCE.—If the variance between an allegation in an indictment and the proof be immaterial, it should be disregarded.

ACQUITTAL FOR VARIANCE WHEN A BAR TO SUBSEQUENT PROSECUTION.—If a party be acquitted on the ground of an immaterial variance, he cannot be again prosecuted for the same offense. The error of the Court or jury, in regarding as material a variance between the allegations and proof, will not render the acquittal less available and conclusive as a bar to a subsequent prosecution. But if the variance be material, the acquittal will not bar a subsequent prosecution.

ALLEGATION OF OWNERSHIP IN INDICTMENT FOR LARCENY.—An allegation of the ownership of the stolen property is essential in an indictment for larceny, unless the offense is otherwise sufficiently described.

APPEAL from the Municipal Criminal Court of the City and County of San Francisco.

The defendant having been indicted for grand larceny pleaded not guilty and previous acquittal. A verdict of guilty

was returned by the jury. From the judgment of imprisonment and from an order overruling a motion for a new trial the defendant appealed.

The other facts are stated in the opinion.

George W. Tyler, for the Appellant, argued that the defendant had been once put in jeopardy by the trial, in which he was acquitted for a variance in the name of the owner of the watch alleged to have been stolen, and could not again be tried for the same offense. He cited *People v. Webb*, 38 Cal. 467.

M. M. Byrne, for the Respondent, argued that the record of the former acquittal was excluded as evidence by section three hundred and five of the Criminal Practice Act.

By the Court, RHODES, C. J.:

The defendant was indicted for stealing "one gold watch of the value of two hundred dollars, * * * of the goods, chattels, and property of *Stephen F. Merritt*." On the trial, in support of his plea of former acquittal, he offered in evidence an indictment charging him with the larceny of "one gold watch of the value of two hundred dollars, * * * of the goods, chattels, and property of *Samuel F. Merritt*;" and offered to prove by the records of the County Court and oral testimony, that he was charged by that indictment with stealing the identical watch mentioned in the pending indictment; that he was placed on trial upon such indictment; that *Stephen F. Merritt*, who, in this case, is alleged to be the owner of the watch, testified that his true name was *Stephen F. Merritt*; that because of the variance between the allegation and the proof, as to the ownership of the watch, the Court instructed the jury to acquit the defendant on the ground of such variance; and that a verdict was rendered by the jury as directed by the Court, and the

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cause was ordered to be resubmitted to the next Grand Jury. The Court excluded the evidence.

It is provided by section three hundred and five, Criminal Practice Act, that "If the defendant were formerly acquitted on the ground of a variance between the indictment and the proof, or upon an objection to the form or substance of the indictment, it shall not be deemed an acquittal of the same offense." If the variance be immaterial it should be disregarded; and if the defendant be in fact acquitted, on the ground of an immaterial variance, he cannot be again prosecuted for the same offense. The question under the plea of former acquittal is: would the evidence which is necessary to support the second indictment, have been sufficient to procure a legal conviction on the first? The error of the Court or jury, in regarding as material a variance between the allegations and proof, will not render the acquittal less available and conclusive as a bar to a subsequent prosecution.

The question, therefore, on which the case turns is, whether the allegation of the ownership of the watch is material — whether the averment that Samuel F. Merritt is the owner of the watch is descriptive of the offense, and must be proven as laid. There can be no doubt that at common law such an averment was both material and essential. The citation of authorities is unnecessary, for that is the doctrine of all the text books and the cases therein cited. But the statute of this State provides (Cr. Prac. Act, Sec. 243) that "when the offense involves the commission, or an attempt to commit a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured, or intended to be injured, shall not be deemed material." It is unnecessary for the purposes of this case to define the meaning of the terms "private injury" and "person injured;" for the offense is not described in the indictment in this case with sufficient

certainty, without the averment as to the ownership of the watch, to identify the criminal act, as required by that section. Omitting that averment, the description of the property is: "one gold watch of the value of two hundred dollars." That description is manifestly insufficient to distinguish the watch from any other gold watch of that value.

In *People v. Ah Sing*, 19 Cal. 598, which was an indictment for larceny, the coin which was stolen, was stated to be the property of Hanach Eisner & Co.; and it was held that the ownership of the coin was sufficiently alleged. That was the only point discussed, but its decision would have been quite useless, had the allegation of the ownership of the coin been considered immaterial. It was held in *People v. Myers*, 20 Cal. 79, that the allegation of the ownership of the building which was burned, was a part of the description of the offense of arson, with which the defendant was charged. (See also, *People v. Vice*, 21 Cal. 344.) It would seem that the ownership of the stolen property is equally essential in an indictment for larceny. The Court, therefore, did not err in excluding the evidence offered by the defendant.

There being no evidence before the jury, tending to show a formal acquittal on an indictment for the same offense, the Court properly refused to submit that issue to the jury.

It is evident that the question, as to whether the Court committed any error on the trial of the first indictment, cannot arise in this case, for the judgment, if not void, cannot be collaterally attacked.

Judgment affirmed.

Opinion of the Court — Crockett, J.

[No. 2,963.]

THE PEOPLE OF THE STATE OF CALIFORNIA v.
MARGARET A. MOORE.

NEW TRIAL — MISCONDUCT OF JURY.—The retirement of a jury for a necessary purpose for a few moments, with the permission of the Sheriff, out of his sight, there being no evidence that during such retirement they communicated with any one, or with each other, but positive proof to the contrary, is not sufficient ground upon which to grant a new trial.

APPEAL from the County Court of San Mateo County.

The defendant was tried for grand larceny and convicted. A motion for new trial, on the ground of misconduct of the jury, was granted. The appeal is taken from the order granting a new trial.

Attorney General, Jo Hamilton. for Appellant.

H. Kincaid, for Respondent.

By the Court, CROCKETT, J.:

The motion of the defendant for a new trial was improperly granted. There is nothing in the record tending in the slightest degree to show any misconduct in the jury, or on the part of the officer having them in charge. There is not only no evidence that the several jurors who retired for a few moments, with the permission of the Sheriff, out of his sight, to obey a call of nature, communicated with any one, or with each other, during their temporary absence, but there is positive proof to the contrary.

Order reversed, and cause remanded for further proceedings, with an order to the Court below to enter judgment on the verdict.

Statement of Facts.

[No. 2,714.]

NANCY R. HUSSEY v. GEORGE CASTLE.

FRAUDULENT CONVEYANCE BY HUSBAND TO WIFE.—There is no legal presumption that a conveyance of land, made by the husband to the wife, is fraudulent as against a judgment creditor of the husband, whose judgment was recovered after the conveyance.

COMMUNITY PROPERTY.—There is no legal presumption that land, the separate property of the husband, conveyed by him to the wife in consideration of money, the separate property of the wife, becomes, after such conveyance, the community property of the husband and wife.

ANTE-NUPTIAL CONTRACT.—An ante-nuptial verbal contract, which is executed by the parties after marriage, cannot be assailed by the parties thereto, or by third parties, on the ground that it was not in writing.

APPEAL from the District Court of the Fifth Judicial District, San Joaquin County.

The complaint averred that the plaintiff was the wife of J. C. Hussey, with whom she intermarried in the State of Iowa, on the 9th day of December, 1869, while temporarily absent from California, which was their domicile; and that pursuant to an ante-nuptial contract between the parties, and in consideration of marriage, and of five thousand dollars in coin, due by said J. C. Hussey to the plaintiff before their marriage (two thousand of which was secured by mortgage on the land), the said J. C. Hussey conveyed to her, after the marriage, a tract of land consisting of one hundred and eighty acres, and that the same, by the conveyance, became her separate property; that said conveyance was recorded on the 16th day of February, 1870, and on the 27th day of May, 1870, one George Loney, in an action of tort, recovered a judgment against J. C. Hussey for eight hundred and eighty-five and forty-five one hundredths dollars, upon which an execution was issued; and that the defendant, who was Sheriff of San Joaquin County, had, by virtue of the execution, advertised the land for sale. There was a prayer that the sale be perpetually

Argument for Respondent.

enjoined. The defendant demurred to the complaint, and the Court below sustained the demurrer; and the plaintiff declining to amend, judgment was rendered for the defendant. The plaintiff appealed.

Terry & Carr, for Appellant.

The marriage vested the husband with no legal or beneficial interest in the wife's separate estate, nor did it affect her right of action for the recovery of the debt, but she could proceed by suit in the same manner as if the marriage had not taken place. (*Lewis & Chard v. Johnson*, 24 Cal. 98; *Wilson v. Wilson*, 36 Cal. 447; *Power v. Lester*, 23 N. Y. 527.) The conveyance from J. C. Hussey to plaintiff was not a voluntary conveyance, but was founded upon a valuable consideration, and is valid as against the creditors of J. C. Hussey. (*Babcock v. Eckler*, 24 N. Y. 623.) The marriage of plaintiff with J. C. Hussey was a valuable consideration, sufficient to support the conveyance; and the *ante-nuptial* promise, though within the statute of frauds, is sufficient to support an executed contract. (*Dundas v. Dutens*, 1 Vesey, 196; *Simmons v. Simmons*, 6 Hare, 352; *Beverly v. Beverly*, 2 Vernon, 131; *Hudson v. Cheynee*, 2 Vernon, 150; *DeBeil v. Thompson*, 3 Beavan, 469; *Montacute v. Maxwell*, 1 Strange, 236; *Hamersley v. DeBeil*, 17 Eng. L. & E. 212.)

S. P. Scaniker, and *J. H. Budd*, for Respondent.

The plaintiff could make no contract with her husband subsequent to marriage, except in special cases, as under the sole trader's Act. (*Snyder v. Webb*, 3 Cal. 83; *Rowe v. Kohle*, 4 Cal. 285; *Luning v. Brady*, 10 Cal. 265; *Shaver v. Bear River and Auburn Water and Mining Company*, 10 Cal. 396; *Jackson v. Parks*, 10 Cush. 550.) In this State marriage contracts are invalid unless in writing, and executed and acknowledged in like manner as a conveyance of land is

required to be executed and acknowledged. (Session laws 1850, p. 254, Hittell, Art. 3,578.) And such contracts do not affect property, except as between the parties thereto, until filed for record in the county where such property is situate. (Laws of 1850, p. 254; Hittell, Art. 3,581; *Taylor v. Hericot*, 4 Desau. 227; *Wilson v. Wilson*, 1 Desau. 401.) Such conveyance will not be upheld as against the creditors of the husband of plaintiff. (*Roach v. Livingston*, 3 Johns. Ch. Rep. 481; *Borst v. Corey*, 18 Barb. 136; *Andrews v. Jones*, 10 Ala. 400; *Blow v. Maynard*, 2 Leigh, Va. 89; *Smith v. Greer*, Humph. 118; *Jackson v. Myers*, 18 Johns. 426; Hittell, 3,164.)

By the Court, SPRAGUE, J.:

The demurrer to the complaint should have been overruled.

There is no legal presumption that the conveyance of the premises described in the complaint, by J. C. Hussey, the husband of the plaintiff, to her, of February 15th, 1870, was fraudulent as against the party now seeking to sell the same in satisfaction of a judgment against the husband of plaintiff, obtained more than three months after such conveyance, even though the husband had made the same as a voluntary conveyance to, or settlement upon, his wife, the plaintiff; and clearly, under the circumstances attending the conveyance, and the substantial money considerations therefor, alleged in the complaint, no presumption of fraud, as against subsequent judgment creditors of the husband, arises; nor does the presumption arise, from a conveyance of the separate property of the husband to the wife, in consideration of money passing from the wife, which was her separate property, that the property thus conveyed becomes the common property of the husband and wife.

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The money alleged to have been the consideration for the conveyance relieves the same from the imputation of being a voluntary conveyance, independent of the ante-nuptial verbal contract. And further, as the ante-nuptial contract is alleged to have been completely executed, the same is not assailable by the parties thereto, or by third parties, on the ground that it was not in writing, as prescribed by statute.

Judgment and order dissolving the injunction reversed, with directions to the Court below to overrule the demurrer to the complaint.

Neither Mr. Justice WALLACE nor Mr. Justice CROCKETT expressed an opinion.

[No. 2,455.]

N. W. RANDALL v. GEORGE FALKNER.

SUMMONS IN FORCIBLE ENTRY AND DETAINER.—The only purpose of a summons is to bring the defendant into Court, and if he appears and answers, he waives any defect in the summons:

DEFENSE IN UNLAWFUL DETAINER.—The facts, that the land in dispute is a part of the public domain, that it has been withdrawn from entry and sale, and that the defendant, by the advice of his attorney and the United States land officers, entered upon it for the purpose of securing a prior right to a homestead, and with a bona fide intention to acquire such right as soon as the land might be open to entry, do not justify an entry upon the actual occupancy of another, and are no defense in an action of unlawful detainer.

UNLAWFUL DETAINER.—If a person enters unlawfully upon land in the possession of another, during his absence, and upon demand being made refuses to restore the possession, he may be proceeded against in an action of unlawful detainer.

TAXATION OF COSTS.—A party to an action is entitled to tax, as costs, the fees of witnesses subpoenaed by him in good faith, although they were not sworn on the trial.

APPEAL from the County Court of Stanislaus County.

Action commenced in the County Court. The complaint alleged that the defendant entered on the land in the night-

Statement of Facts.

time, during the temporary absence of the plaintiff, and that more than five days before the commencement of the action the plaintiff demanded of the defendant that he surrender the land to the plaintiff.

The summons stated that the action was brought for the possession and restitution of the land, describing it.

The defendant moved to dismiss the action, because the Court had no jurisdiction over the subject matter, as it appeared upon the face of the summons that it was simply an action to recover possession of land, and that the District Court only could exercise jurisdiction.

The defendant requested the Court to give the following instructions, which were refused:

"If the jury should find from the evidence that defendant peaceably entered upon the land in controversy, believing he had a right to do so, and that he had good reasons to believe he had such right, then they must find for defendant."

"The question of title cannot be litigated in this action; and if the jury find from the evidence that defendant, at the time of his peaceful entry upon the land, had a bona fide claim, which in time might ripen into a legal title, then they cannot consider whether plaintiff had any better right, but they must find for the defendant."

"If the jury should find from the evidence that the defendant entered upon the land in controversy at the time stated in the complaint, without using force, violence, menaces, or fraud, under a bona fide claim and color of right, then the jury cannot inquire whether the defendant's title to the land is better than the plaintiff's, because the title to the land cannot be litigated in this action; but in such case the jury must find for the defendant."

The defendant inserted in his bill of costs the fees of three witnesses, who had been subpoenaed by him, and had attended the trial, but had not been sworn.

Argument for Respondent.

The plaintiff moved the Court to strike out these costs, because they were not disbursements necessarily incurred in the action. No affidavits were read in support of the motion. The Court denied the motion.

The other facts are stated in the opinion.

J. H. Budd, and Schell & Hewell, for Appellant.

Section six of the Act concerning forcible entry and detainer, of April 2d, 1866, provides that among other things the summons shall state the nature of the action. The cause of action stated in the summons is not one of the actions defined by the statute, but simply an action in ejectment, over which the District Court alone could exercise jurisdiction. The court erred in striking out, on motion of plaintiff, the new matter set up as a defense — first in the answer and afterwards in the amended answer. The action was for an unlawful entry under the third section of the statute. The facts set up in the answer showed conclusively the right of defendant to enter at the time he did. Proof of these facts would have entitled him to a judgment, and in order to enable him to prove these facts, he was required to plead them. (Stats. 1865-6, p. 769, Sec. 7; *Moore v. Del Valle*, 28 Cal. 172; *Burke v. Carruthers*, 31 Cal. 468.)

S. P. Scaniker, and Schell & Scrivner, for Respondent.

If the summons was insufficient, the appearance of the defendant and filing his answer therein was a waiver of any and all irregularities that might appear upon the face of the summons. And the motion made after such appearance was too late, and properly overruled by the Court. (6 How. Prac. 441; *Smith v. Carter*, 7 Cal. 587; *Hays v. Shattuck*, 21 Cal. 51; *Deidesheimer v. Brown*, 8 Cal. 339.) The unlawful entry, having been alleged in the complaint and already specifically traversed by the answer, was then at issue, and any facts or circumstances tending to illustrate the character of the entry

are mere surplusage, and will be stricken out on motion. Nor did the circumstances set up tend to raise any issue between the parties. (*Green v. Palmer*, 15 Cal. 411.) The matter stricken from defendant's answer constituted no defense to the action, if taken as true. Section nine of said Act specifically defines what may be set up by defendant. It does not in terms provide for but one defense, to wit: the quiet and peaceable possession of the defendant, or those through whom he claims, for the space of one whole year next preceding the commencement of the action.

By the Court, CROCKETT, J.:

This is an action for forcible detainer, under the third section of the forcible entry and detainer Act of April 2d, 1866. (Stats. 1865-6, p. 769.) Judgment was entered for the plaintiff, and the defendant appeals, assigning as error certain rulings of the Court during the progress of the trial, as shown by bills of exception brought up in the record.

After filing his answer the defendant moved to quash the summons as insufficient; but the motion was properly denied. The only purpose of the summons is to bring the defendant into Court; and when he appears and answers he waives any defect in the summons. Whether the summons be good or bad, its end has been accomplished when the defendant appears and answers. Nor did the Court err in striking out a portion of the defendant's answer and excluding the proof of the averments so stricken out. These allegations were, in substance, that the land in contest is a portion of the public domain of the United States; but is at present withdrawn from entry and sale; that in 1867 the defendant erected a cabin on it with the intention to acquire a right to it as a homestead, under the laws of the United States, so soon as the land should be subject to entry for that purpose; that in the following year one Ewing, against the will of the defend-

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ant, and without right, removed the cabin, and afterwards sold whatever right he had to the land to plaintiff, who in November, 1869, hauled to the land lumber for the purpose of erecting a house upon it, and plowed the greater portion of the land and put it in grain; that, thereupon, the defendant consulted an attorney as to his rights, and the attorney, together with the land officers of the United States for that district, advised him to enter upon the land and erect a cabin, with a view to acquire a prior right to a homestead claim as soon as the land should become subject to entry for that purpose; that he was qualified to acquire a homestead right; and acting under the advice aforesaid, and with a bona fide intention to acquire such right, he entered in February, 1870, peaceably and quietly upon the land, and has ever since remained in possession. These facts, if proved, would not have justified the entry of the defendant upon land in the actual occupancy of the plaintiff. It is not pretended that the land was then subject to entry under the homestead Act; and though it was public land, *non constat*, that it ever will be subject to entry as a homestead. The mere hope or expectation, however well founded, that at some future time the land might become subject to entry for that purpose, could afford no justification for an invasion of the actual possession of the plaintiff. However honestly the defendant may have believed that he had a right to enter, his entry was unlawful; and having been made in the absence of the plaintiff, and the defendant having refused to surrender the possession, after a proper demand, the case comes fully within the third section of the Act. Upon these facts proved, the Court committed no error in the giving or refusal of instructions, nor in denying the defendant's motion to retax the costs. For aught that appears the plaintiff may have had every reason to believe that the witnesses who were summoned, but not sworn, would be essentially necessary to rebut the defendant's proofs; and their testimony

Points decided.

may have become unnecessary by reason of a modification of the pleadings, and the exclusion by the Court of the testimony offered by the defendant. There is certainly nothing to show that the plaintiff acted in bad faith in summoning them, and that their testimony may not have been necessary, except for the rulings of the Court on the pleadings and evidence.

I think the appellant has failed to show any error in the record, and that the judgment ought to be affirmed.

[No. 2,375.]

ARTHUR QUINN AND JOHN CARROLL v. SETH H. WETHERBEE, JOHN REYNOLDS, S. F. REYNOLDS, AND HENRY COWELL.

RELIEF IN EQUITY AGAINST JUDGMENTS AT LAW.— Courts of equity will not grant relief against judgments recovered at law, unless the party asking for relief was unable to avail himself of his defense in the action at law, or was prevented from doing so by fraud, accident, or mistake, without negligence on his part.

HERR.— When an attorney for defendant, on the trial of a cause, objects to the introduction of certain testimony, and the court erroneously overrules the objection, and an exception is taken to the ruling, and by reason of said erroneous ruling the plaintiff recovers judgment, and the testimony is taken down by the official reporter, who fails to note the objection and exception, and the defendant moves for a new trial, and adopts as his statement the report of the official reporter, without observing the error in the report, and by means thereof fails to obtain a new trial, the mistake has been accompanied by such negligence of defendant's attorney that a Court of equity will not relieve against the judgment.

APPEAL from the District Court of the Fourth Judicial District, City and County of San Francisco.

The Court below rendered judgment for the plaintiffs, and the defendants appealed.

The other facts are stated in the opinion.

Argument for Appellants.

John Reynolds, for Appellants.

The whole scope of this complaint is to correct an alleged error of law committed by a Court of law. Courts of equity will not entertain bills for such a purpose. (14 Cal. 142; 4 McLean, 12; *Merit v. Baldwin*, 6 Wis. 439; *Shottenkirk v. Wheeler*, 3 Johns. Ch. 279-81.) No fault whatever is charged upon the defendants, and Courts of equity will only relieve against unjust judgments, where some fraud, actual or constructive, has been practiced. (*Pinkham v. McFarland*, 5 Cal. 137; 3 Graham & Waterman on New Trials, Secs. 1,489-1,491.) Taking the complaint in its whole scope, and giving it the most liberal construction, it cannot be sustained. It is destitute of equity. Plaintiffs seek nothing now but what they have had two opportunities to avail themselves of at law, and have neglected them both. (Hilliard on New Trials, Sec. 3, p. 451; authorities cited by plaintiffs' counsel; *Collins v. Butler*, 14 Cal. 226; *Borland v. Thornton*, 12 Cal. 443-447; 1 Graham & Waterman on New Trials, 467, and 3 id. 1,468, 1,489, 1,491, 1,495; *Strope v. Sullivan*, 1 Kelly, 136; 1 Johns. Ch. 97.)

If for no other reason, this bill should be dismissed on account of the *laches* of the plaintiffs, and they are chargeable with the knowledge and neglect of their attorney; and the attorney must be held to have had notice and knowledge of what occurred under his own exclusive direction. He was not justified in relying on the reporter's notes. They form no part of a statement; and if it was intended that they might be so used, why require any settlement of the statement? (See Prac. Act, Sec. 195; 3 Graham & W. on N. T. 1,520.)

W. H. Patterson, for Respondents.

The assessment was void, there being no dollar mark before the figures showing the valuation. (*Hurlbut v.*

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Butenop, 27 Cal. 50; *Bradley v. Seaman*, 30 Cal. 619; *People v. San Francisco, S. N.*, 31 Cal. 135; *People v. Hastings*, 34 Cal. 571.) The facts are sufficient to authorize the relief awarded. (*Wright v. Eaton*, 7 Wis. R. 607; *Huebschman v. Baker*, 7 id. 542; *Bacon v. Jones*, 1 Comstock's R. 281; *Huggins v. King*, 3 Barb. R. 619; *Truly v. Wanzer*, 5 How. U. S. 141; *Kent v. Ricards*, 3 Md. Ch. 397; *Pollock v. Gilbert*, 16 Georgia R. 398; *Marine Ins. Co. v. Hodgson*, 7 Cranch, 332; *Lambro v. Anderson*, 1 Chandler, 224; *Little v. Price*, 1 Md. Ch. 182; *Graham & Waterman on N. T.*, Vol. 1, pp. 572-4.) If the attorney could not be made answerable as for negligence in the given case, the client, having no knowledge, and trusting to his attorney, cannot be held guilty of negligence. (*Patterson v. Matthews and Wife*, 3 Bibb, Ky. R. 80.) As it is only through the attorney that *laches* can be imputed to the client (as by proxy), the measure of the attorney's negligence is the criterion by which the conduct of the client will be determined; and if the attorney is not chargeable, the client will not be presumed to be. We are content to state the rule as it obtains in most of the United States, in which attorneys and counsel are allowed to contract for fees and pay for their services, which are held to be "the exercise of reasonable skill and diligence." (*Varnum v. Martin*, 15 Peck, 440; *Goodman v. Walker*, 21 Ala. [N. S.] 647; *Ransom v. Cothron*, 6 Sanders & Marshall, 3 Mason, 405; *Pennington v. Yell*, 6 Eng. Ark. 212; *Wilson v. Russ*, 20 Maine, 421; *Lynch v. Commonwealth*, 16 Serg. & R. 368; *Gilbert v. Williams*, 8 Mass. 57.) Was it culpable negligence in the attorney to rely on the certified notes of the reporter as being a faithful and correct transcript of the evidence taken on the trial? The statute declares they shall be deemed and taken to be correct. We argue then, that the accident or mistake not

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being the act of the attorney, or of his clerk or agent, he is not chargeable with or liable for the consequences of it.

By the Court, TEMPLE, J.:

There seems to be no conflict in the authorities as to the principles upon which Courts of equity interfere to grant relief against judgments recovered at law. It must appear that the party could not avail himself of his defense in the action at law, or that he was prevented from doing so by fraud, accident, or mistake, without fault or negligence on his part. To this effect are all the authorities cited; and the only question I deem it necessary to discuss is whether the defendants in the action sought to be set aside were guilty of negligence.

That action was brought to recover certain premises in San Francisco, and the plaintiff in that suit relied entirely upon a tax title. The assessment roll was introduced, showing the assessment upon which the tax sale was based, and from that it appeared that no dollar mark was prefixed to the valuation of the property in the assessment. This assessment has in several cases since that trial been declared void by this Court. The evidence was taken down by the official reporter; and judgment having been rendered for plaintiffs, a motion for a new trial was duly made, and a statement of the evidence proposed and settled. On the trial the plaintiffs in this action — defendants in that — had objected to the assessment roll on account of the defect above mentioned; but in making up their statement on motion for a new trial they adopted the report of the official reporter, who had taken down the statements from the assessment roll as though the dollar mark had been added. This error was not observed by the counsel for the defendants in that action until twenty days after the judgment had been affirmed by this Court. It is claimed that the judg-

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ment in that case must inevitably have been reversed but for this mistake on the part of the official reporter.

It will be observed that these plaintiffs had the full benefit of all the facts in the trial of the former action in the District Court. The assessment was correctly read there. And yet, in the present action, the same Court, claiming to sit as a Court of equity, has set aside its former judgment, rendered before upon precisely the same facts which were before it in the former case, and not only without proof of accident, mistake, or fraud, but upon positive proof that there was neither. It is not claimed that the District Court, on the former trial, would have granted a new trial if the evidence had been correctly stated. The true evidence was before that Court, and neither counsel nor the Court seem to have discovered that the statement did not accord with the facts. The reason for this most likely was that this fact was not regarded as very essential until after the decision of this Court declaring the defect fatal to the assessment. The only effect of the mistake was that defendant in that action failed to obtain a review of his case in this Court. To obtain the benefit of such a review is the real object of this action.

No case cited raises any question as to the degree of negligence which will prevent a party from obtaining relief in this form. I think it clear, however, that one is bound to exercise at least ordinary care and diligence in the management of his defense to the action brought against him. As I think the complaint in this case shows a want of ordinary care and diligence, it is not necessary to inquire whether a party could obtain relief in this way, although he may have been guilty of some degree of negligence.

In the first place, the evidence, as written out by the reporter, is not the statement contemplated in section one hundred and ninety-five of the Practice Act. No prudent attorney would adopt it as a statement of evidence without

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a careful examination to see if it stated the evidence and noted his exceptions correctly. The reporter is not required to take down documentary evidence; and if he were, attorneys would scarcely accept his copies in preference to the originals; and if they did it would be very negligent not to compare them when the case turns upon so slight a thing as the omission of a letter or a dollar mark. The official reporter cannot be expected to understand the importance of such things, and to suppose no such mistake could occur would be to credit him with greater accuracy than is often found.

Amendments were then proposed to this statement, and it became the duty of the attorney for these plaintiffs, in that action, as the moving party, to have it correctly engrossed. After that, the motion for a new trial was submitted to the District Court. If this ruling were one of the errors assigned upon that motion, it is strange that it was not pointed out, or that such an assignment of error were made in the statement, and the statement itself not examined to see if the errors appeared. The only office of the statement is to show the errors, and the attorney ought to have seen that only such evidence as was necessary to explain the points taken was inserted. On appeal to this Court the same statement was used, and it became the duty of the appellants in that case to see that a correct transcript was prepared and correctly printed, and then point out the errors to this Court.

On all these occasions it became the duty of the attorney for the defendants in the former action to examine his statement and to see that it was correct. Attorneys ought, and generally do, examine carefully their transcripts before they have been printed for use here, to see if they are correct, in order that prompt measures may be taken to supply defects. If the error had existed only in the transcript used here, it certainly would have been culpable negligence to allow so material an error to pass unnoticed.

Statement of Facts.

The judgment is reversed and the Court directed to sustain the demurrer.

Mr. Justice WALLACE, having been of counsel below, did not sit in this cause.

[No. 2,494.]

JAMES B. CHASE AND THOMAS DE VRIES v. CHRISTIAN H. CHRISTIANSON AND R. MURDOCH ET AL.

COLLATERAL ATTACK ON JUDGMENT.—If the Court has jurisdiction of the subject matter, and acquires jurisdiction of the person of the defendant, the decision of all other questions arising in the cause is but the exercise of that jurisdiction, and an erroneous decision of any of these other questions cannot impair the validity and binding force of the judgment, when brought in question collaterally.

ERRONEOUS JUDGMENT NOT VOID.—A judgment rendered by the Court in a cause in which it has jurisdiction of the subject matter and of the person is not void, even though it may exceed the measure of relief demanded in the complaint, and no answer may have been filed.

STAY OF EXECUTION.—The Court will not, on motion, order a perpetual stay of execution on an erroneous judgment, if it had jurisdiction of the subject matter and of the person of defendant.

SECTION ONE HUNDRED AND FORTY-SEVEN OF THE PRACTICE ACT.—Section one hundred and forty-seven of the Practice Act, which provides that the relief granted to the plaintiff shall not exceed that asked in the complaint, has no application to questions of jurisdiction.

APPEAL from the District Court of the Fifteenth Judicial District, City and County of San Francisco.

In the action to recover the street assessment, the complaint was filed December 30th, 1864. The plaintiff in his complaint asked for judgment against the lot, and that a decree be made for the sale of the lot, and that all persons claiming subsequent to the date of the warrant be barred and foreclosed of all equity of redemption. There was no claim for a personal judgment against the defendants. Judg-

Argument for Respondent.

ment was rendered December 23d, 1865, and it contained the following clause: "And it is further ordered, adjudged, and decreed that if the moneys arising from such sale shall be insufficient to pay the amount due to plaintiffs, with interest, costs, and expenses of sale as aforesaid, that the Sheriff specify the amount of such deficiency in his report of said sale, and thereupon judgment shall be docketed against the defendant, R. Murdoch, who is personally liable for the payment of the debt, for the amount of such deficiency, with interest thereon at the rate of ten per cent per annum from the date of said report; and that plaintiffs have execution therefor against said R. Murdoch, defendant within named."

An order of sale was issued on the judgment, and the lot was sold by the Sheriff on the 30th day of January, 1866. There was a deficiency of one thousand three hundred and fifteen and sixty-two one hundredths dollars returned by the Sheriff. An execution was issued against the property of Murdoch for this deficiency, and he moved the Court for a perpetual stay of the execution on the personal judgment. The Court below denied the motion, and the defendant, Murdoch, appealed from the order denying the motion.

The other facts are stated in the opinion.

J. M. Seawell, for Appellant.

G. F. & W. H. Sharp, and *James Mee*, for Respondent.

The judgment in this case was erroneous, and not void, and the omission to appeal within statutory time rendered it valid. (*Clarey v. Hoagland*, 6 Cal. 688; *Ex Parte Cohen*, 3 Cal. 494; *De Castro v. Richards*, 25 Cal. 52; *People v. Sheppard*, 28 Cal. 115; *Mayo v. Ah Loy*, 32 Cal. 480; *Langanneur v. French*, 34 Cal. 99; *People v. Doe*, 36 Cal. 220; *Blockman v. Van Inwagen*, 5 How. 367; 1 Smith Leading Cases, 828-848; *Hunt v. Loucks*, 38 Cal. 372.)

By the Court, WALLACE, J.:

The motion made by Murdoch to set aside the execution and to perpetually stay all other proceedings upon the personal judgment against him, was correctly denied.

The motion proceeded upon the assumed ground that the judgment itself was not merely erroneous, but was utterly void — so much waste paper — and to be treated as a mere nullity whenever and however assailed.

The subject matter of the action was a claim assessed by the plaintiffs for street work in San Francisco, and which was alleged in their complaint to have been assessed upon a certain city lot, of which Murdoch was averred to be owner. Murdoch appeared in the action and made defense. Here, then, was jurisdiction of the subject matter and of the person, and, these conditions conceded, the decision of all other questions arising in the case is but the exercise of that jurisdiction, and an erroneous decision of any of these other questions could not impair the validity and binding force of the judgment when brought in question collaterally.

One of the questions, and the first one in natural order, for determination at the trial of the action had in the Court below, was as to whether or not the plaintiffs had any claim to be paid. That being determined in their favor, then came the question of its amount. Upon that being ascertained, the *quo modo* of its enforcement unavoidably presented itself for the judgment of the Court. Murdoch was thereupon adjudged to be personally liable for any deficiency which might remain after the proceeds of the sale of the lot should be exhausted, and execution was accordingly directed to issue against his property therefor.

This was a decision upon the *quo modo*. The judgment of the Court might have disposed of the question in some other way. It might have limited the plaintiffs to the proceeds of the sale of the lot, or it might have adjudged Murdoch to

Argument for Appellants.

of the Western Pacific. The property of respondent, Seale, was in the same condition, with reference to the Western Pacific, as that of E. P. Reed; but the Southern Pacific took a portion of his land in addition to that taken by the Western Pacific. The Commissioners awarded Seale fifty dollars damages for his land taken, and six hundred and fifty dollars for damages to his land not taken. James F. Reed and his children owned one hundred and fifty acres, and the land taken for the track of the Southern Pacific was a portion of this track. The Commissioners awarded them one thousand five hundred and forty dollars for their land taken, and four thousand and one hundred dollars for damage to their land not taken.

The other facts are stated in the opinion.

Peckham & Payne, for Appellants.

The ordinance of the Mayor and Common Council of San José was passed in pursuance of authority conferred upon them by the Legislature. (See Laws of 1861, p. 618, Sec. 21.) This ordinance conferred upon the railroad company the right to lay their track upon the street, and to pass and repass over it with their trains, without making any compensation to the original proprietor of the soil. . The mere possibility of reverter to the original owner, or his heirs or grantees, is not an appreciable interest requiring compensation. (See *Wright v. Coster*, 3 Dutcher, 76; *Plant v. Long Island Railroad Co.*, 10 Barb. 26; *Adams v. The Saratoga and Washington Railway*, 11 Barb. 414; *Chapman v. Albany and Schenectady Railway*, 10 Barb. 260; *Drake v. The Hudson River Railway*, 7 Barb. 508; *Applegate v. Lexington and Ohio Railway*, 8 Dana, 289; *Wolf v. The Covington and Lexington Railway*, 15 B. Monroe, 404; *Williams v. The New York Central Railway*, 18 Barb. 222, 246; *Brainard v. Connecticut River Railway*, 7 Cushing, 506.)

S. O. Houghton, for Respondents.

The only right a railway company can acquire to a street of a city is the same easement which the public in general enjoy. The grant by the City of San José only gives the appellants the public property in the street, and does not prevent E. P. Reed from recovering any damages that he may sustain by reason of the location of the road in question. (*Fletcher v. Auburn and Syracuse Railroad Co.*, 25 Barb. 463, 464.) That Reed will be damaged by the construction of appellants' road, is beyond question. His property will be to a great extent inaccessible, unless he gives to the public at least ten feet off of the front of his property, on the side upon which the additional track is laid. "The owner of land adjacent to a street has a right, as an essential incident to his title, to certain services and easements in the street, which are as inviolable and may be as valuable to him as his right to the land itself; among these is the right to free and unobstructed passage into and upon the street to and from his adjacent land." (*Chapman v. The Albany and Schenectady R. R. Co.*, 10 Barb. 367.)

By the Court, CROCKETT, J.:

This is an appeal by the Southern Pacific Railroad Company from a judgment awarding damages to each of the respondents, severally, for lands in the City of San José, taken by the appellant for the use of its railroad. The respondent, E. P. Reed, was the owner of a considerable tract, containing about thirty acres, within the corporate limits of the city, and in the year 1862 laid it out into lots and blocks, fronting on a street called Dame street, which he opened and laid out through the property with a view to enhance its value. Subsequently, the Western Pacific Railroad Company obtained the right of way for its road through said

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street, and damages to the amount of three thousand dollars were awarded to said Reed and paid to him by said company; and thereupon the track of their road was laid in the center of said street, and has ever since continued to be used for the conveyance of freights and passengers. In 1868 the city authorities, by ordinance, granted to the Santa Clara and Pajaro Valley Railroad Company the right to lay their track through said street; but the right was not exercised, and the company assigned to the Southern Pacific Railroad Company what rights it acquired in this respect under the ordinance. The street is eighty feet wide, and the Southern Pacific Railroad Company has laid its track on one side of the street, as near to the track of the Western Pacific Company as could conveniently be done to permit of the safe passage of trains over the two roads. But there is left a very narrow space between the track of the Southern Pacific Railroad Company and the sidewalk — too narrow to allow the safe transit of teams and vehicles when trains are passing over that part of the road. In the present action the Commissioners awarded to Reed damages to the amount of two thousand dollars, which award was confirmed by the Court; and the company has appealed. The award is resisted on three grounds, to wit: First — That Reed has already been paid by the Western Pacific Railroad Company all the damages which he has sustained or to which he is entitled by reason of the use of the streets for railroad purposes. Second — That, as assignee of the Santa Clara and Pajaro Valley Railroad Company, the Southern Pacific Railroad Company is authorized, by ordinance of the city, to lay its track through the street without the payment of damages to any one. Third — That the damages awarded are excessive, and not justified by the proofs. But neither of these grounds is tenable. If it be conceded that Reed dedicated the lands included in the street to public use as a highway for ordinary travel, with a view to enhance the value of his

conterminous lands (and the evidence shows that it had that effect), it by no means results that his adjoining lands may not be greatly depreciated by devoting the street to railroad purposes—a purpose not contemplated by him when the street was opened. Taking this view of his rights, the Court awarded to him three thousand dollars for the damages which he suffered by the location of the track of the Western Pacific Railroad Company through the street. But this gave to that company no title to the land, nor any interest in it, except a mere easement, consisting of a right of way over the street, in common with the general public. If private property was injured by the use and enjoyment of this easement by the company, the owners of it were entitled to a just compensation. But the damages paid to Reed by the Western Pacific Railroad Company were only those which he suffered from the location of the road of that company. But it by no means follows that the location of another railroad in the same street may not inflict additional, and perhaps much greater damage. A single railroad track in the center of a wide street may not very seriously obstruct ordinary travel; but another railroad track, by the side of the first, may so obstruct the street as almost to exclude it from use by teams and vehicles. It is too plain for discussion, that each succeeding railroad track laid through a public street tends to obstruct, in an additional degree, ordinary travel through it; and if the whole street be occupied with railroad tracks it would be comparatively useless as a highway for other purposes. If, therefore, Reed was damaged by the use of the street by the Southern Pacific Railroad Company, he was entitled to a just compensation. Nor can the company escape its liability for the damage on the ground that, as assignee of the Santa Clara and Pajaro Valley Railroad Company, it was authorized, by the ordinance, to lay its track through this street. Without the consent of the city authorities none of

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the streets of the city could be used for that purpose; but this consent, when obtained, in no wise touches the question of damages to private property on the line of the street. The right to a just compensation for the injuries inflicted on private property by the appropriation of the street to a public use not contemplated when it was opened and dedicated as a highway for ordinary travel, is in no wise affected by the question whether the city authorities did or did not consent to such appropriation.

The two propositions have no just or necessary relation to each other; and the right to a just compensation in no degree depends upon, or is affected by, the fact that the city authorities did or did not consent to such use of the street. Nor can we disturb the award on the ground that the damages are excessive, and not justified by the evidence. On this point it would be sufficient to say that there is a substantial conflict in the evidence; but, giving proper weight to the judgment of the Commissioners, we think the preponderance of the evidence is in favor of the award.

The views already expressed are decisive of the case of the respondent, Seale. We discover no error in the award of damages to him. In respect to the case of the respondent, James F. Reed, and his children, the appeal is frivolous. No plausible ground whatsoever is alleged why the award should be set aside, or is unjust.

Judgment affirmed as to the respondents, Seale and E. P. Reed; and as to the respondent, James F. Reed, and his children, it is affirmed with twenty per cent damages.

Points decided.

[No. 1,480.]

THE PEOPLE OF THE STATE OF CALIFORNIA v.
JOHN G. KLUMPKE, ELISHA HIGGINS, ALEX-
ANDER BLANC, WILLIAM C. HOFF, A. A. HAR-
VEY, W. J. TURNER, HERMAN WOHLER, AND
C. K. GARRISON.

EVIDENCE IN EJECTMENT — DIAGRAM TO SHOW CLAIM.— In an action of ejectment, where the question in controversy was the position of the red line, or water front, of San Francisco: *held*, that a diagram, made by the County Surveyor and believed by him to be correct, though not an official plat, was admissible in evidence for the purpose of showing what the party offering it claimed to be the true position of such line.

SAN FRANCISCO WATER FRONT — HARBOR COMMISSIONERS' MAP.— In an action of ejectment by the State for land in San Francisco claimed to be outside of the red line, or water front: *held*, that the map purporting to have been made in 1864 by order of the State Harbor Commissioners, but not shown to have been approved or adopted by them, was not competent evidence in their favor to show the true location of the red line.

SAN FRANCISCO WATER FRONT — STATE LAND COMMISSIONERS' MAP.— The Board of State Land Commissioners, appointed under the Act of May 18th, 1853, establishing such Board (Stats. 1853, p. 219), was authorized to find the red line, or water front, of San Francisco, as established by the Act of March 26th, 1851 (Stats. 1851, p. 307), and their map is competent evidence tending to prove the position of that line.

SAN FRANCISCO WATER FRONT — DEEDS OF STATE LAND COMMISSIONERS AS EVIDENCE.— In an action of ejectment by the State for land in San Francisco between Jackson and Pacific streets, and claimed by it to be outside of the red line, or water front: *held*, that deeds of the State Land Commissioners, appointed under the Act of May 18th, 1853 (Stats. 1853, p. 219), for lands to the south of Jackson street, were not admissible for the purpose of showing the position of the red line.

LOCATION OF THE SAN FRANCISCO RED LINE.— The question of the location of the San Francisco red line, or water front, established by the Act of March 26th, 1851 (Stats. 1851, p. 307), is a question of fact; and the acts of official surveyors and Boards in running and mapping out the line, though they tend to show its position, yet as they could not change, they do not conclusively fix it.

SURVEYS OF SAN FRANCISCO RED LINE.— As the Act of March 26th, 1851, establishing the red line, or water front, of San Francisco (Stats. 1851, p. 307), mentioned a number of points on it with the same certainty as the initial point, the true position of the line between any two of such points can be ascertained by drawing a line between them, and it is unnecessary for a survey to commence at the initial point.

Points decided.

SAN FRANCISCO RED LINE — ACTS OF STATE LAND COMMISSIONERS — ESTOPPEL IN PAIS — If the State Land Commissioners, appointed under the Act of May 18th, 1853 (Stats. 1853, p. 219), changed the red line, or water front of San Francisco, as laid down by the Act of March 26th, 1851 (Stats. 1851, p. 307), an alleged adoption and recognition by the State of the acts of the Commissioners would not effect a change or create an estoppel *in pais* as against the State, unless it should be shown that the Legislature and other officials, while adopting and recognizing such acts, knew that they had changed the line.

EVIDENCE OF SALES OF SAN FRANCISCO LOTS, OUTSIDE OF RED LINE. EXCLUDED. — In a suit by the State, for land in San Francisco, outside of the red line, or water front, claimed by defendants under deeds from the Board of State Land Commissioners, appointed under the Act of May 18th, 1853 (Stats. 1853, p. 219): *held*, that, as the Board was destitute of authority to sell such lots, it was no error to exclude defendants' proffered evidence of the reports of the Board to the Legislature, and the Controller's receipts for the purchase money paid.

DEEDS OF STATE LAND COMMISSIONERS, OUTSIDE OF SAN FRANCISCO RED LINE, VOID. — Deeds from the State Land Commissioners, appointed under the Act of May 18th, 1853 (Stats. 1853, p. 219), so far as they include lands in San Francisco, lying outside of the red line, are void.

NO REVERSAL OF VERDICT AS AGAINST EVIDENCE, WHERE CONFLICT. — A verdict and judgment will not be disturbed, as being against evidence, where there is a conflict in the evidence.

DEED VOID FOR UNCERTAINTY OF DESCRIPTION. — Where a deed called for a lot in San Francisco, commencing on the north line of Jackson street, seventy-two feet from the intersection of Jackson and Drumm streets, running thence easterly on the north line of Jackson street fifty feet; thence north on East street forty feet; thence at right angles west fifty feet; and thence to the place of beginning: *held*, that if East street did not extend north of Jackson street, or was so understood and recognized. East street was a false call, and must be rejected; and the deed, as the description then would fit equally well four different parcels of land, would be void for uncertainty.

STATUTE OF LIMITATIONS — ADVERSE POSSESSION OF ONE'S GRANTORS. — In an ejectment suit by the State, for land in San Francisco outside of the red line, where a defendant claimed title under the statute of limitations, and relied upon the adverse possession of his grantors; but it appeared that his deeds either called for land different from that sued for, or were void for uncertainty of description: *held*, that he did not connect himself, by means of such deeds, with the possession of his grantors.

APPEAL from the District Court of the Fourth Judicial District, City and County of San Francisco.

Statement of Facts.

This was an action brought by the people of the State, upon the relation of the Board of State Harbor Commissioners, to recover possession of certain property in the City and County of San Francisco, two hundred and eighty-eight feet in length by one hundred feet in width, lying north of Jackson street and east of what was alleged to be the water front of said city and county, as established by law. Of this property the defendants were in possession, and had built piers and wharves thereon, from which they collected tolls and rents. The answers set up that the separate portions of the land held by defendants, respectively, were within and to the westward of the water front established by law; they also alleged quiet, peaceable, notorious, and exclusive possession in themselves and their grantors for ten years and upwards, and set up the statute of limitations.

When the case was called for trial in the Court below, the defendant, William C. Hoff, was not prepared, on account of the absence of his counsel, and the cause proceeded, under the order of the Judge, as against the other defendants. There was a verdict and judgment for the plaintiff, motion for new trial made and overruled, and this appeal by the defendants was both from the order overruling the motion for a new trial and from the judgment.

On the trial the plaintiff called George C. Potter as a witness, who testified that he was City and County Surveyor; that he was acquainted with the water front of the city since 1849; that he was employed by the State Harbor Commissioners, in the Spring of 1864, to make a survey and map of the city front, in accordance with the Act of the Legislature creating the Board of State Harbor Commissioners; that he made such a map, which was produced in Court; that he did not think the red line (the water front line) was laid down on the map where it crossed Jackson and Pacific

Statement of Facts

streets; that a diagram had been made in his office, under his directions, which he had examined, and believed to be correct.

The diagram was then produced, marked "Exhibit A," and offered in evidence. Defendants objected that it was irrelevant, incompetent, and inadmissible, as being a mere diagram or sketch made in the office of the witness, without authority, and not an official act; and that none of the parties could be affected by it. The Court overruled the objections and permitted the diagram to go to the jury, as showing what plaintiff claimed to be the true line. Defendants excepted.

The plaintiff also offered in evidence the map above referred to, marked "Exhibit B." Defendants objected, on the ground that it appeared to have been gotten up by the direction of the Harbor Commissioners, without authority of law; that it was prepared *ex parte* on their behalf, for their own purposes, and could not affect the rights of, or be used as evidence against, the defendants. The Court overruled the objection and allowed the map in evidence, and defendants excepted.

The defendants, among other testimony, introduced in evidence "An act to provide for the disposition of certain property of the State of California," passed March 26th, 1851, (Stats. 1851, p. 307); also, "An act to provide for the sale of the interest of the State of California in the property within the water-line front of the City of San Francisco, as defined in and by the Act of March 26th, 1851," approved May 18th, 1853 (Stats. 1853, p. 219); also, "An act supplementary to and amendatory of the Act of May 18th, 1853," passed May 1st, 1855 (Stats. 1855, p. 226). They called as a witness Richard H. Sinton, who testified that he had resided in the city since 1848; was familiar with the city front property; was connected with the State Land Commissioners (who had been appointed by and under the above

Statement of Facts.

mentioned Act of May 18th, 1853); had sold all the property sold by the Land Commissioners, as auctioneer for the city and State; and had, and produced in Court, the original map, according to which the sale was made by order of the Land Commissioners, and which had been made under their supervision.

Defendants offered the map in evidence. Plaintiff objected that it was immaterial and incompetent, on the ground that the Land Commissioners had no authority to fix the red line, and there was nothing to show that they had any knowledge of it. The court sustained the objection and ruled the maps out, and defendants excepted.

Defendants also offered in evidence, deeds from the State Land Commissioners for all the lots and blocks lying between Drumm, Jackson, and Washington streets, and between Washington, Clay, and Drumm streets, for the purpose of showing the location of the red line of 1851, as fixed, ascertained, and laid down by the State Land Commissioners, under the provisions of the Act of May 18th, 1853, and that the State had sold and disposed of its property in the same, in lots and blocks, according to such location of said Commissioners. The plaintiff objected, on the ground that such testimony was irrelevant and immaterial. The Court sustained the objection, and defendants excepted.

Defendants also offered in evidence the reports of the State Land Commissioners to the Legislature, dated January 7th, 1854, and other legislative documents relating to the Commission and its proceedings, and also receipts of the State Controller for the amounts due to the State from sale of lots between Jackson, Pacific, and Drumm streets and the eastern limits of the city. Plaintiff objected, on the ground that they were immaterial. The objection was sustained, the testimony ruled out, and defendants excepted.

The defendant Alexander Blanc, in his answer, claimed the lot commencing on the north side of Jackson street,

Argument for Appellants.

seventy-two feet east from the northeast corner of Jackson and Drumm streets; running thence east fifty feet; thence at a right angle north forty feet; thence west fifty feet; and thence south forty feet. The deeds under which Blanc claimed described the property as a lot beginning on the north line of Jackson street, seventy-two feet from the intersection of Jackson and Drumm streets; running east on the north line of Jackson street fifty feet; thence north on East street forty feet; thence at right angles west fifty feet; thence south parallel with Drumm street to the place of beginning. Plaintiff objected to these deeds, on the grounds that they did not describe the property claimed by Blanc, and that they were void for the uncertainty of the description.

J. P. Hoge, for Appellants.

1. The diagram "A" was a mere sketch, made in the office of the witness Potter, without authority—not an official act—and it was not competent as evidence to affect the rights of defendants.

2. The map "B," purporting to be made by order of the State Harbor Commissioners, was improperly admitted in evidence. The Commissioners, under the statute (Stats. 1863-4, p. 144), were simply required, by an accurate plot, to show the location and lines of the streets along the water front. The evidence did not show that this map had ever been filed, or acted upon or adopted, or approved in any way by the Commissioners. The true location of the so-called red line of 1851, is a question of fact. (*Cook v. Bonnet*, 4 Cal. 398.) Upon what principle can the ex parte proceedings of the plaintiffs, as represented by the Harbor Commissioners, be made evidence against the defendants? The plaintiffs themselves locate the line upon which depends their whole right as against these defendants, and by their own act make it evidence, and conclusive evidence, as the

Argument for Appellants.

result proved, of their own rights, and of the adverse rights of the defendants. Nothing can be found in the Act of 1864 to sustain any such action.

3. The true location of the red line, as established in 1851, could only be ascertained and fixed by commencing at the initial point of the line, as established by the Act of the 26th of March, 1851, and then running out the whole line according to the calls of the Act itself. The only point that could by any possibility serve to determine the position of the line, was the initial point. (*Lay v. Neville*, 25 Cal. 553; *Waugh v. Waugh*, 28 N. Y. 94.)

4. There was error in refusing to admit the map of the State Land Commissioners. It is difficult to understand the reasoning by which the Harbor Commissioners' map was admitted and the State Land Commissioners' map excluded. The latter was not only authorized by the Acts of the Legislature, but it was intended to fix definitely and permanently, on the part of the State, the line of water front in San Francisco, beyond which the State would never go. This map was, therefore, not only admissible, but was conclusive evidence against the State of the true location of the red line. It was, in fact, an act of State, locating the water front boundary as delineated thereon. (*People v. Frisbie*, October Term, 1865, not reported.)

5. The Court erred in refusing to admit the deeds of the State Land Commissioners for the lots and blocks lying between Jackson, Washington, and Drumm streets, and Washington, Clay, and Drumm streets. They were offered for the purpose of showing the location of the red line of 1851, as fixed, ascertained, and laid down by the State Land Commissioners, under the provisions of the Act of May 18th, 1853, and that the State sold and disposed of its property in the same, in lots and blocks, according to such location.

6. It was error to exclude the reports of the State Land Commissioners and the legislative proceedings thereon, and

Argument for Respondent.

Edward Tompkins, for Respondent.

1. The State owned the *locus in quo*, by virtue of its sovereignty, and the defendants wholly failed to connect themselves with the title thereto. The premises are wholly without the red line of the water front, as established by the Act of March 26th, 1851. The defendants averred that the premises they claimed were within that line; and hence the real issue in the case was the location of the red line of 1851. For the purpose of making out title defendants attempted to show that they had acquired it under deeds from the Board of State Land Commissioners. But to this attempt there are two answers: First, that the deeds do not profess to go beyond the red line, but, on the contrary, bound upon it; and second, the Board had no power or authority beyond that line, and the purchasers knew it. The Act under which they were appointed expressly limited them to land "within the line fixed by the Act of March 26th, 1851." It could be claimed with equal plausibility that a power of attorney authorizing the sale of a particular piece of property only, would enable the attorney to convey everything belonging to his principal. If the Board could go one foot beyond the red line, they could convey the whole Bay of San Francisco. The several offers to prove that the State received the money for the lots sold was immaterial in itself, and doubly so, because not accompanied with any offer to show that it was received with knowledge that the Board had exceeded its powers. The offer of the map of the Land Commissioners of the property within the red line, it is not supposed would have been material to any issue in this case, even if it had been otherwise sufficiently proven. The Commissioners had no more power to affect the rights of the State outside of the red line, by making a map, than they had by giving a deed.

2. The defendants wholly failed to establish a defense

Argument for Respondent.

under the statute of limitations. It is not conceded that the statute of limitations has any application. That statute, we submit, applies only to land as such, held by the State under grant from the government, or otherwise acquired, to be used and disposed of at its pleasure, and not to the rights which it holds by virtue of its sovereignty, in trust for the benefit of the whole people. It needs neither argument nor authority at this day to establish that the Legislature could not grant away the exclusive use of the entire bay to individuals, and if not the whole, they could not any part that would interfere with the general and beneficial use. Surely they cannot do by neglect what they could not by express grant. It is further insisted, that the Act of April 24th, 1853, substantially repealed the statute of limitations, if it had before applied to such cases. It rendered the occupation by the defendants illegal, and made it a misdemeanor for the defendants to collect wharfage, or to interfere with the Commissioners in the use and occupation of the property outside of the red line. The first beach and water Act made the red line the permanent line of the water front, and required the space beyond it to be kept free from all obstructions. The second Act (Stats. 1851, p. 311) required the spaces between the wharves, outside of the red line, to be kept free from obstructions for public slips. Thus, the entry and occupation by the defendants have all been in direct violation of the statutes of the State, and for the last year have been a continuous misdemeanor, upon which no right to continue to violate the law can be founded. But if the statute applied, the defendants had the whole benefit of it, and the jury who heard the evidence found directly against them upon the facts.

3. The defendant Blane presents his case separately from the other defendants, and claims the benefit of alleged

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errors, that affect his interests only. It will be manifest from an examination of the transcript that he had no interests to be prejudiced. On his title, as exhibited by himself, no error that the Court could have committed would have been material. It is only those that are prejudiced that can complain of errors. It is manifest that he must make out title or show an adverse possession by himself and his grantors for over ten years. All the title or adverse possession for that length of time, which he even attempts to make out, is under a certain quitclaim deed of persons who are not shown ever to have had either title or possession, and which, in addition to other objections, is void for uncertainty of description. It calls for a lot on the north line of Jackson street, commencing seventy-two feet from the intersection of Jackson and Drumm streets. This might be east or west, and it might be seventy-two feet from the northeast or from the northwest corner. Thus, there would be four lots, either one of which would answer that call in the deed. The second line does not help it, but the third runs "north on East street." That, it will be remembered, is the east line of the lot, and the utmost the defendant can claim is, that his lot is thus located between East and Drumm streets, with East street for its eastern boundary. But by reference to the map it will be seen that not only the lot as thus located, but the whole of East street, also, is within the red line of 1851, and that the lot by no possibility can be a part of the demanded premises. Really, East street only extended to Jackson street, and hence the East line is an impossible call in the deed.

By the Court, RHODES, C. J.:

The Court did not err in admitting in evidence the diagram marked "A," offered by the plaintiffs. It was offered as a diagram, and was admissible as such, in connection with,

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and explanatory of, the testimony of the City and County Surveyor, and for the purpose of showing what the plaintiffs claimed to be the true position of the red line—the water front.

The Court erred in admitting in evidence the map marked Exhibit "B," and purporting to be made by the Harbor Commissioners. It was not competent evidence of the true location of the red line, as it was not shown that it had been approved or adopted by the Harbor Commissioners.

The Court erred in refusing to admit in evidence the map made by the State Land Commissioners. The Board, in the discharge of its duties, was authorized to find the red line, but it was not authorized to change the line, or to establish a new line in the place of that which was established by the Act of March 26th, 1851. The map was competent evidence, tending to prove the position of that line, but was not conclusive evidence on that point.

The deeds of the State Land Commissioners, offered in evidence by the defendants, were not admissible for the purpose of showing the position of the red line; but they would have been admissible for the purpose of showing title in such of the defendants as claimed through those deeds, had the Court admitted evidence tending to show—as do the maps made by the State Land Commissioners—that the red line was to the east of the lots mentioned in the deeds.

The question of the location of the red line is a question of fact. The line was established and fixed by the Act of 1851. The acts of the surveyors and of the different Boards in running the line, and making maps to show the line, do not fix the line, but those acts tend to show the position of the line as established by the Act of 1851. Those officials were authorized to find, but not to fix the line, and if in running the line on the ground or in platting it, they have varied from the calls of the Act, their proceedings did not have the effect to change the line.

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A number of points in the red line were mentioned in the Act, and many of them were described with the same certainty as the initial point. By drawing a line through those points which are near the premises in controversy, the position of the red line, between Jackson and Pacific streets, can be ascertained. It was unnecessary for the surveyors, who testified in the case, to have commenced their surveys at the initial point of the red line.

If the red line, as laid down by the Land Commissioners, was the red line as established by the Act of 1851, then any adoption or recognition thereof by the State, through the Legislature, or any of her officials, adds nothing to the title of the defendants, who claim under the deeds of the Land Commissioners. If, on the other hand, the line laid down by the Land Commissioners varies from the true water front line established by the Act of 1851, the alleged adoption and recognition by the State, of the acts of the Land Commissioners in that respect will not aid the defendants, unless it be shown that the Legislature and the other officials, while adopting and recognizing the acts of the Land Commissioners, knew that they had changed the red line. That fact is not shown. The *estoppel in pais* asserted by the defendants against the State fails for the same reasons.

The State is neither bound nor estopped by the proceedings of the Land Commissioners in selling lots outside of the water front — if they sold any east of the red line — for they were as destitute of authority to sell lands beyond that line as beyond the State lines. The Court, therefore, did not err in excluding the reports of the Land Commissioners, and other legislative documents, and the Controller's receipt for the purchase money.

The Land Commissioners had no power to convey lands lying outside of the red line. By providing that the space adjacent to and outside of that line should be kept open for the benefit of commerce, the Legislature prohibited the sale

of lands lying to the east of that line, and along the eastern water front of the city. The deeds of the Land Commissioners, to the persons under whom certain of the defendants claim title, so far as they include lands—if any—lying east of the red line, are void.

The title derived from the Land Commissioners' deeds may be assailed in an action of ejectment, by showing that the land purporting to be conveyed by the deeds, is beyond the limits of the lands which they were authorized to sell and convey; in other words, by showing that the Commissioners had no authority to sell and convey the lands described in the deeds. The description of the lots mentioned in the Land Commissioners' deeds is not given in the transcript, but we understand that the deeds purport to convey beach and water lots. Beach and water lots, at the eastern front of the city, are situated west of the red line.

If it be found that the lands in controversy are east of the red line, the defendants cannot rely on the Land Commissioners' deeds in proof of title, because the Land Commissioners had no power to sell or convey such lands; and the defendants cannot maintain their defense to the action, unless they can show adverse possession as against the State. The lands lying to the east of the red line were covered by the waters of the bay; the State held the title for the benefit of commerce and navigation, and had provided by law, that for that purpose, they should be kept open and free from obstructions. The question whether a private person can acquire a title by adverse possession, to lands held in that manner and for that purpose, will not be discussed or decided at this time. But if adverse possession of such lands can be maintained, the verdict against the defendants, other than Blanc, will not be disturbed as contrary to the evidence relative to that issue, for the evidence is manifestly conflicting.

The defendant Blanc claims that the premises for which

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he defends are within the red line, and that, whether they are within or without that line, he has shown an adverse possession for more than ten years. He does not claim title under the State. All the deeds through which he claims, down to and including the Sheriff's deed to McGlensy, describe the property as bounded on the south by Jackson street, and on the east by East street. If East street did not extend north of the north line of Jackson street, or if it was not so understood and recognized, East street is a false call, and must be rejected; and in that event the description of the premises would fit equally well four different parcels of land, and the deeds would be void for uncertainty. Should East street not be rejected as a false description, then the premises described in the deed would not extend to the east of the red line, and would not include any portion of the premises in controversy. The defendant Blanc, therefore, does not connect himself, by means of the deeds above mentioned, with the possession of the respective grantors named in the deeds.

Judgment reversed, and cause remanded for a new trial

SPRAGUE, J., concurring:

I concur in the judgment.

[No. 2,122.]

WILLIAM GREGORY ET AL v. JAMES NELSON ET AL.

APPEAL.—An appeal from a judgment and subsequent order of the Court denying appellants' motion to modify the same, is only an appeal from the judgment.

WHAT JUDGMENT SHOULD BE.—A judgment should be a simple sentence of the law upon the ultimate facts admitted by the pleadings or found by the Court.

WHAT JUDGMENT SHOULD NOT CONTAIN.—A judgment should not declare the existence of facts which are not within the issues made or tendered

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by the pleadings, nor should it declare the judgment of the Court upon such facts.

JUDGMENT ON FACTS NOT IN ISSUE.—If the judgment decrees the existence of facts not within any issues made or tendered by the pleadings, and then pronounces the judgment of the Courts upon such facts, such part of the judgment is superfluous and void.

JUDGMENT MUST ACCORD WITH FACTS ADMITTED.—Any finding or judgment of the Court, repugnant to facts admitted by the pleadings, is erroneous.

JUDGMENT ON PLEADINGS WHEN INJUNCTION IS ASKED.—If, in an action to enjoin the destruction of a ditch, the complaint avers the ownership by plaintiffs of the ditch for the conveyance of water, and that the ground over which it passes was vacant and unoccupied when it was dug, and that plaintiffs have used it for years for mining purposes, and the answer does not deny these allegations; nor set up any prior right of the defendants to the ground over which it passes, nor any claim or right of defendants to destroy it by reason of any custom, the Court should not, by its judgment, limit or restrain the right of plaintiffs in the use of its ditch, but on the pleadings should enjoin the defendants from destroying or interfering with the same, regardless of the testimony.

EVIDENCE MUST BE PERTINENT TO THE ISSUES.—The appellate Court will not presume that the Court below permitted evidence to be introduced on the trial to rebut facts admitted by the answer, nor will it presume that any evidence was received except such as was pertinent to the issues.

JUDGMENT IN ACTION TO ENJOIN WASHING AWAY DITCH.—If a party owns a ditch and the right of way for the same to conduct water for mining purposes, and has acquired such right by priority of location, the Court should not, in an action to enjoin another party from washing away the ground over which it passes, limit the plaintiff's right, by allowing the defendant to wash away the ditch if he builds a flume or other aqueduct in place of the ditch, of sufficient capacity to carry the water, and gives bond to pay the damages sustained thereby.

FACTS FOUND MAY BE PRESUMED FROM THE JUDGMENT.—If, in an action to enjoin a defendant from washing away a ditch, the answer admits the plaintiff's ownership of the ditch and right of way, but denies that the defendant is about to wash it away, it will be presumed that the Court found, as a fact, that the defendant was about to wash the ditch away if, in its judgment, it allows him to wash it away upon the condition of previously building an aqueduct to convey the water in place of the ditch.

POWER OF COURT OF EQUITY.—If a plaintiff owns a ditch and right of way for same, by priority of location, a court of equity has no power, by its judgment, to allow the same to be washed away for mining purposes, provided an aqueduct of sufficient capacity to carry the water is previously built in its place.

Argument for Appellants.

COURT OF EQUITY SHOULD NOT LICENSE TRESPASS.—A Court of equity should not license a trespass upon ditch property in the mining regions, nor compel the owner to exchange the same for another means of conveyance for the water flowing therein.

APPEAL from the District Court of the Second Judicial District, County of Butte.

There were no findings of fact or conclusions of law in the Court below, except such as were included in the judgment.

The other facts are stated in the opinion.

W. C. Belcher, for Appellants.

This judgment only requires the defendants to keep up the flume or pipe until the plaintiffs have worked out their claims. As we understand the law, if the plaintiffs, owning a reservoir for the collection of water, had acquired, by location or adverse possession, a right of way for a ditch to convey the water from the reservoir to some place of use the Court has no authority or power to limit the time, or restrict the method of use. They may, when the mining claims on which they now use it are worked out, or before, extend this ditch still further to other mining ground of their own or of others, or may use the water flowing through it for irrigation, or any other useful purpose. Their right of way for the ditch, and the right of use of the ditch, and the water, are absolute; and Courts should protect them in the enjoyment of their rights. When the Court had determined that the plaintiffs were the absolute owners of the ditch, and that the defendants were about to destroy it, the conclusion of law necessarily followed that they were entitled to the judgment of the Court, making the injunction perpetual. The duty of Courts of equity, as of Courts of law, is to ascertain and protect the rights of parties; and it never was competent for any Court to compel the owner of any specific property, real or personal, to give it up for the

Argument for Respondents.

convenience of another, and to receive something else in its stead.

Haymond & Stratton, for Respondents.

The findings of fact are one thing, and the judgment of a Court another, and very different thing. The former contain the results of a judicial examination or inquiry into some matter of fact (Pr. Act, Sec. 180), whilst the latter embodies the sentence of the law on facts found (Pr. Act, Sec. 144). The language used by the learned Judge below, in this case, is not the language in which facts are stated, but that in which rights are fixed. It is "adjudged and decreed" (not found as facts), that plaintiffs and defendants have certain right in the premises. To treat the matters contained in this judgment as findings of fact would be to do violence to the language used; for such, evidently, was not the purpose of the Court below, or it would have used expressions more in accord with that purpose. The district is a mineral one, and the value of property of all kinds there situated depends solely upon a development of its mineral resources. To encourage that development has always been the policy of the Government, and the end of the law is the preservation of rights acquired under that policy. Whilst the miner's right to mine in a given spot, and the ditch owner's right of way is treated as real estate, yet neither has any fee in the soil, and use measures the extent of the rights of either. Both may use the same piece of land at the same time, each for his own purpose, and whilst they do so, neither can complain of the other. (*O'Keiffe v. Cunningham*, 9 Cal. 591.) The right of the former is to mine the land, and extract the precious metals from the soil; the right of the latter, to have his water flow uninterrupted; and whenever a Court enforces either right, it

seems plain that the complaining party can demand nothing further. (*Clark v. Willett*, 35 Cal. 548.)

By the Court, SPRAGUE, J.:

This is an appeal from the judgment and subsequent order of the court denying appellant's motion to modify the same. Substantially, it is but an appeal from the judgment upon the judgment roll alone.

The practice adopted by the learned Judge of the District Court before whom the case was tried cannot be commended. What is termed the judgment in the case, instead of being a simple sentence of the law upon the material ultimate facts, admitted by the pleadings or found by the court, proceeds to adjudge and decree the existence of ultimate facts, some of which are not within the issues made or tendered by the pleadings, and then declares the judgment of the court upon the facts previously adjudged to exist.

The action was for the purpose of obtaining a judgment and decree perpetually restraining defendants from a destruction of plaintiff's water ditch, and from the further prosecution of mining operations, in which they were engaged in such manner as to endanger the stability and security of plaintiff's said ditch.

"The complaint is verified, and alleges that plaintiffs are the owners of certain mining claims at Cherokee Flat, and also of a certain reservoir and water privileges at or near said point, called and known as the 'Tom Jones Reservoir,' and of a certain ditch leading from said reservoir to said claims and certain other mining claims at Cherokee Flat, to conduct the water of said reservoir to said claims for mining purposes." This allegation is not denied by the answer.

The complaint further alleges that said ditch and ground in which the same is constructed was located for said ditch in 1856, and the ditch fully constructed and completed in

the Fall of the same year. This allegation is not denied by the answer.

The complaint also alleges that some of the plaintiffs were the original locators of said ditch, and that all of them now own the same by good and sufficient conveyances from the first locators, and are and have been in the actual and peaceable possession of the same since June 3d, 1862, and are and have been using the same for the purposes aforesaid. This allegation is not denied by the answer.

It is further alleged that at the time said ditch was located, in 1856, and when said ditch was constructed, the ground over which it passed was vacant and unlocated, and that plaintiffs' rights in the premises are prior and paramount to any that defendants have or claim to have in the ground on the line of said ditch. This allegation is not traversed so as to put the material facts therein alleged in issue as between plaintiffs and defendants.

These averments, not denied by defendants, and hence, for the purposes of the action, admitted by them, established the plaintiffs' rights in the premises.

The subsequent averments of the complaint, as to the acts and operations, intentions and threats, of defendants, as to what they had already done and were about to do tending to endanger the safety and stability of plaintiffs' ditch, and its ultimate destruction by defendants, to the irreparable injury and damage of plaintiffs, were substantially denied by the answer.

The answer does not set up any prior right in defendants to the ground over which plaintiffs' ditch was constructed, or any part thereof; neither does it set up any claim or right, derived from the customs or usages of the mining district or otherwise, to prosecute their mining operations in such manner as to endanger the safety or security of plaintiffs' ditch, destroy the same at any point, or in any manner interfere with the same against the wishes of plaintiffs. Nor does

the answer set up any claim or right of defendants to any specified mining ground, or describe any mining claims whatever as belonging to defendants.

What by respondents is termed the judgment of the Court upon the issues thus made and tendered by the pleadings, proceed first to adjudge and decree "that the defendants have title and right of possession to the mining land in action, as defined in defendants' answer." Whether this be regarded as the finding of an ultimate fact, conclusion of law or judgment, it is entirely outside of any issues made or tendered by the pleadings; hence, as a finding of fact, conclusion of law, or judgment of the Court upon the subject matter embraced therein, is superfluous and nugatory. (*Burnett v. Stearns*, 83 Cal. 473, 474.)

The judgment then proceeds: "It is further adjudged and decreed that plaintiffs have a right of way for the purpose of conveying water across a portion of said mining ground from the line of defendants' claim where defendants' ditch enters upon it to the point of departure of plaintiffs' ditch from the line of defendants' claim, and that the same has been acquired from and by adverse possession for more than five years last past prior to the bringing of this action, and that the ditch, the right of way for which was thus acquired from adverse possession, was of the capacity of one hundred and fifty inches of water."

Neither the complaint, answer, nor any other portion of the record before us defines or in any manner describes or indicates any specific mining ground or claims of defendants; hence that portion of the judgment, conclusion of law, or finding last quoted, for want of certainty and definiteness is utterly impotent as the assertion or protection of a right of way for plaintiffs' ditch to any extent. The allegations of the complaint in relation to the acts performed and contemplated by defendants, alleged to be injurious and prospectively destructive of plaintiffs' rights in their ditch, and

that defendants have entered into a conspiracy to wash down and away so much of plaintiffs' ditch as is on the ground known as the Welsh Boys' claims; that in pursuance to said conspiracy defendants had already washed off ground abreast and along the line of plaintiffs' ditch for the distance of about one hundred feet to the depth of from twenty to twenty-five feet, and for the space of about one hundred feet aforesaid had washed down the ground to within sixteen feet of said ditch, and threaten and declare that they will continue to prosecute their operations on and through the ground over which plaintiffs' said ditch is located, and wash down and away said ditch to the extent of about four hundred and fifty feet; that defendants were then mining towards and near said ditch, and in conducting their operations use a large head of water, and run the same over the surface of the ground along the line of said ditch, thereby softening the ground and rendering it liable to break, cave, and to pass plaintiffs' ditch; that defendants declare that they will continue to run water on and over said grounds there known as the Welsh Boys' claims; that if defendants wash off the grounds upon which the plaintiffs' said ditch is located within the limits of the said Welsh Boys' claims, it would be a great and irreparable injury to plaintiffs, etc. These allegations are simply denied by the answer. Defendants, by their answer, do not claim to own or to have any right to work the Welsh Boys' claims, or any other specified ground or claims.

It is adjudged that the plaintiffs have a right of way for their ditch within some indefinite, undefined, and intangible limits, and that such right was acquired from and by an adverse possession of more than five years next preceding the commencement of this suit. The undenied allegations of the complaint are that plaintiffs' ditch was located and constructed in the year 1856; that some of the plaintiffs were the original locators of said ditch, and that all of them

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now own the same by good and sufficient conveyances from the first locators as aforesaid, and are and have been in the actual and peaceable possession of the same since June 3d, 1862 (the suit was commenced December 12th, 1867); that at the time said ditch was located and constructed, in 1856, the ground over which it passed was vacant and unlocated, and that plaintiffs' rights in the premises are prior and paramount to any that defendants or any of them have or claim to have in the ground on the line of the said ditch. For want of denial these averments became admitted facts in the case, and any finding or judgment in the case repugnant to these facts is erroneous.

Whether plaintiffs' rights in the premises were acquired by prior location, grant, or prescription — if they are adjudged to exist — the law protects them in the full enjoyment thereof.

The Court next proceeds to further adjudge and decree "that plaintiffs have no title, or right of possession, or right of working the mining grounds described, save and except the right of way to convey the said one hundred and fifty inches of water across a portion of the mining ground of defendants to claims of plaintiffs, until the claims of plaintiffs shall have been fully worked out, according to mining usages."

In view of the pleadings it is difficult to comprehend the pertinency or utility of the last quoted portion of the judgment; no issue is made or tendered by the pleadings as to the right of plaintiffs to work the mining grounds over which their ditch is located and constructed, and no "mining ground of defendants" is specified or described either in the complaint or answer. Again: the ownership of the ditch by plaintiffs and their right of way for the same from the Tom Jones Reservoir over and across the ground known as the Welsh Boys' claims to claims of plaintiffs "and certain other mining claims at Cherokee Flat" being established by the pleadings, we look in vain for any issue made or tendered by the pleadings to justify or authorize a judg-

ment limiting or restricting this right of property in the ditch, and the right of way for the same to such time as "the claims of plaintiffs shall have been worked out according to mining usages."

This Court cannot presume that the trial Court required or permitted evidence to be introduced on the trial for the purpose of establishing or rebutting allegations of the complaint not denied by the answer; nor can it be presumed that any evidence was received by the trial Court, except such as was pertinent to the issues made or tendered by the pleadings, and evidence tending to rebut such legitimate evidence.

The judgment under consideration, after having adjudged and decreed as hereinbefore recited, proceeds, upon the basis of such adjudication, to modify an absolute and unconditional order theretofore granted, restraining defendants "from washing down or damaging in any manner the ditch of plaintiffs called the Tom Jones Ditch, at any point within or without the ground known as Cherokee Flat, * * * as the Welsh claims, and also from washing away the ground upon which said ditch is located, and from washing or working in any manner that will be injurious to said ditch," as follows: "It is further adjudged and decreed that the injunction heretofore issued in this cause be hereby [so] modified as to permit the defendants to mine the ground described in defendants' answer, fully and freely, and as of right, upon the erection of a flume of wood or metal pipe as shall be sufficient to conduct and convey one hundred and fifty inches of water across said grounds, for the use and benefit of plaintiffs, * * * and that said flume of wood or metal pipe shall be so erected or constructed as to delay the flow of the water of plaintiffs for the least practicable or reasonable time; * * * that prior to the washing and mining away of said ditch of plaintiffs, that defendant shall file in this Court a bond in the penal sum of five hundred dollars, pay-

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able to plaintiffs, to be approved by the County Clerk, conditioned to pay all damages which may occur to plaintiffs by the failure of defendants to keep said flume or metal pipe in repair, until the claims of plaintiffs shall be worked out according to the usage of miners, * * * and that each party — plaintiffs and defendants — pay each their own costs in this action."

The allegations of the complaint unquestionably were entirely sufficient to authorize an injunction to the full extent prayed for, and as temporarily granted by the Judge. These allegations, so far as they relate to the rights of property of plaintiffs in the ditch and reservoir, with the right of way for their ditch, as we have seen, were not denied by the answer. The subsequent allegations as to acts of defendants already performed and designed, and threatened by them to be continued, and the consequences of such acts to the property and rights of plaintiffs, if continued, are simply denied by the answer. The answer does not set up any substantive matter of defense, or claim any legal or equitable right derived from the customs or usages of the mining district or otherwise, to wash away or in any manner interfere with the plaintiffs' ditch. There is nothing in the pleadings which can serve as a legitimate foundation for, or authorize that portion of, the judgment which is styled a modification of the injunction theretofore issued. It is but a license to the defendants, upon the condition precedent of their filing their bond in the penal sum of five hundred dollars, payable to plaintiffs, to enter upon and destroy the plaintiffs' property.

If the acts and purposes of defendants, with the resulting consequences to plaintiffs' ditch, as alleged in the complaint, were established by the evidence on the trial, most clearly the Court should, by its judgment, have made its preliminary injunction perpetual. On the contrary, if the evidence failed to establish that plaintiffs' rights of property in their ditch were jeopardized by the contemplated operations of

defendants, the injunction should have been dissolved and bill dismissed.

In support of the judgment modifying the previous injunction, it must be presumed that the evidence fully established the allegations of the complaint as to the designs of defendants in reference to plaintiffs' ditch, for the judgment authorizes the precise thing which plaintiffs alleged defendants designed to do, and which, by their answer, they denied—upon condition that they would give their bond in the sum of five hundred dollars, conditioned that they would substitute for a limited period, for the use of plaintiffs, a flume of wood or metal pipe in place of plaintiffs' ditch, and pay such damages as plaintiffs might suffer by reason of defendants' failure to keep such flume or metal pipe in repair. But this modification or license to defendants to invade the private property and admitted vested rights of plaintiffs without their consent, is entirely beyond and outside of the subject matter submitted to the Court by the pleadings, and for this reason alone the judgment should be reversed.

But even had the defendants, after having admitted the property rights of plaintiffs in their ditch, as alleged in their complaint, admitted their intention to wash away the ground upon which it was constructed, as alleged by plaintiffs, and alleged in justification of such purpose their design to substitute, in place of so much of plaintiffs' ditch as they should wash away, a flume or metal pipe for conducting the water for the use of plaintiffs, and that such flume or pipe would answer plaintiffs' purposes as well as the ditch, with a prayer that the Court, by its judgment and decree, authorize them to consummate their designs, upon their filing a bond, payable to plaintiffs, conditioned to keep such flume or metal pipe in repair until plaintiffs' claim should be worked out, I know of no principle of law or power in a Court of equity

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to justify or authorize such an invasion of the property rights of one private party to serve the wishes, convenience, or necessities of another private party. Such a principle, if once adopted by judicial tribunals, upon grounds of necessity, in view of the peculiar relations and character of private property rights of miners on the public domain, would readily be invoked as applicable to other property rights, and its practicable application would result in a system of judicial condemnation of the property of one citizen to answer an assumed paramount necessity or convenience of another citizen.

It is the duty of Courts to protect a party in the enjoyment of his private property, not to license a trespass upon such property, or to compel the owner to exchange the same for other property to answer private purposes or necessities.

Judgment reversed, with costs, and cause remanded, with directions to the Court below to render judgment enjoining defendants substantially in the terms of the preliminary injunction, with costs.

[No. 2,298.]

ZACHARIAH MONTGOMERY, AND ELLEN MONTGOMERY, HIS WIFE, v. ROBERT O. STURDIVANT.

DEEDS WITHOUT WORDS OF INHERITANCE.—A deed, which in its granting part, simply grants, bargains, and sells to the party of the second part, and contains no words of inheritance, under our statute, conveys a fee simple title; but the title thus conveyed may be limited, in the *habendum* clause, to an estate for life.

IDEM.—Such limitation in the *habendum* clause of a deed is not repugnant to the granting clause.

HABENDUM CLAUSE IN A DEED.—The office of the *habendum* clause in a deed is to limit and define the estate which the grantee is to have in the property granted.

CONVEYANCE OF LIFE ESTATE WITH REMAINDER TO HEIRS.—A conveyance to husband and wife, for their joint lives, and to the survivor during

Argument for Appellant.

the life of the survivor, with remainder to the issue and heirs of their two bodies, and the heirs of such issue forever, vests a life estate in the grantees, and a full estate in their children.

APPEAL from the District Court of the Fifteenth Judicial District, City and County of San Francisco.

The court below gave judgment for the plaintiff, directing the defendant to perform specifically the contract mentioned in the opinion. The defendant appealed.

The other facts are stated in the opinion.

Williams & Thornton, for Appellant.

At common law the word heirs, or words of a similar import, are necessary to the creation of a fee. (4 Kent, 6.) Our statute dispenses with the necessity of such terms to create a fee. In applying, then, this statute to a deed which omits the term *heirs*, and all other words of inheritance, it is necessary to inquire whether or not the intent to pass a less estate than a fee appears by *express terms* in the instrument itself. If such intent appears, the act has no application to the deed. The statute does not provide that this express intent must appear in one part or another of the deed. It matters not whether it appears in the premises or the *habendum*, so that it appears on the face of the deed. But it is said that the clause in the *habendum* is repugnant to the premises. We do not see in what the repugnancy consists. The grant is to Montgomery and wife, without stating the quantity of the estate. It may be for life, for a term of years, or in fee. It is the very object of the *habendum* "to determine the interest granted, or to lessen, enlarge, explain, or qualify the premises. But it cannot perform the office of divesting the estate already vested by the deed; for it is void if it be repugnant to the estate granted. It has degenerated into a mere useless form; and the premises now contain the specification of the estate granted, and the deed becomes effectual without any *habendum*. If, however, the

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premises should be merely descriptive, and no estate be mentioned, then the *habendum* becomes efficient to declare the intention; and it will rebut any implication arising from the silence of the premises." (4 Kent, 519, 520; vide, also, *Mitchell v. Wilson*, 3 Cranch C. C. 242; *Jackson v. Ireland*, 3 Wend. 101.)

The language, "the issue and heirs of their two bodies," etc., is clearly intended as *descriptio personæ*; for the deed provides that in case of the death of one of them, the share of the one so dying shall go to his child, if he leaves any. (Wash. Real. Prop. 559; Reeves' Dom. Rel. 619.) The word "heirs" may sometimes mean the same as child or children, which are words of purchase. The word "issue," in a deed, is always taken as a word of purchase, and when so used is synonymous and coextensive with the term descendants, and includes all persons who answer that description. (4 Kent, 240; Reeves' Dom. Rel. 609 [465]; *Cooper v. Collis*, 4 T. R. 299.) This interpretation comports with our statute. (Laws of 1855, Sec. 5, p. 171.) In *Norris v. Hensley*, 27 Cal. 445, it is said: "The first thing, therefore, to be ascertained is, what the object of the testator is; the next, whether it is such as the rules of law and equity admit." In *Perrin v. Blake*, 4 Burr. 2,579, Lord MANSFIELD said, the rule (in Shelley's Case) is not a general proposition, subject to no control, where the intention is on the other side, and where the objections may be answered; and he agreed with Justices WILMOT and ASTON, that the intention is to govern, and that Shelley's Case does not constitute a decisive uncontrollable rule. (1 Preston on Estates, 275; *Tanner v. Livingston*, 12 Wend. 90.) It is a general principle that a person not a party can take nothing by the deed; but remainders are exceptions to the rule. This is admitted in the case of *Eldridge v. See Yup Co.*, 17 Cal. 52, 53.

S. F. & L. Reynolds, for Respondent.

The most important part of a deed is the premises. A deed may be good with the premises alone, and without any *habendum* clause. The premises in a deed embraces the date, the parties, names and description, the recitals, consideration, the grant, and the thing granted and conveyed. (1 Wood's Conveyancing, 315; 2 Washb. Real Prop. 612, Secs. 6, 7; 372, Secs. 60, 61; 4 Kent, 468, [519]; 2 Blackstone's Com. 298.)

A deed is perfectly good without a *habendum* clause. A grant cannot be included in the *habendum*. If there is no grant, nor thing granted, before the *habendum*, nothing passes. If, therefore, anything is embraced in the *habendum* which is not granted, it does not pass. (1 Wood's Con. 324; 2 Washb. 374.) By the statute of this State, the word "heirs" is not necessary to create an inheritance.

When an estate in fee or of inheritance passes by the premises, and the *habendum* clause is repugnant to the grant, or by it the estate is limited in the premises or granting part of the deed, then the *habendum* must yield to the grant, and is void. (2 Blackstone, 298; 2 Washb. 612, 613, 642; 1 Wood's Con. 314.) The words of the *habendum* are mere words of limitation, as they are called, in distinction from the words in the grant, which are words of purchase and conveyance. (2 Washb. 373.) It is a principle well settled, that a limitation of the freehold to one, whether by deed or will, followed by a limitation in the same conveyance to the heirs, or heirs of the body of the grantee, will vest the inheritance in the grantee. This is the general rule, as settled in the case known as "Shelley's Case." It is said that the word "issue" is a word of purchase. That may be so in certain or limited cases, when the remainder is to the issue "then living," or any other words annexed, showing the intent to confine it to certain persons, as a par-

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ticular designation of persons, and not as descendants or to an indefinite issue, or what is called to an indefinite failure of issue, then it may be a word of purchase. Whatever difference of opinion and views may have arisen in certain cases subsequent to Shelley's Case, it will be found that that difference arose rather from the application to the particular case considered, and the facts of such case, than upon the property of the rule, as a rule of property. In all those cases the rule, and its propriety as a rule of property and its application, were, with greater learning and ability, discussed in the case of *Perrin v. Blake*, 4 Burr. 2,579, than in any other case. See, also, *Coulson v. Coulson*, 2 Atk. 246; 2 Strange, 1,123; and *Haynes v. Lorde*, 2 Wm. Blackstone, 698.) The rule in Shelley's Case would apply if the limitation is accompanied by a declaration to the effect that the heirs shall take as purchasers, or is made to the heirs of the first taker and their heirs, or when the estate is to A. for life, and after his death to the heirs of his body, to share as tenants in common, or to be equally divided between them. (Hargrave's Law Tracts, 562-574; *Toller v. Atwood*, 15 Q. B. 929; 2 Wash. 272, Sec. 14; *Kingsland v. Rapleye*, 3 Edwards, 1.) In the last case, the words "lawful issue" were held to have as extensive a significance as heirs of the body. In Tennessee, in the case of *Polk v. Favis*, 9 Yerger, 209, the rule, with all its force, has been declared as a rule of property. It was declared by Judge Reeves to be a settled principle of the common law, and that whatever may have been the original policy of the rule, it was a rule of property not inconsistent with the genius of our institutions or with the liberal and commercial spirit of the age. It checked the disposition to lock up property and render it inalienable. (*Dore v. Featherstone*, 1 Barn. & Adol. 944; *Franklin v. Lay*, 6 Madd. 258; *Leigh v. Norbury*, 13 Ves. 339; *Doe v. Harvey*, 4 Barn. & Cress. 610; *Doe v. Cooper*, 1 East, 229.)

By the Court, TEMPLE, J.:

On the 12th day of March, 1864, Bridget M. Evoy, for an expressed consideration of one thousand dollars, conveyed to Z. Montgomery, and Ellen, his wife (the said Ellen being the daughter of the grantor), a tract of land. The premises of the deed contain no words of inheritance, but simply grant, bargain, convey, and confirm to parties of the second part a specific tract of land. The *habendum* is as follows:

“To have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said parties of the second part, and to the longest liver of them, for and during their natural lives and the natural life of such longest liver, remainder thereafter to the issue and heirs of their two bodies, begotten and to be begotten, and the heirs of such issue forever, to and for the use and benefit of such longest liver of them, for and during the life of such longest liver, and thereafter to and for the use and benefit of the said issue and heirs of their two bodies, begotten and to be begotten, in equal shares, as tenants in common, the issue, if any, of any child of their bodies who may die before the death of the longest liver of said parties of the second part, to take the share and portion of such deceased child.”

In November, 1869, Montgomery and wife made a valid contract, by which they agreed to sell to defendant a portion of this land. In pursuance of this contract they afterwards tendered a deed to the defendant, and demanded a performance on his part, which was refused on the ground that plaintiffs were not the owners of the land in fee simple, the deed from Mrs. Evoy conveying to them a life estate only. This action is brought to compel defendant to perform the contract, and is resisted on the ground above stated.

It is first contended by plaintiffs that under our statute the

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granting part of the deed conveyed to them an estate in fee simple, and that the limitation in the *habendum* is repugnant to the grant, and therefore void. The section of the statute referred to is as follows:

“Section 2. The term heirs, or other words of inheritance, shall not be necessary to create or convey an estate in fee simple; and every conveyance of any real estate hereafter executed shall pass all the estate of the grantor, unless the intent to pass a less estate shall appear by express terms or be necessarily implied in the terms of the grant.”

If the *habendum* were entirely omitted, the deed in question would undoubtedly have conveyed an estate in fee simple; and it is, therefore, contended that the language of the *habendum*, which attempts to limit the estate granted to a life estate, is repugnant. Independently of the statute, the common law rule was that a deed like this, without the *habendum*, would convey a life estate only. The estate, though different, was just as definite as that under the rule of the statute. If the argument of counsel were correct, the result would have been that the grant could not have been enlarged by the *habendum*. Yet we all know that where the formal parts of a deed are all used this was the customary mode of conveying, and is still often followed.

The rule of common law was only intended to apply to conveyances in which the extent of ownership of the grantee in the thing granted was not defined in the conveyance. The statute rule was merely intended to take the place of the common law rule. Neither was intended to override the expressed intention of the parties. The office of the *habendum* is to limit and define the estate which the grantee is to have in the property granted. It is not an essential part of a deed, but has generally been used, and in some States the form adopted in this case is in general use. No estate is limited in the granting part of the deed, but this is done in

the *habendum*. The Legislature did not intend to prohibit this form of conveyance, but merely to supply a rule of construction when the parties failed to define the estate conveyed. The word grant, in the last part of the section of the statute, has precisely the same meaning as the word conveyance in the preceding clause.

Giving full effect to the language of the *habendum* clause in this deed, it is a conveyance to the grantees for their joint lives, and to the survivor during the life of the survivor, with the remainder to the issue and heirs of their two bodies and the heirs of such issue forever.

It is contended by the defendant, and I think correctly, that this language clearly indicates an intention of limiting the interest of the grantees named in the deed to a life estate, and that the issue or children of the grantees named take by purchase and not by limitation; and this is rendered more evident from the fact that the deed goes further and uses apt words to vest an estate in fee simple in such issue, as though they had been the first takers. It is to them and their heirs, and in a subsequent clause provision is made that they shall take as tenants in common; and that in case of the death of one of them, during the life of the longer liver of the grantees named in the deed, the issue of such deceased child, if any, shall take the share of such deceased child. The conveyance is to the grantees and to the heirs and issues of their bodies. Had it stopped there, undoubtedly, by familiar rules of construction, it would have vested in Montgomery and wife an estate in fee tail general. The word issue, connected as it is with the word heirs, would not indicate a specific designation of certain individuals, but the phrase, heirs of their bodies, would clearly be a *nomen collectivum*, indicating a class of heirs who would take in perpetual succession. It would include all the posterity of the

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grantees. But the conveyance vests a new inheritance in the heirs of their bodies. They take an estate of inheritance generally. The remainder is to the heirs of the bodies of the grantees. When once vested in them, however, it is inheritable generally, and may go to those who are not descended from the first grantees. As a new descent commences from the issue of the first grantees, it is necessary that the estate shall vest in them, as the root of this new inheritance. (2 Wash. on Real Prop. 273; 4 Kent Com. 221, and cases there cited.)

This language clearly indicates an intention on the part of the grantor to limit a life estate in Montgomery and wife, and to vest a full estate in their children. Otherwise, by the terms of the conveyance, it would be an estate tail in the first grantees, and an estate in fee simple in their heirs. This, of course, could not be.

Judgment reversed, and cause remanded for further proceedings in accordance with this opinion.

[No. 2,566.]**JOHN McCULLOUGH v. J. B. CLARK.**

VERIFICATION OF ANSWER.—If the plaintiff goes to trial on the merits, without objection to the verification of an answer, he will not be allowed to raise the point in the appellate Court that it was not properly verified.

PROCEEDINGS SUPPLEMENTARY TO EXECUTION.—Proceedings supplementary to execution, by which a judgment debtor is required to appear before a Court or referee to answer concerning his property, are but a substitute for a creditor's bill at common law, and are purely judicial; and each party may call and examine witnesses.

ORDER ON PROCEEDINGS SUPPLEMENTARY TO EXECUTION AN ESTOPPEL.—If a judgment debtor is examined concerning his property before a Court or referee, on proceedings supplementary to execution, the order made by the tribunal before which the examination takes place, concerning the subject matter, is binding, and estops the parties from again litigating the same matter in another form of action.

IDEM — SUCH ESTOPPEL PROTECTS THE SHERIFF.—If a Court or referee, on proceedings supplementary to execution, orders property of the judgment

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debtor to be delivered up to the Sheriff to be sold on the execution, the judgment creditor is estopped by the order from maintaining an action against the Sheriff for selling the property.

DEED — APPEAL FROM SUCH ORDER.— If a party, in proceedings supplementary to execution, is dissatisfied with an order made by the Court or referee, his only remedy is by appeal.

APPEAL.— An appeal may be taken from an order made by a Court or referee on proceedings supplementary to execution.

SPECIFICATION OF ERROR IN STATEMENT.— When a motion is made for a new trial on the ground that the evidence is insufficient to justify the verdict, a specification of such insufficiency of the evidence is good if it direct the attention of the adverse party to the particular point on which it is claimed the evidence is insufficient.

APPEAL from the District Court of the Tenth Judicial District, Sutter County.

March 20th, 1868, Alfred Briggs recovered a judgment in the District Court of the Sixth District, Sacramento County, for three thousand six hundred and twenty-eight dollars and twelve cents. On the 15th of May, 1868, the Judge of said Court made an order for said McCullough and Knobland to appear before a referee to answer concerning their property. The Sheriff, the defendant here, advertised the policy for sale, and this action was commenced to obtain judgment for a return of the policy, or, if return could not be had, for its value. The defendant, in his answer, set up the proceedings supplementary to execution as a bar to the action, and on the trial they were introduced as testimony. The Court below gave judgment for the plaintiff. The defendant moved for a new trial, and in his statement inserted all the said proceedings. His specification of grounds on which he would rely for a new trial, so far as the insufficiency of the evidence was concerned, was as follows:

Because the evidence of plaintiff and defendant showed that there had been no wrongful seizure or detention of the policy by defendant; that the policy in question had been delivered by plaintiff to the defendant pursuant to a judg-

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ment of the Sixth Judicial District Court, which judgment was afterwards affirmed by the Supreme Court. Because the documentary evidence in this case established defendant's plea in bar, and showed that, first, the referee, second, the District Court of the Sixth Judicial District, and, third, the Supreme Court, had each determined the policy in question not to be exempt from execution under the law of March 28th, 1868, entitled "An Act to exempt certain property named therein from execution," or any other law.

The Court below denied a new trial, and the defendant appealed.

The other facts are stated in the opinion of the Court, and in 36 Cal., referred to in the opinion.

George Cadwalader and J. G. Eastman, for Appellant.

Defendant's plea in bar was fully sustained by the evidence, and should have been allowed. (*Ex Parte McCullough*, 35 Cal. 97; *McCullough v. Briggs*, 36 Cal. 542.) This last case was a judgment upon the merits, and a final determination that the policy was not exempt from execution. The judgment of the Court below entirely ignores that section of our Practice Act providing for proceedings "supplementary to execution." According to its theory, our proceedings before the referee, District Court, and this tribunal were judicial farces. Besides *Ex Parte McCullough* and *Briggs v. McCullough*, there was for the information of the Court below the case of *Adams v. Hackett*, 7 Cal. 201, declaring:

"In reference to the chapter prescribing the mode of proceedings supplementary to execution, it seems clear that those proceedings were intended as a substitute for what was called a creditor's bill. This is so stated by the Practice Commissioners, in their original note to this chapter in the New York Code. The design was, in the language of

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those Commissioners, to furnish a cheap and easier method. The different sections of the statute, when taken together, form a connected and harmonious whole, and when fairly and literally carried out, afford a cheaper and easier method than the former one by creditor's bill. * * * It would seem clear that so soon as the proceedings supplementary to execution were instituted before the District Court, that Court obtained jurisdiction over the case, and had authority to proceed and apply the property of the judgment debtors to the satisfaction of the judgments of the present defendants."

Borland v. Thornton, 12 Cal. 440, gives the same effect to the order of a referee as if made by a Court; and *Ex Parte Rowe*, 7 Cal. 175, and *Ware v. Robinson*, 9 Cal. 111, establishes the right to a civil appeal from a contempt order. Both the orders were after final judgment, and the last affirmed the former — in fact, embodied it. Both were appealed from and affirmed on the merits of the controversy.

S. J. Stabler and Van Clief & McCann, for Respondent.

The alleged former adjudications are not such as to estop the plaintiff from showing, in this action, that his policy of insurance was exempt from execution, for the following reasons:

The proceeding, supplementary to execution, had before the referee, was not an action or proceeding in which the orders or decisions may be regarded as *res adjudicata*. (*Boggs v. Clark*, 37 Cal. 237; *Simpson v. Hart*, 14 Johns. 73; *Van Rensselaer v. Sheriff of Albany*, 1 Cow. 512.) The question as to which plaintiff is alleged to be concluded arose and was decided, if at all, collaterally to the main issues in the former proceedings, and, therefore, the decision of it is not conclusive. (*Hanlow v. Fulton*, 20 Cal. 450; *Caperton v. Schmidt*, 26 Cal. 450; *Garwood v. Garwood*, 29 Cal. 521; 4 Conn. 276; 15 Cal. 145, 182.)


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By the Court, CROCKETT, J.:

If the answer of the defendant was not properly verified, the plaintiff should have moved in the Court below, either to strike out the answer, or for judgment as for want of an answer. But after going to trial on the merits, without objection to the verification, he will not be allowed to raise the point, for the first time, in this Court. He must be held to have waived all objection to the verification by his failure to except to it at the proper time. The principal question in the case is whether or not the adjudication of the District Court in the proceeding supplementary to execution, and of this Court on appeal from the order of the District Court, are *res adjudicata* in such form as to estop the plaintiff from maintaining this action. Under our code, proceedings supplementary to execution, by which a judgment debtor is required to appear before the Court or a referee to answer concerning his property, are but a substitute for a creditor's bill at common law. It is only a summary method of purging the debtor's conscience and compelling the disclosure of any property he may have which is subject to the execution. The proceeding was intended to be summary and effectual, and affords the widest scope for inquiry concerning the property and business affairs of the judgment debtor. It is true there are no formal issues framed; for in the very nature of the proceeding it would generally be impossible to frame specific issues in advance of the examination of the judgment debtor. The very object of the proceeding is to compel him to give information concerning his property; and until the disclosure is made there is nothing upon which an issue could be framed. Nevertheless, witnesses may be called and examined on either side; and after hearing the case the Court or referee is to decide what property, if any, the judgment debtor has which is subject to be applied to the satisfaction of the judgment, and to direct its application

accordingly. The proceeding is purely judicial, involving an examination into the facts upon sworn testimony, and the decision of questions of law arising on the facts proved. The judgment creditor and debtor are parties to the proceeding, and each is at liberty to call and examine witnesses in respect to any contested fact which may be brought in issue in the course of the proceeding. If the parties to such a proceeding, as between themselves and privies, are not estopped from again litigating the same matters in another form of action, the whole proceeding would be but a judicial farce, accomplishing no useful end. But it is too plain for argument that, after the Court or referee has finally decided that a specific parcel of property should be applied to the satisfaction of the judgment, the only remedy which the law affords to the judgment debtor is an appeal to this Court from the order of the District Court.

If he claims that the property was exempt from execution, and that the Court erred in ordering it to be applied to the satisfaction of the judgment, he has a plain and adequate remedy by appeal to this Court; but cannot again litigate the same matters in an independent action, as the plaintiff has attempted to do in this case. Before the referee and the District Court he distinctly made the point that the policy of insurance was exempt from execution and was not liable to be applied toward the satisfaction of the judgment. The referee decided against him and ordered him to deliver the policy to the Sheriff, who then had the execution, in order that he might apply the policy toward satisfying the judgment. Refusing to obey the order, the Court ordered him to comply with it, on pain of being committed for a contempt. Still refusing, and after being committed to prison, he sued out a writ of habeas corpus, on the ground that the policy was exempt from execution and that he was illegally committed for refusing to deliver it. On the hearing the writ was dismissed, and thereupon the plaintiff delivered the



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policy to the Sheriff as he had been ordered to do, but prosecuted an appeal to this Court from the order of the District Court. On the hearing of the appeal, the plaintiff insisted in this Court that the policy was exempt from execution; but on the facts, as presented on the appeal, we held otherwise, and that the referee and the District Court properly ordered it to be applied towards the satisfaction of the judgment. (86 Cal. 542.) After an adjudication by the referee, the District Court and this Court upon the precise point, that this particular policy was not exempt from execution and ought to be applied towards the satisfaction of Briggs' judgment, it is quite evident, that as between Briggs and himself, the plaintiff is estopped from again litigating the same question. And as between them the estoppel was mutual. If the Court had decided in that proceeding that the policy was exempt from execution, Briggs would have been concluded by the judgment, in like manner, and for the same reason, that the plaintiff is now concluded by it. Nor can the plaintiff assert any rights as against the Sheriff, the defendant in this action, to whom he delivered the policy, other than those he could have asserted against Briggs. The plaintiff being estopped to deny that the policy was properly ordered to be applied towards the satisfaction of the judgment, and the Sheriff having received it and now holding it, in obedience to that order, which has been affirmed by this Court, it is clear that the Sheriff, in seeking to apply the policy toward the payment of the judgment, is only performing a duty enjoined upon him by law, and, therefore, cannot be treated as a wrongdoer.

I think the defendant's specifications in his statement of the particulars wherein the evidence was insufficient to justify the judgment or decision of the Court, were sufficiently specific. The only object of the specification required by the statute is, clearly, to direct the attention of the adverse party to the particular point on which the evi-

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dence is laimed to be insufficient; and the specifications in this case were sufficient for that purpose.

Judgment reversed and cause remanded for a new trial.

[No. 2,114.]

**MORRIS LOCKE AND WILLIAM M. MONTAGUE v.
THE PORTER GOLD AND SILVER MINING
COMPANY, N. D. RIDEOUT, WILLIAM SMITH.
G. W. PRESCOTT, C. W. SCHEIDEL, AND GEORGE
C. PERKINS.**

RECEIPT OF A PERSON NOT A PARTY AS EVIDENCE.—If A. executes a mortgage to B., to secure some of A.'s creditors, and B. seeks to enforce the mortgage, and a contest arises between him and other creditors of A., who claim that the mortgage is fraudulent, B. may, for the purpose of showing that one of the persons, for whose benefit the mortgage was given, paid money to a third person for A.'s benefit, introduce in evidence the receipt from such third person to the one paying the money. The fact that A. owed the person to whom the money was paid must, however, be shown by other evidence.

APPEAL from the District Court of the Second Judicial District, Butte County.

The Court below gave judgment in favor of the attaching creditors, and the plaintiffs appealed.

The other facts are stated in the opinion.

George Rowe and F. L. Hatch, for Appellants.

Charles E. Filkins, for Respondents.

By the Court, **WALLACE, J.:**

The controversy is between the creditors of the company; and the principal question made is as to the validity of a note for thirteen thousand dollars, given by the company to

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Locke & Montague, with a mortgage upon the company's property to secure its payment, and which they seek to foreclose in this action. The other creditors, who levied attachments upon the mortgaged property subsequently to the recordation of the mortgage, allege, and gave evidence tending to show, that the thirteen thousand dollar debt was fictitious.

Locke & Montague do not claim that the company was indebted to them in that sum; but it is claimed that the note and mortgage were executed to them to secure sundry creditors of the company in the payment of divers sums, alleged to be severally owing to them; and, among others, the claim of one J. W. Moore (deceased since the making of the mortgage) for three thousand dollars.

To show that the claim of Moore was actual and bona fide, Locke & Montague offered the genuine receipt of Prescott & Scheidel, foundrymen of Marysville, acknowledging the payment to them by Moore of the sum of five hundred dollars for certain machinery, furnished and paid for by Moore for the benefit of the company, and used in the construction of the company's mill. The receipt was objected to as "irrelevant, and not the best evidence the nature of the case would admit of." The Court sustained the objection, and the plaintiffs excepted.

In *Prather v. Johnson*, 3 Harris & Johns. 490, the Court of Appeals of Maryland say: "If A., as surety for B., pays a debt due to C., on the proof of the payment, A. could recover of B. He could recover on C.'s saying A. had paid; and, of course, if C. wrote that A. had paid, surely it is evidence whether the writing was in a book or letter." This decision of the Court of Appeals was lately cited and approved by the Supreme Court of the United States. (3 Wallace R. 149.)

In *Holladay v. Littlepage*, 2 Munf., 306, the Supreme Court of Appeals of Virginia held that in an action of as-

sumpsit, in which the plaintiff sought to recover for passage money paid by him for the testator of the defendant, upon the voyage of the testator to Europe, the statements of the Captain of the ship, made to a third party, in which he admitted that the plaintiff had advanced the passage money for the testator, was admissible. The District Court had admitted the evidence, on the ground that the Captain was dead; but the Court of Appeals said "the acknowledgment" (of the Captain of the ship) "having been made at or about the time of the said testator's sailing for Europe; and being the admissions of those who were competent to charge themselves with the receipt of the passage money, by an ordinary receipt or acquittance, the Court is of opinion that the said testimony, on these grounds, and not on that assigned by the Court below, was properly received by that Court." (See also, *Sherman v. Grosby*, 11 Johns. 70.) We think the receipt was prima facie evidence that Moore did make the payment in question — of course the fact of the indebtedness of the company to Prescott & Scheidel must be shown by other evidence than the receipt.

As, for this error, the case must go back for a new trial, it will be unnecessary to express an opinion upon the questions of practice presented, since upon the new trial they will not probably arise.

Judgment reversed, and cause remanded for a new trial.

Statement of Facts.

[No. 2,819.]

HARRIET ANDERSON, ARTHUR B. ROSS, EXECUTOR OF D. L. ROSS, DECEASED, JOHN D. HOLLINGSWORTH, AND HEZEKIAH S. HOLLINGSWORTH, JOSEPH B. HOLLINGSWORTH, SARAH E. DUNCAN, AND WILLIAM T. HOLLINGSWORTH, MINORS, BY THEIR GUARDIAN *ad litem*, J. D. HOLLINGSWORTH v. JOHN FISK, S. C. HASTINGS, WM. J. DOBBINS, MASON WILSON, WM. B. DAVIS, ADMINISTRATOR OF WILS. DAVIS, DECEASED, E. F. GILLESPIE, P. ABRAHAMSON, W. J. GLENN, BASCOM JEWETT, MARION JANES, JACOB BLUM, M. BLUM, JOHN BLUM, AND E. LONG.

JURISDICTION OF PROBATE COURT—RECONVEYANCE BY EXECUTOR OF LAND HELD AS SECURITY.—A Probate Court has no authority, on the petition of an executor, to order him, on the receipt of money loaned, to reconvey real estate, conveyed to his testator by deed absolute on its face, but intended only as security for the repayment of such money.

APPEAL from the District Court of the Seventh Judicial District, Solano County.

This was an action of ejectment, to recover possession of a portion of the Rancho Los Potos, in Solano County. There was a former appeal in the same case, which will be found reported in 36 Cal. 625. It appears that the original title was a Mexican grant to Manuel Cabeza de Vaca and Juan Felipe Pena, afterwards confirmed and patented by the United States Government.

The plaintiffs claimed title under a deed executed in 1848 by Vaca to Jacob D. Hoppe and Zimri Hollingsworth. This deed was not recorded until December 31st, 1851; previous to which, in 1850, Vaca executed another deed of the same land, recorded August 22d, 1850, to William McDaniel, who had also become the purchaser from Pena. In 1854 McDaniel executed a deed, absolute on its face, to J. Caleb Smith,

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and George T. Marye, of the land purchased by him of Vaca. Afterwards J. Caleb Smith died, and Austin E. Smith was appointed, by the Probate Court of the City and County of San Francisco, the executor of his last will and testament.

In 1858, Austin E. Smith, as such executor, presented a petition to the Probate Court of San Francisco, setting forth; that on or before August 10th, 1854, McDaniel entered into a contract with the said J. Caleb Smith and George T. Marye, whereby said Smith and Marye agreed to advance, and did advance to McDaniel, at a monthly interest of two per cent, the sum of five thousand dollars; that for the purpose of securing the payment of the said sum and interest, McDaniel conveyed to Smith and Marye, by deed absolute, the property mentioned; that there was then due and owing, on the sum so advanced, the amount of eight thousand eight hundred and fifty-three dollars, which said McDaniel was ready and willing to pay upon the proper reconveyance being made to him of the property; that Marye had sold and transferred all his interest in the property to H. Clay Smith, who was ready to make a reconveyance to McDaniel upon the receipt of his portion of said money; that the only obstacle in the way of a full and final settlement of the matter was the inability of the petitioner to execute the necessary deed as the executor of said J. Caleb Smith, deceased, without the order of the Court; and praying to be allowed, upon receiving the portion of the money due the estate, to make, execute, and deliver the necessary conveyance of the property to McDaniel. In response to this petition, proceedings, analogous to those usual upon a petition for the sale of real estate, took place in the Probate Court; and on May 10th, 1855, an order and decree was entered, directing the executor, by deed of release and quitclaim, to reconvey the property to McDaniel upon the payment of the amount found due the estate; and a deed in accordance with that

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order was soon after made, executed, and delivered by the said executor.

Upon the trial of the cause from which this appeal is prosecuted, after the plaintiffs had introduced their proofs, the defendants offered the record of the Probate Court of the City and County of San Francisco, in the above mentioned matter, for the purpose of showing a reconveyance to McDaniel, under whom they claimed, of the interest previously conveyed by him to J. Caleb Smith, deceased. The plaintiffs objected to the admission of the record and evidence, upon the grounds that the same were irrelevant and incompetent to show any transfer of title, for the reason that the Probate Court had no jurisdiction to receive the petition of Austin E. Smith, or to act upon the same or the subject matter thereof, or adjudicate the same, or to enter the order and decree prayed for and entered, and that no authority was shown in Austin E. Smith to execute the deed so as to make it operative as a conveyance of the legal title to McDaniel. The objections were overruled and the record admitted in evidence, to which rulings plaintiffs excepted.

There was a judgment for defendants; and a motion for a new trial having been denied, the plaintiffs appealed.

M. A. Wheaton and James L. English, for Appellants.

The petition of Austin E. Smith was a bill in equity, and the order entered thereon was a regular decree in equity, which bill and decree could only have been entertained in the District Courts of the State. As the State Constitution then read, the District Courts had "original jurisdiction in law and equity in all civil cases where the amount in dispute exceeds two hundred dollars, exclusive of interest." (Const., Art. VI. Sec. 6.) Austin E. Smith did not believe, and no one will now contend, that he had any power as executor to convey such legal title to McDaniel, unless he could obtain such power from some Court. Under the

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statutes the only power which the Probate Court had to order a transfer of legal title was in cases of probate sales, and the instances in which decedents were bound by contracts in writing to convey real estate. (Probate Act, Secs. 205, 206.) If it should be claimed that Austin E. Smith and the Court were intending to proceed under the sections of the Probate Act last quoted, then we say the petition was entirely insufficient to confer jurisdiction, because it was presented by the executor, and not "by any person claiming to be entitled to such conveyance;" nor did it set forth any facts upon which such claim could be predicated, to wit: that J. Caleb Smith was bound by any contract in writing to make such conveyance, nor, indeed, did it even state that McDaniel, or any one else, claimed such conveyance. The petition not being presented by one having a right to present it, and not stating enough to confer jurisdiction upon the Probate Court, its entire proceedings in the matter were a nullity. (*Gregory v. McPherson*, 18 Cal. 576; *Hayes v. Meeks*, 20 Cal. 314; *Townsend v. Gordon*, 19 Cal. 207; *Gregory v. Taber*, 19 Cal. 409; 4 Kent's Com. 303; 1 Story's Eq. Jur. 29; *Belloc v. Rogers*, 9 Cal. 128; *Willis v. Farley*, 24 Cal. 499; *Fallon v. Butler*, 21 Cal. 32.) The question is important, because our deed was good against all the world, except parties holding under Vaca's second deed; and any interest in the land which they do not hold under that conveyance we are entitled to recover, because we have the legal title to it, and the defendants have no title whatever to it. It is only subsequent bona fide purchasers, for a valuable consideration of the same interest, conveyed by the first deed, which are protected. (Recording Act, Secs. 26, 41; *Hunter v. Watson*, 12 Cal. 373.)

Williams & Thornton, William S. Wells, and T. M. Swan,
for Respondents.

Opinion of the Court—Rhodes, C. J.

By the Court, RHODES, C. J.:

The Court erred in admitting in evidence the record of the Probate Court in the estate of J. Caleb Smith, deceased.

Judgment reversed, and cause remanded for a new trial.

Neither Mr. Justice CROCKETT nor Mr. Justice TEMPLE participated in the foregoing decision.

[No. 2,187.]

JAMES REILLY ET AL. v. GEORGE RUDDOCK ET AL.

SETTING ASIDE DEFAULT.—Where the Court makes an order requiring the plaintiff to appear at a time specified, and show cause why a default of the defendant for failure to answer should not be set aside, and there is no service of the moving papers, but the application is heard and decided in the absence of plaintiff's attorney, and where there is no reasonable excuse for the failure to answer within the proper time, it is error for the Court to set aside the default.

SHOWING OF DILIGENCE.—It is not a sufficient showing of diligence to excuse a failure to answer, for an attorney who has interposed a demurrer, which is afterwards struck out, and default for failure to answer entered, to make an affidavit that he was present in Court at the calling of the law calendar, on law day, and answered, "Ready," when the demurrer was called for argument, but did not then argue it, because the opposing attorney was not present in Court; and that he did not know that the Court would entertain a motion concerning a demurrer, except on a regular law day, without stating that he had no notice of the motion to strike out the demurrer, nor when he was informed, for the first time, that it had been struck out, nor that he supposed the demurrer to be still pending until after the time for answering had expired.

APPEAL from the District Court of the Fifteenth Judicial District, City and County of San Francisco.

This was an action upon a promissory note. The defendants demurred to the complaint; the demurrer was struck out, and a default for failure to answer was entered against them. Afterwards, on motion of defendants, the default

Opinion of the Court — Crockett, J.

was set aside, and an answer was filed. The case was tried by a jury, and a verdict was rendered for the defendants. Plaintiffs appealed.

The other facts are stated in the opinion of the Court.

Thomas H. Brents, for Appellants.

Plaintiff's counsel had no sufficient or any notice of defendant's motion to set aside the default. (*Vallejo v. Green*, 16 Cal.) The affidavit upon which the motion for leave to answer was based was insufficient, because it failed either to excuse the default or to present a meritorious defense. (*Bailey v. Taaffe*, 29 Cal. 423; *Johnson v. Clarke*, 6 Wend. 517; *King v. Merchants' Exchange Co.*, 5 Sand. 697; *Slover v. Forbes*, 22 How. 477; *Elliott v. Shaw*, 16 Cal. 377.)

W. H. Tompkins, for Respondents.

By the Court, CROCKETT, J.:

The default of the defendants for a failure to answer was improperly set aside: First—Because there was no service of the moving papers, and the application was heard and decided in the absence of the plaintiff's attorney, who had no notice of the motion. This was error. (*Vallejo v. Green*, 16 Cal. 160.) Second—No reasonable excuse was given for the failure to answer within the proper time. The defendants had interposed a demurrer to the complaint, and the defendants' attorney states in his affidavit that he was present in Court at the calling of the law calendar on the last preceding "steamer day," and answered "Ready" when the demurrer was called for argument, but did not then argue it, because the plaintiff's attorney was not present in Court; and that he did not know that the Court would entertain a motion concerning a demurrer except on the regular law

Points decided.

days. The Court, in the meantime, had stricken out the demurrer, because, as we infer, it was deemed to be frivolous. But the attorney does not state that he had no notice of the motion to strike out the demurrer, nor when he was informed, for the first time, that it had been stricken out, nor that he supposed the demurrer to be still pending, until after the time for answering had expired. This was the only showing of diligence, and the only excuse offered for failure to answer, and it was clearly insufficient.

Judgment reversed and cause remanded, with an order to the Court below to vacate the order setting aside the default of the defendants, and with a further order that the answer of the defendants be stricken out.

WALLACE, J., concurring:

I concur in the judgment upon the first point.

[No. 2,110.]

CORNELIUS KING v. JOSEPH H. BLOOD AND ISAAC HARTMAN.

COMPLAINT IN SUIT ON JUDGMENT.—In a complaint, in an action brought on a judgment, it is unnecessary to aver that an execution has been issued on the judgment, and an unsuccessful effort made to collect it.

STATEMENT IN SUMMONS.—A statement in a summons, that "the said action is brought to recover judgment against the defendants for the sum of five thousand three hundred and seventy-one dollars and twelve cents, and interest at three per cent. per month from November 14th, 1863, and the further sum of eleven dollars and twenty cents, and the costs of this action," is sufficient to answer the twenty-fourth section of the Practice Act, as a copy of the complaint is served with the summons.

SERVICE OF SUMMONS AND COPY OF COMPLAINT.—When there are several defendants, and all are served with summons in one county, the presumption is that all resided in the county where served, and a service of a copy of the complaint on one is deemed a service on all.

Argument for Respondent.

APPEAL from the District Court of the Fourth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

M. A. Cobb, for Appellants.

The Practice Act (section twenty-four) requires that the summons shall state, among other things, "the cause and general nature of the action." A statement that the action is brought to recover a judgment for so many dollars, without anything further, is not stating the cause or general nature of the action. (*Polack v. Hunt*, 2 Cal. 193; *People v. Woodlief*, 2 Cal. 241; *Porter v. Herrmann*, 8 Cal. 619; *Joyce v. Joyce*, 5 Cal. 449.) If the summons contains no cause of action, but refers to the complaint for a further statement of a cause of action, it is sufficient. No such reference is made to the complaint, in the summons under consideration, for a fuller statement of the cause of action. It is a good defense to an action on a judgment to show that execution is still available on the former judgment. (*White v. Hadnot*, 1 Port. 419; *Welles v. Dexter*, 1 Root, 253.)

Whiting & Naphtaly, for Respondent.

As the statute required a certified copy of the complaint to be annexed to the summons, the most general statement is sufficient; a detailed one would be surplusage. The cases cited by appellant in this connection all arose on motion to strike out the summons, which is the only way to take advantage of any defect that might exist in it. We have not been able to obtain access to 1 Port. It may have been under a local statute, or it may have arisen on issue joined. At all events, it is sufficiently answered by the fact that our State has adopted the common law rule, which treated a judgment like any other contract. And from the next case quoted by appellant, it would seem that the fact of a remedy,

to be available on execution, must be affirmatively shown to constitute a defense.

By the Court, SPRAGUE, J.:

This action was commenced in the Fourth District Court, City and County of San Francisco, by filing a complaint and causing summons to be issued thereon on the 15th day of November, 1867, to recover the amount of a former judgment against defendants.

The summons states that "the said action is brought to recover judgment against the defendants for the sum of five thousand three hundred and seventy-one dollars and twelve cents, and interest at three per cent per month from November 14th, 1863; and the further sum of eleven dollars and twenty cents, and the costs of this action;" and further notified defendants that if they failed to appear and answer the said complaint within the time specified in the summons, plaintiff would take judgment against them by default for the said sum of five thousand three hundred and seventy-one dollars and twelve cents, and interest from November 14th, 1863, at three per cent per month, and for the further sum of eleven dollars and twenty cents, and the costs of this action.

The summons, together with a certified copy of the complaint, was duly served upon defendant Blood, in the City and County of San Francisco, on the 23d day of May, 1868; and the summons was duly served on defendant Hartman, in the same city and county, on the 1st day of June, 1868. The defendants having failed to appear, answer, or demur, judgment by default was entered against them by the Clerk of said Court, on the 25th day of June, 1868. From this judgment defendants appeal to this Court, having filed their notice of appeal June 1st, 1869; and now insist that the judgment is erroneous and must be reversed, because the

summons, as appears from the record, does not state "the cause and general nature of the action," as required by the twenty-fourth section of the Practice Act. And it is further contended that the complaint fails to state a good cause of action upon a judgment, because it does not allege that an execution had been issued upon the judgment and an effort made to collect the same, without success.

The last point is untenable. There is no more necessity for alleging an unsuccessful effort by execution to collect the judgment, upon action brought thereon, than there is for alleging an unsuccessful demand upon defendant for the payment of an overdue promissory note made by him.

Upon the first point I think the statement in the summons a substantial compliance with section twenty-four of the Practice Act. Again, a certified copy of the complaint was served with the summons personally upon one of the defendants, and as both of defendants were served with the summons in that county, they are, therefore, presumed to have been residents of said city and county, and service of such copy is deemed to have been made upon both. (*Calderwood v. Brooks*, 28 Cal. 153.)

By the summons and copy of complaint thus served the defendants were fully and particularly notified of the cause, general nature and object of the action, the relief sought, the time within which they were required to appear and answer, and the consequence of a failure to appear.

The error or defect claimed to exist in the summons is more technical than real, and I am unable to discover that any substantial right of defendants could be affected thereby, or that the judgment should be reversed on account thereof. (Prac. Act, Secs. 71 and 188; *Page v. O'Neil*, 12 Cal. 493; *English v. Johnson*, 17 id. 107.)

Judgment affirmed.

Opinion of Temple, J., specially concurring.

TEMPLE, J., concurring specially.

I concur in the judgment.

Mr. Justice CROCKETT, being disqualified, took no part in the decision.

[No. 2,352.]

HORACE ALLEN v. JOHN CURREY.

BILL OF REVIEW FOR NEW TRIAL.—A bill of review for a new trial must be filed within the time allowed by law for the prosecution of an appeal, or writ of error, in the original cause, a review of which is sought.

BILL TO SET ASIDE A JUDGMENT AS FRAUDULENT.—A bill of review to set aside a judgment as fraudulent will not be sustained on the ground that the opposing party was sworn as a witness in the case in which the judgment was rendered, and knew of a fact which, if proved, would have given judgment to the other party, and failed to disclose it, and witnesses have since been discovered who will testify to such fact.

APPEAL from the District Court of the Fifteenth Judicial District, Contra Costa County.

The facts out of which this case arose are stated in *Currey v. Allen*, 34 Cal. 254. The complaint in this case averred that Currey recovered a judgment against Joaquin Y. Castro on the 24th day of October, 1855; that an execution was issued October 26th, 1855; and the Sheriff, on the 29th day of November, 1855, sold the land, and that plaintiff became the purchaser, and received the Sheriff's certificate of sale; and that the Sheriff, on the 25th of April, 1863, gave him a deed; that on the 24th of August, 1865, Currey brought suit to have him declared a trustee, and to compel him to convey to him (Currey); and that Currey was a witness on the trial, and testified that Allen bought as his agent, and for him; and that Allen was a witness, and testified that he did not buy as Currey's agent, and that no

Argument for Respondent.

other witnesses were sworn. The complaint then recited the judgment in the former cause, and the affirmation of the same in the Supreme Court; and that Allen had since discovered new evidence, to wit, that of Joseph Emeric. This suit was commenced in June, 1869.

The other facts are state in the opinion.

A. W. Sweet, for Appellant.

The suppression of facts material to an issue, where the party is in conscience bound to reveal them, is fraud. (See 1 Story Eq. Jur., Sec. 187; 1 Story Eq. Jur., Secs. 204-207; Page's Ep. R. 390, Sec. 2; Page's Eq. R. 394, Sec. 4.) Fraud taints, and when shown, will set aside and annul all contracts and judgments and decrees, either in law or in equity; and equity Courts have, from time immemorial, had unlimited jurisdiction over all cases of fraud, whether the fraud consists in contract, or in obtaining a judgment in a Court of last resort.

H. Allen, also for himself.

A bill of review will be entertained in equity when it appears on the face of the pleadings that the former decree is against law, or when there is newly discovered evidence that could not have been brought before the Court in any manner, before the final determination of the case. (2 Barbour's Ch. Prac. 90-93.)

S. F. & L. Reynolds, for Respondent.

The proposed evidence, if proven by Emeric, would be only cumulative to that of Allen, tending only to discredit that of Currey, and to corroborate that of Allen. It has been long established as a just and reasonable practice not to grant a new trial to introduce new witnesses or new evidence to points before in controversy. There would be no safety in trials upon any other doctrine. And in no case

Opinion of the Court — CROCKETT, J.

will a new trial be granted on the ground of newly discovered evidence, which does not relate to new facts but goes only to corroborate the testimony given at the former trial; or which consists merely of cumulative facts or circumstances, relative to the same matters controverted at the former trial. (*Smith v. Bush*, 8 John. 84; *Pike v. Evans*, 15 John. 210; *Steinbach v. Columbian Co.*, 2 Caines, 129; *Taylor v. Stage Company*, 6 Cal. 228-230; *Blockenbaum v. Pierson*, 22 Cal. 160-163; *Live Yankee v. Oregon Co.*, 7 Cal. 40-42.) If the bill in this cause shall be considered as of review then it should have been filed within one year after the decree in the former case was entered. The well settled rule of England is, that such a bill will not lie after the time when a writ of error to a judgment at law could be brought. That time there was twenty years. (Story's Eq. Pleadings, Sec. 410; *Smith v. Clay*, Ambl. R. 645; Cooper Eq. Pleadings, 91.) Here the time for an appeal or writ of review is one year.

By the Court, CROCKETT, J.:

In the action of *Currey v. Allen* the precise point in issue was whether or not Currey had authorized Allen to bid in the land in contest, at the execution sale, in Allen's name and for his own benefit; or whether, in bidding it in, Allen was acting only as the agent and attorney of Currey. This was the only point in contest; and each of the parties testified in his own behalf, and there was no other evidence in the cause. The judgment was in favor of Currey; and after a motion for a new trial, which was denied, Allen appealed to this Court. On the hearing of the appeal the judgment was affirmed (34 Cal. 254), and thereupon Allen conveyed to Currey the title he had acquired at the execution sale, as he was required to do by the judgment.

The present action is in the nature of a bill of review, or

for a new trial, on the ground of newly discovered evidence, to the effect that Currey, many months prior to the former action, had admitted, in a conversation with one Emeric, that he had authorized Allen to bid in the land in his own name and for his own benefit, and that he (Currey) had no interest whatever in the land. The District Court sustained a demurrer to the complaint, and entered a final judgment for the defendant from which judgment the plaintiff has appealed.

If the complaint be treated as a bill of review, the application for relief came too late. Nearly three years had elapsed after final judgment of the District Court in the former action before the complaint in this case was filed; and it is well settled that courts of equity will not entertain a bill of review after the time within which an appeal or writ of error may be prosecuted. The repose of society demands that when a controversy has been ended by the final judgment of a Court, it shall not be reopened except within a reasonable time; and in respect to bills of review Courts of equity have adopted, as a reasonable period within which they may be prosecuted, the time allowed by law for the prosecution of an appeal or writ of error. (Story Eq. Pl. Sec. 410; *Smith v. Clay Ambler* R. 645; *Cooper* Eq. Pl. 91; *Thomas v. Harrie*, 10 Wheaton R. 146.)

Tested by this rule, and treating the complaint as a bill of review, the Court below properly refused to entertain it, because it came too late. But the plaintiff claims that the judgment in the former action was obtained by means of a fraudulent suppression, by the present defendant, of the facts of the transaction, and ought, therefore, to be set aside on the ground of fraud. The fraud imputed to the defendant is his alleged failure to disclose at the trial the fact that he had authorized the plaintiff to bid in the land in his own name

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and for his own benefit; but it is said that instead of admitting this fact, as he ought to have done, the defendant denied it, when testifying in his own behalf; and it is proposed to prove the truth of this allegation by the testimony of Emeric, in addition to that of the plaintiff himself. It is not pretended that any new fact has occurred since the former trial, to vary the rights of the parties, nor that the plaintiff was then ignorant of the facts of the transaction. All that he has since discovered is some additional testimony tending to sustain the theory of the facts, and to rebut that of the defendant. But it is quite evident that if a judgment could be set aside as fraudulent on such a showing as this, litigation would be interminable. If, on another trial, the plaintiff should still fail to maintain his case, he might, on the same theory, thereafter institute a new action on the discovery of additional evidence, and so on *ad infinitum*. If the losing party were permitted to assail the judgment as fraudulent, on the ground that his adversary knew the facts to be as he claimed them to be at the trial and failed to disclose them, and that he has since discovered some additional evidence tending to prove them, a judgment, instead of being a "final determination of the rights of the parties," as defined by the statute, would be little else, in its legal effect, than an order to show cause why it should not be set aside.

Judgment affirmed.

[No. 2,256.]**ABEL GUY v. CHARLES BIBEND.**

DEFENSE IN SUIT ON NOTE.—The fact that contemporaneously with a promissory note, a parol agreement was made, that the note should be payable only out of the surplus arising from the sale of goods assigned to the payor, as security for a debt due him, it appearing no such surplus has arisen, is no defense in a suit on the note.

Argument for Respondent.

CONSIDERATION FOR NOTE.—A promise by A. to B. to give B. further time to pay a debt he owes to A. is a good consideration for a promissory note, given by C. to A., for the amount of B.'s debt to him.

APPEAL from the District Court of the Fifteenth Judicial District, City and County of San Francisco.

The plaintiff demurred to the answer, and the Court below sustained the demurrer. The defendant declined to amend the answer, and the plaintiff had judgment by default. The defendant appealed.

The other facts are stated in the opinion.

Whiting & Naphtaly, for Appellant.

While we admit, as of course, that this note in the hands of a bona fide purchaser for value could not be disputed, we are at a loss to see how the holder, a party to the note, receiving it with the understanding that it was to be paid to him only upon the happening of a contingency—that is, the realization by Bibend of the amount of the note in excess of his own claim—can possibly claim that he has any right to enforce the payment of the note. The contingency upon which the note was to become payable has not occurred, and no consideration has been received by the maker.

Pringle & Pringle, for Respondent.

The defense is an attempt to vary by parol the written instrument. It seeks to convert an absolute promise into a promise to pay out of a certain fund, or, on the happening of a certain event. (Cowen & Hill's Notes to Phillips Ev. 591.) The pleader evidently hopes to rely upon the general rule that in commercial paper between the original parties he may prove the want or failure of consideration, although a consideration be expressed. Certainly, if he leaves the instrument to say what it purports to say, he may prove that

Opinion of the Court — Temple, J.

it is void for misrepresentation or for want of consideration. But in this case he cannot reach his defense without first changing the character of the instrument. This note, if it did not take away the respondent's right of action against Wegener & Schoenbar, at least suspended his remedies against them, and this delay was a sufficient consideration for the note. (*Miller v. Cook*, 23 N. Y. 495; *Moscher v. Hotchkiss*, 40 N. Y. 161.)

By the Court, TEMPLE, J.:

The plaintiff sues upon a promissory note, and the answer sets up as a defense that the note was obtained under these circumstances: The firm of Wegener & Schoenbar were indebted to defendant in the sum of thirty-three thousand dollars, and in payment of such indebtedness conveyed to defendant personal property estimated to be worth more than eighty thousand dollars; that after the conveyance of this property to defendant, plaintiff's agent, and also Wegener & Schoenbar, requested defendant to give plaintiff his promissory note for some two thousand four hundred dollars, representing, as an inducement to defendant, that he would realize out of the assets assigned to him twenty thousand dollars or thirty thousand dollars more than his claim. That defendant thereupon agreed to give his note, payable only out of such surplus, and then did execute and deliver to plaintiff his note, payable in four months. At the expiration of this time, not having realized the assets assigned to him, he gave plaintiff a new note, with the understanding that it should be paid only out of such surplus. When this second note became due, defendant paid nearly one-half the sum due, and gave a new note for the residue, which is the note sued upon. This note is alleged to have been given with the express understanding that it was payable only out of the surplus arising from the assets received from Wege-

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ner & Schoenbar, and that there was no other consideration for the note than the expectation created by the representation that there would be a large surplus arising from such assets. The property received from Wegener & Schoenbar has been sold, and there is no surplus whatever; that the sum realized did not equal one third of the indebtedness of Wegener & Schoenbar to him.

The facts averred in the answer show a contract or understanding, made contemporaneously with the note, that it should be payable only out of a particular fund, to wit: the surplus arising from the assets received from Wegener & Schoenbar, after paying the debt due to defendant. This defense cannot be maintained. To do so would be to vary or add to the terms of the written contract by parol. It does not go to the consideration of the note. The answer shows a sufficient consideration for the note in the credit given by plaintiff for the indebtedness of Wegener & Schoenbar to him. The first note was payable four months from its date, and was accepted in lieu of the claim of plaintiff against Wegener & Schoenbar. The note sued upon is payable thirty days after date. The demurrer, therefore, was properly sustained.

Judgment affirmed.

Mr. Justice CROCKETT, having been counsel in the cause, did not participate in this decision.

[No. 2,140.]**DAVID KENYON v. JOHN QUINN.**

PRE-EMPTION CLAIM.—The question whether a pre-emption claim on the public lands is subject to seizure and sale, under an execution against the pre-emptor, not decided.

WHAT SHERIFF MAY SEIZE AND SELL.—A Sheriff, under an execution issued on a judgment, which is not a lien, can only seize and sell such

Statement of Facts.

title and interest as the judgment debtor had in the land at the time of the levy, and such as he acquired between the time of the levy and the sale.

UNITED STATES CERTIFICATE CONVEYS AN EQUITABLE TITLE ONLY.—A pre-emptioner on public lands, by paying for the same and obtaining a certificate of purchase, acquires only an equitable title to the land, which entitles him to a conveyance of the legal title by a patent from the Government.

WHEN SHERIFF'S SALE CONVEYS AN EQUITABLE TITLE.—If, after the levy of an execution by the Sheriff on public land, and before the sale, the judgment debtor, being a pre-emptioner, pays for the land levied on, and obtains a certificate of purchase, the purchaser at the Sheriff's sale succeeds only to the equitable title of the judgment debtor, who, when he obtains the legal title by means of the patent, holds it in trust for the purchaser at the Sheriff's sale.

A SHERIFF'S DEED.—The thirty-third section of the Act concerning conveyances which provides that a conveyance of land in fee simple absolute shall convey the legal estate afterwards acquired by the grantor, has no application to a Sheriff's deed, made under execution sale.

EQUITABLE TITLE AS DEFENSE TO BE PLEADED.—If a defendant in ejectment desires to avail himself of an equitable title, as a defense, he must plead it, and ask for the appropriate relief.

EVIDENCE OF A TRUST.—If the plaintiff in ejectment holds the legal title in trust for the defendant, the defendant cannot, on the trial, introduce evidence of that fact, unless he sets it up in his answer, and asks for the appropriate relief.

APPEAL from the District Court of the Fifth Judicial District, San Joaquin County.

Ejectment to recover one hundred and sixty acres of land. For several years prior to January 1st, 1867, a contest had been going on in the United States Land Office between Brennus Kenyon, a brother of the plaintiff, and the defendant, relative to the demanded premises, the same being a part of the public domain of the United States. Said Brennus claimed the land as a pre-emptioner, under the laws of the United States; and the defendant claimed it by a location made through him by the State of California, as a part of the five hundred thousand acres granted by Act of Congress to the State of California for school purposes. This contest was decided by the Secretary of the Interior in favor of said Brennus, on the 29th day of January, 1867. On the

Argument for Appellant.

22d day of January, 1863, the defendant obtained a judgment against said Brennus for thirteen hundred and fifty-eight dollars. On the 19th of March, 1867, the defendant caused an execution to be issued on the judgment; and the Sheriff, on that day, levied on the interest of said Brennus in the land. On the third day of April following said Brennus paid the United States for the land, and received a certificate of purchase. On the twenty-ninth day of April thereafter, the Sheriff, after legal notice, sold the land to satisfy the execution, and the defendant became the purchaser. On the 1st day of October, 1867, a patent was issued by the United States to said Brennus for the land. On the 29th day of October, 1867, the Sheriff executed a deed to the defendant. On the 30th day of April, 1867, said Brennus conveyed the land to the plaintiff, and again, in 1868, made another conveyance to the plaintiff.

On the trial of this action the defendant offered in evidence the said judgment, execution, Sheriff's certificate of sale, and deed. The plaintiff objected to the same, and the Court overruled the objection. The defendant had judgment, and the plaintiff appealed.

The other facts are stated in the opinion.

J. H. Budd, for Appellant.

The Court erred in overruling the objection of plaintiff to the judgment, execution, Sheriff's sale, and Sheriff's deed, offered in evidence by defendant. Such evidence was clearly irrelevant under the pleadings. The legal title was derived from the United States under the patent. The most that could be claimed from such evidence was to show that the defendant had acquired the equitable title of plaintiff's grantor to the land, arising from payment of the purchase money to the United States; but the answer sets up no such equitable title. In ejectment, unless an equitable defense is set up, the legal title must prevail. (*Clark v. Lockwood*, 21

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Cal. 220.) An equitable defense cannot avail a defendant unless it be pleaded. (*Cadiz v. Majors*, 33 Cal. 288.)

The Sheriff could not have levied on the equitable interest of plaintiff's grantor arising from payment of the purchase money, since such equitable interest did not exist at the time of the levy. The levy controlled all subsequent proceedings. (*Steaper v. Fisher*, 1 Rawl. 155.) Plaintiff's grantor acquired his right to the land under the preëmption laws of the United States. This right could not be assigned or transferred prior to the issuing of the patent. (Preëmption Act of 1841, Sec. 12.) There is no ambiguity in the preëmption law on this point. It provides that "all assignments and transfers of the right hereby secured prior to the issuing of the patent shall be null and void."

George W. Tyler, for Respondent.

At the time of the levy and sale, Brennus Kenyon had an equitable title to the land, a preëmption claim being an equitable interest that can be sold on execution. At any rate, the right acquired by him upon payment for the land, and taking a certificate of purchase, may be sold, as well as taxed. (Pr. Act, Sec. 217; *People v. Shearer*, 30 Cal. 645; *Bludworth v. Lake*, 33 Cal. 255.) The Sheriff levied on all the right, legal and equitable, Kenyon had, and that right passed by the Sheriff's deed. At common law, whatever title the debtor had at the levy and sale passed by the deed, because the title passed by the sale, and the deed could be executed at once. The same rule prevails in States where no redemption is allowed by statute. (*Starks v. Harrison*, 5 Rich. 7; *Ernstine v. Sawyer*, 2 Wend. 507; see, also, 9 Cowen, 182.) But under our statute the purchaser at Sheriff's sale gets no title till the Sheriff's deed is executed. (9 Cal. 103; 12 Cal. 128; 26 Cal. 655.)

It seems somewhat absurd to hold that when a man pays for the land and gets a certificate of entry, and then his

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rights are divested by a Sheriff's sale, that, if the naked legal title comes into the debtor before the time for redemption expires, the same would not pass by the deed.

By the Court, CROCKETT, J.:

Assuming that the preemption claim of Brennus Kenyon was subject to seizure and sale under the defendant's execution (a point not now necessary to be decided), all that the Sheriff could have done, and all that he attempted to do, was to seize and sell such right, title, and interest as Kenyon had in the premises at the time of the levy, and such as he acquired between the time of the levy and sale. At the date of the levy Kenyon had no title to the land, either legal or equitable, not then having paid the purchase money or obtained a certificate of purchase. (*Hutton v. Frisbie*, 37 Cal. 475.) But after the levy, and before the sale, he paid the purchase money and obtained a certificate of purchase, which vested in him an equitable title, and which entitled him to a conveyance of the legal title by a patent from the Government. Assuming that this equitable title was and could be sold to the defendant under the execution, when he obtained the Sheriff's deed he thereby became invested with the equitable title of Kenyon, and nothing more, this being all that the Sheriff sold, or had the power to sell. But the Sheriff had no power, and did not attempt, to bind Kenyon by any covenant of warranty, seizin, or for further assurance, nor are any such covenants implied by law in the Sheriff's deed. The defendant, by his purchase and the Sheriff's deed, had simply succeeded to the equitable title of Kenyon; and when the latter afterwards obtained the legal title by means of the patent, he held it in trust for the defendant, and could have been compelled to convey it upon a proper application to a Court of equity for that purpose. The

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defendant, however, claims that under section thirty-three of the Act concerning conveyances, the legal title conveyed by the patent inured to his benefit, and vested in him by operation of law. But that section has no application to a Sheriff's deed made under an execution sale. This section provides that "if any person shall convey any real estate, by conveyance purporting to convey the same in fee simple absolute, and shall not at the time of such conveyance have the legal estate in such real estate, but shall afterwards acquire the same, the legal estate subsequently acquired shall immediately pass to the grantee, and such conveyance shall be valid as if such legal estate had been in the grantor at the time of the conveyance." To bring a conveyance within this section, it must have been made by the party by himself or his duly authorized attorney; but a Sheriff's deed is not made by the judgment debtor, nor does it purport to be a conveyance by him. On the contrary, it is made by an officer of the law having authority to convey the title of the judgment debtor *in invitum*, and does not, on its face, purport to convey the fee, but only such right, title, or interest as the judgment debtor had. The section above quoted has no application to such a conveyance. It results, from these views, that the defendant acquired, if anything, only an equity in the land by the Sheriff's deed, and that the legal title conveyed by the patent did not pass to the defendant; and if he desired to avail himself of his equitable title as a defense to this action, he should have pleaded it, and asked the appropriate relief. Not having done so, he was not entitled to give it in evidence, under the answer as it now stands.

I deem it unnecessary to express an opinion on the other points presented on the appeal.

Judgment reversed, and cause remanded for a new trial, with leave to the defendant to amend his answer if he shall elect to do so.

Statement of Facts.

WALLACE, J., concurring specially:

I concur in the judgment.

[No. 2,678.]

JACOB MORRIS ET AL. v. EULOGIO F. DE CELIS.

PASSING ON MOTION FOR A NEW TRIAL.—The Court should not decide a motion for a new trial before the statement, as settled, has been engrossed and certified as correct.

REMARK.—Even if the statement has been settled, engrossed, and certified, and filed as correct, the Court should not pass on the motion for a new trial, until it has been submitted for decision, and the parties afforded an opportunity to be heard if desired.

SETTING ASIDE ORDER MADE ON MOTION FOR NEW TRIAL.—If a motion for a new trial is decided by the Court, before it has been submitted, the order denying or granting the new trial should be set aside as improvidently made, if application is made therefor.

APPEAL from the District Court of the First Judicial District, Los Angeles County.

The statement on motion for a new trial had no certificate of the Judge attached to it, nor did it appear by the record, except as stated in the order denying the motion to set aside the order granting a new trial, that it had been settled. The appellant made a statement on appeal from this order, reciting the motion to set aside the order, and containing an affidavit that the motion for a new trial had not been submitted, and appellant's counsel had no notice of submission until after the order was made granting a new trial, and reciting the order granting a new trial, and the following order made by the Court: "Statement on motion for new trial submitted for settlement by the Court, who took the same under advisement." This statement the attorneys on each side stipulated to be the statement on appeal.

The other facts are stated in the opinion.

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Glassel, Chapman & Smith, and James H. Lander, for Appellants.

There was, therefore, no basis to support an order setting aside the verdict of the jury, and the judgment thereon, and granting a new trial herein. (*Cosgrove v. Johnson*, 30 Cal. 509; *Kimball v. Semple*, 31 Cal. 657; *Linn v. Twist*, 3 Cal. 89; *Baldwin v. Frere*, 23 Cal. 461; *Vilhac v. Biven*, 28 Cal. 409; *Marlow v. Marsh*, 9 Cal. 259; *Quivey v. Gambert*, 32 Cal. 304.)

Thom & Ross, and V. E. & F. Howard, for Respondent.

The purported statement on motion for new trial cannot be reviewed by this Court for any purpose, for the obvious reason that it is not authenticated, either by stipulation of the respective parties, nor by a certificate of the Judge, nor in any manner whatever. (Practice Act, Sec. 195; *Cosgrove v. Johnson*, 30 Cal. 509; *Marlow v. Marsh*, 9 Cal. 259; *Baldwin v. Frere*, 23 Cal. 461.)

It does not appear that appellant's attorney ever applied to be heard, and if he had, it was a matter discretionary with the Judge. The Judge had a right to set aside the verdict and order a new trial the moment it had been placed upon the record.

By the Court, WALLACE, J.:

A verdict and judgment for defendant having been rendered, the plaintiffs gave notice of their intention to move for a new trial.

The statement in support of the motion, and the amendments proposed thereto, were submitted for settlement on May 9th, 1870. On July seventh following an order was entered granting the motion for a new trial. Neither party appears to have been notified in anywise, in the meantime, that the statement had been, in fact, settled. No opportunity

for engrossment was afforded, nor was it even known, with certainty, what matters would be contained in the statement when it should be thereafter finally engrossed and certified, so as to be used on the hearing of the motion for a new trial. On August fifteenth following a motion was made by the defendant to set aside the order granting a new trial, on the ground that it was improvidently made, that the motion for a new trial had never been submitted, etc. This motion came on to be heard on August twenty-second, and was supported by affidavit of the counsel for defendant and the records of the Court, and was then heard and taken under advisement until September 5th, 1870, when an order was entered denying the motion. This last order is as follows:

"This cause having been heretofore submitted on motion to vacate and set aside the order granting a new trial herein, the same having been well considered by the Court, it is ordered that the statement on motion for new trial, as submitted by the plaintiffs, together with such of defendant's amendments as are marked 'Allowed,' and the testimony of O. W. Childs and Matthew Keller, be, and the same is, the statement as settled by the Court, and is allowed as the true statement in the case. It is further ordered that said statement, so settled, be considered now as having been engrossed at the time of its settlement. And whereas, the said statement was settled before the motion for new trial was passed upon by the Court, but was not certified or engrossed, by reason of an inadvertence growing out of the multiplicity of duties devolving upon the Court at that time, it is further ordered that said statement, so settled, be and the same is hereby settled and considered engrossed, now for them. It is further ordered that defendant's motion to vacate and set aside the order granting a new trial herein is hereby denied, and that the said order, heretofore made, granting a new trial, be and is hereby affirmed.

"MORRISON, Judge.

Opinion of Rhodes, C. J., dissenting.

"Los Angeles, August 31st, 1870.

"Filed September 5th, 1870."

I think that the Court below should have sustained the motion of the defendant to set aside the order granting the motion for a new trial. Even in view of what is recited in the order of September 5th, it is clear enough that the motion for a new trial itself had never been submitted to the Court for decision; and even if the Court had in the meantime not only settled the statement, but had engrossed it, and certified and filed it as a correct statement, it should not have undertaken to determine the motion until that motion had been first submitted for decision, and the parties afforded an opportunity to be heard on the motion, if desired.

The practice here pursued operated as a complete surprise upon the defendant, and if countenanced would be utterly subversive of the rights of parties litigant.

It is ordered that the order of the Court below, denying the motion of the defendants to set aside the order granting a new trial, be reversed, and that the cause be remanded, with instructions to sustain said motion of the defendant, and for further proceedings for the orderly determination of plaintiff's motion for a new trial.

RHODES, C. J., dissenting:

The appeal is taken from an order granting a new trial, and from an order refusing to vacate the order granting the new trial. The foregoing opinion proceeds on the latter order alone. I would be content with merely expressing my dissent, were it not that the opinion establishes a new rule of practice, and in doing so overrules, without mentioning *Quivey v. Gambert*, 32 Cal. 304, and the authorities on which the decision in that case was based, and the large number of cases following *Quivey v. Gambert*. Indeed, so constant and

Points decided.

uniform have been the decisions since that case, that by far the larger number have been rendered orally from the bench. The appeal in that case was dismissed because the order was not a special order made after final judgment. Nor is the order in this case a special order after final judgment in the sense of the statute. I do not propose, at this time, to reopen the discussion of the question involved in those cases.

I concur with my associates in the opinion that the action of the Court in passing on the motion for a new trial, before it was submitted, was erroneous; but I have no manner of doubt that the error can be corrected on an appeal from the order granting a new trial.

[No. 1,733.]**DICK GERDES v. CHARLES MOODY ET AL.**

CONSTRUCTION OF DEED.—Powell gave a power of attorney to Neleigh, authorising him to convey certain lots in San Jose, confirming by the terms of the instrument any sales he might make. Soon after receiving the power of attorney, Neleigh sold the property to Naglee for a fair consideration, and conveyed it to him by his own deed, in which there is no reference to Powell; but about a year thereafter, and while the power of attorney remained in full force, Neleigh indorsed on the deed a writing to the effect that the lots were intended to be sold to Naglee under the power of attorney, and that he executed the deed only as the attorney for Powell, adding: "and as such attorney I do hereby bind John W. Powell, his heirs and assigns, to the within agreement, having received the consideration as within specified. (Signed): ROBT B. NELLEIGH, Attorney." *Held*, that in order to ascertain the intention of the parties, these two papers must be construed together, and that under the circumstances they constitute an attempt by Neleigh to convey to Naglee under the power of attorney.

RELIEF FOR DEFECTIVE EXECUTION OF POWER OF ATTORNEY.—Such a case is the ordinary one of a defective execution of a power, and a Court of equity will afford the appropriate relief.

DEED—WHEN INVOKED.—It is only when there has been an unsuccessful attempt to execute a power in proper form that the interposition of a Court of equity is properly invoked.

Argument for Appellants.

EQUITIES OF OCCUPANT WITHOUT LEGAL TITLE.—Neither the fact that the party in possession first entered as an intruder without title, and subsequently obtained from Naglee all his title to the premises, nor the fact that Naglee reconveyed one of the lots to Neleigh soon after the making of the second writing, would impair the equities of the party in possession.

STATUTE OF LIMITATIONS BAR TO EQUITABLE DEFENSE.—In an action by the vendor of lands holding the naked legal title against his vendee to recover the possession, the vendee having paid the purchase money and being rightfully in possession under his contract of purchase, the statute of limitations is not a bar to the equitable defense of the vendee and to his right to affirmative relief.

APPEAL from the District Court of the Third Judicial District, Santa Clara County.

The facts are stated in the opinion of the Court.

S. O. Houghton, for Appellants.

1. In equity Powell is bound by the contract of sale made by his duly authorized agent. The instrument attached to the deed made by Neleigh to Naglee declares fully the intention of the agent to bind his principal; and the fact that that instrument is not signed with the name of the principal by the agent, does not make the instrument inoperative. It was an attempt to execute the power, but it was defectively executed. While equity will not compel the execution of a power of this character, it will relieve in the case of a defective execution of it in favor of a purchaser for a valuable consideration. (Willard's Eq. Juris. 83; *Salmon v. Hoffman*, 2 Cal. 142; *Beatty v. Clark*, 20 Cal. 35; Story's Eq. Juris., Vol. 1, Secs. 169, 170; *Love v. The Sierra Nevada Water and Mining Co.*, 32 Cal. 652.)

Neleigh, at the time he executed the second instrument, was still the attorney in fact of Powell, and yet had power to bind him, for there is no proof that his power ever was revoked; and if he had the power to bind Powell in the first instrument, but failed to do it through ignorance or by mistake, he could yet remedy the defect.

Argument for Appellants.

A power over a legal estate defectively executed at first may be executed over again, and the last execution shall stand, the first being a nullity. (*Hervey v. Hervey*, Bernardiston's Chan. R. 111.)

The testimony of Neleigh shows that the lots in question were really the property of Neleigh, and when he made the deed to Naglee he may have acted upon the belief that his own deed would pass the legal title; but, subsequently, it is evident he learned that such was not its effect, and to remedy the defect he executed the second instrument. Neleigh testifies that he applied for the grant of these lots, and that he paid for them with his own money — fourteen dollars each.

2. In a contract for the sale of real estate, when the consideration is paid and the purchaser goes into possession, the vendor holds the legal title in trust for the vendee. The trust which arises from such a transaction is a presumptive or resulting trust. (*Taft v. Stephenson*, 7 Hare, 1; *Green v. Smith*, 1 Atk. 572.)

The general rule in relation to the enforcement of trusts is, that so long as the trust subsists or is recognized, no lapse of time will bar the beneficiary from asserting his rights to the trust property as against the trustee, whether the trust be express or implied. But it is conceived that the principle upon which the statute of limitations is set in motion in all cases of trust is the same — that is to say, it begins to run from the time that the claims of the *cestui que trust* and the trustee become adverse. It has been stated in some cases in general terms, that as between the trustee and *cestui que trust* an express trust will not be barred by any length of time. That rule, however, is subject to the qualification that the relation of trustee and *cestui que trust* still subsists. (*Cholmondeley v. Clinton*, 2 Merivale, 360; *Wedderburn v. Wedderburn*, 4 Mylne & C. 53.) The statute begins to run

Argument for Appellants.

from the open disavowal of the trust and what amounts to an adverse possession by the trustee. (*Kane v. Bloodgood*, 7 John. Ch. R.; *Oliver v. Piatt*, 3 How. S. C. R. 411.) In this respect, express and resulting trusts stand substantially upon the same footing. The general rule is, that after the sale of land, and before a conveyance of the legal title, the vendor is the trustee of the vendee, and the Act of limitations will have no operation. (*Piper et al. v. Lodge*, 4 Serg. & R. 310.) Whenever the legal title is in one person and the real interest in another, they form but one title, and the statute of limitations does not run between the holders of such title until the trustee disclaims and acts adversely to the *cestui que trust*. (*Rush v. Barr*, 1 Watts, Penn. 110; *Lyon v. Marclay*, 1 Watts, Penn. 271; *Murdock v. Hughes*, 7 S. & M. 219; *Wesner v. Barnett*, 4 Wash. C. C. 631; 2 Story's Eq. Juris., Sec. 1,520.)

The general rule seems to be, that the time when the trustee disavows the trust or sets up a claim adverse to the *cestui que trust* is the *terminus a quo* — the statute of limitations begins to run.

The appellants have been in the actual possession of the premises for many years, and have made extensive and valuable improvements thereon, without any claim having ever been set up by Powell adverse to them, although he lived in and about San José until 1854 — was a policeman there; and in 1865 was informed by a lawyer that the lots were granted in his name.

It does not appear, then, that Powell ever disavowed the trust or denied the right of appellants to the property, or that he ever did any act which placed him in a position adverse to the right claimed by appellants until he executed the deed to respondent, even if that act, under the circumstances, could be so considered. Under these circumstances he must be considered as recognizing the trust as still subsisting, at least until he made the deed to respondent, for a disavowal

Argument for Appellants.

must be by positive acts, and not by mere silence. If, then, our view is correct, that the statute did not commence to run so long as the trust was a recognized and subsisting one, it certainly did not begin to run before appellants filed their bill against Powell for a specific performance, August 7th, 1866, which was a few days before the deed was made to respondent, if the filing of that complaint be deemed a sufficient demand, which it doubtless was according to the rules of practice of Courts of Chancery. (*Bruce v. Tilson*, 25 N. Y. 203; *Grey v. Dougherty*, 25 Cal. 282; *Jones v. City of Petaluma*, 36 Cal. 233.)

Powell answered in that action, and denied the right of the plaintiffs therein to a specific performance; and Gerdes, the respondent, filed his petition to intervene therein, after he obtained the deed from Powell, and demanded judgment against plaintiffs for the possession of the premises. That action was subsequently dismissed by plaintiffs, as doubts were entertained whether such an action could be maintained under our code without a demand for and a refusal to execute a deed before suit brought, where there had been no act done by the trustee amounting to a disavowal of the trust.

If either the institution of that action, or the denial of the trust by the answer filed therein, or the execution of the deed by Powell to Gerdes, first set the statute in motion, the right of appellants to compel a specific performance was not barred by lapse of time when this action was commenced, as less than two months had passed after the happening of either of those events. Lapse of time will not bar an action by the vendee for a specific performance of a contract of sale where there has been no adverse possession by the vendor. (*Tiffany & Bullard on Trusts and Trustees*, 720; *Hill on Trustees*, 268; *Grey v. Dougherty*, 25 Cal. 279; *Bruce v. Tilson*, 25 N. Y. 202; *Dodge v. Clarke*, 17 Cal. 588; *Miller v. Bear*, 3 Paige, 467; *Barbour v. Whitlock*, 4 Monroe, 197.)

Argument for Respondent.

A. J. Moultrie and William Matthews, for Respondent.

The position of appellants, that there was a defective execution of a power to sell, is unsupported by any averment in the cross complaint, or any testimony in the record. The averment in the cross complaint is, that on the 27th of December, 1847, Neleigh, "being thereunto duly authorized and empowered by John W. Powell, and acting for him and in his behalf, sold the said lots to Henry M. Naglee." This is an averment of a valid, not an invalid, execution of a power; and to support it the defendants offered upon the trial an instrument appearing to be a deed or conveyance, in which "Robert B. Neleigh" is the grantor, and purporting to convey "Neleigh's right, title, and interest" in the lots described in the pleadings to "Henry M. Naglee." Powell's name is not mentioned in the instrument, and no reference, however remote, is made to any power from him to Neleigh. This deed bears date on the 27th of December, 1847. Three hundred and sixty-three days afterwards Mr. Neleigh writes upon the record, underneath his deed, to Naglee that he "acknowledges," and states "that the foregoing deed was executed by him as the attorney of John W. Powell, and that thereby binds John W. Powell, his heirs and assigns, to the within agreement;" and he signs it, "In witness whereof, I have hereunto set my hand and seal. ROBERT B. NELEIGH, Attorney." So far as Neleigh, in this instrument, attempts to "bind" Powell by any agreement, his act was void. The letter of his authority limited his power to the making of the deeds and conveyances. He was not empowered to make any contracts or agreements for Powell.

But we submit that this instrument is nothing more than the legal opinion of Mr. Neleigh, as to the effect of his own deed, the value of which is somewhat diminished by the fact that four days after the making of this last instrument,

Argument for Respondent.

viz: on the 26th of December, 1848, Naglee, in consideration of the sum of one dollar, reconveyed one of the lots to Neleigh. Courts of equity never aid the non-execution of a power. (1 Story's Eq. Jur., Sec. 169; *Tollet v. Tollet*, 2 P. W. 490.)

But independent of these considerations, the defendants do not stand in the position of parties in whose favor Courts of equity will reform a deed defectively executed. Such reformation will be directed only upon a valuable and meritorious consideration. (1 Story's Eq. Sec. 169; *Beatie v. Clark*, 20 Cal. 13.) The defendants do not so stand in Court. With the record evidence of Powell's rights before them, they have succeeded to Ransom G. Moody, who entered upon the premises without pretense of title; and they stand in the shoes of Robert B. Neleigh, who declares that he has attempted to convey the lands of his constituent, and four days thereafter receives from the person to whom he conveys, for the nominal consideration of one dollar, one half of his constituent's estate. No such transaction as this was, we submit, ever aided by a Court of equity. Nor does the circumstance that Powell was ignorant of his title to these lots, until Mr. Ryland informed him of the fact in 1865, assist the defendants. The ignorance of his rights was produced by the false statement of Neleigh, that his four lots were situate in block four and range four. A statement which the circumstances of the case would lead to the suspicion was deliberately untrue.

The consent of Powell that Neleigh might use his name in acquiring lots for Neleigh's benefit — the granting officer being ignorant of this private arrangement — created neither an express or implied trust in Neleigh's favor, or constituted an agreement which a Court will enforce. (*Hill on Trustees*, Note 3, marginal, 93; *Leggett v. Dubois*, 5 Paige, 114; *Hubbard v. Goodwin*, 3 Leigh, 514; *Fuller v. Dake*, 18 Pick. 481; *Marshall v. Balt. & O. R. R. Co.*, 16 How. 334; *Cooth v.*

Jackson, 6 Ves. 31; Chitty on Contracts, marginal, 580, *et seq.*; 1 Story Eq. Juris. Sec. 294.)

No trust resulted by the payment of the fees incident to the grant of the lot. (*Noe v. Card*, 14 Cal. 607; *Scott v. Ward*, 13 Cal. 458; *Donner v. Palmer*, 31 Cal. 500; *Hood v. Hamilton*, 33 Cal. 703; 2 Story Eq. Juris. 1,201 *a.*)

Trusts arising by implication of law are barred after the lapse of four years. (*Kane v. Bloodgood*, 7 Johns. Ch. 89; *Elmerdorf v. Taylor*, 10 Wheat.; *Furnam v. Brooks*, 9 Pick.; *Angell & Ames on Lim.*, Ch. 55; *Cunningham v. Hawkins*, 24 Cal. 410.)

In the present case, the right to file a bill to reform the defective execution of the power by Neleigh existed, if at all, in Naglee, on the 17th of April, 1850, when the statute of limitations was passed.

The cause of action, therefore, became barred on the 18th of April, 1854. The defendants in this case did not connect themselves, in any manner, with the supposed rights of Naglee, until the 3d of September, 1858. Eight years and four months had thus passed, more than double the period, upon the lapse of which the action became barred.

By the Court, CROCKETT, J.:

This is an action in the usual form, to recover the possession of two lots in the City of San José. Among other defenses the answer avers, in substance, that in July, 1847, at the request of one Neleigh, the Alcalde of San José granted and conveyed the lots to one Powell; that the purchase money therefor was paid by Neleigh, and was never refunded by Powell; that Powell never applied for the grant; that soon after the grant was made Neleigh entered into possession, and erected a house thereon, which he occupied with his family; that in October, 1847, Powell executed and delivered to Neleigh a power of attorney, whereby he

authorized the latter to sell and convey the lots for such price and to such person as he should deem meet; that in December, 1847, Neleigh, whilst in possession, "and being thereunto duly authorized and empowered by the said Powell, and acting for him and on his behalf, sold the said lots to Henry M. Naglee for the price or sum of forty dollars, which was at the time the full value thereof;" that Naglee paid the said sum to Neleigh, and the defendants, by proper mesne conveyances and for a valuable consideration, have succeeded to all the rights of Naglee in the premises; that by virtue of the rights so acquired, the defendants entered into possession, and for more than eight years past have been and yet are in possession; that relying on the belief that Powell would fulfill and perform said contract of sale, and convey said premises to them, the defendants have erected thereon valuable improvements, consisting of a steam flouring mill, sawmill, brick warehouse, etc., of the value of fifteen thousand dollars; that in August, 1866, while the defendants were so in possession, Powell conveyed said premises by quitclaim deed to the plaintiff, for the consideration of three hundred dollars, then paid in cash, and the further sum of five hundred dollars, to be thereafter paid, in the event that the plaintiff recovered the property; that the plaintiff purchased with full and actual notice of the defendants' equities; that in September, 1866, the defendants demanded of Powell a proper conveyance of the premises, which he refused to make; that the plaintiff has no other title than that derived from the deed from Powell.

As a separate defense, the answer sets up the statute of limitations, and prays, as affirmative relief, that the defendants be adjudged to be the owners of the property, and that the plaintiff release to them the legal title. To this new matter an answer was filed by the plaintiff, which denies all the material allegations of the defendants in that behalf.

The equitable defense thus set up in the answer was first

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tried, and after hearing the evidence, the Court finds, in substance, that Powell and Neleigh came together across the Plains to California in 1846; that while Powell was working at San Francisco, Neleigh obtained his permission to use his name in procuring a grant to town lots in San José from the Alcalde for Neleigh's use and benefit, on the pretext that Neleigh had already obtained a grant for four lots in his own name, and the law permitted only four lots to be granted to one person; that Neleigh, in fact, had no grant of lots at that time in San José; but there was, in 1847, a regulation of the Ayuntamiento of San José which fixed the size of lots to be granted at fifty varas square, and prescribed that not more than four lots should be granted to any one person; that this regulation, however, was not observed by the Alcalde, because it appears from the records of the Alcalde that on the 16th of July, 1847, four lots were granted to Neleigh, and on the 20th of July, 1847, four other lots were also granted to him; that on the 16th of July, 1847, four lots were granted to Powell, and in the year 1848 five other lots were granted to him; that after Powell had consented to the use of his name by Neleigh, for obtaining a grant for the benefit of the latter, Neleigh solicited the Alcalde for a grant of four lots to himself and of four lots to Powell; and on the 16th of July, 1847, the Alcalde granted four lots to Neleigh and four to Powell, for all of which Neleigh paid the municipal fees; that the lots in controversy are two of those which were thus granted to Powell; that in October, 1847, Powell executed and delivered to Neleigh a power of attorney, authorizing him for Powell, and in his name, "to make and execute, sign, seal, and deliver any and all deeds or other instruments of writing which may be necessary to convey and assure title to any and all my real and personal estate in said Pueblo San José, for the absolute disposal thereof or any part of it;" that in December, 1847, Neleigh sold the lots in controversy to Naglee for forty dollars, which

was a fair price for them; that Naglee paid the purchase money to Neleigh, and thereupon Neleigh, in his own name, and not in the name of Powell, made, executed, and delivered to Naglee his deed of bargain and sale for the lots, whereby he, for himself, conveyed to Naglee "all his right, title, and interest in and to said lots;" that afterwards Neleigh made and delivered to Naglee an instrument in writing, indorsed on said deed in the following words:

"In connection with the foregoing, I, the undersigned, Robert B. Neleigh, attorney for John W. Powell, this 25th day of December, 1848, in the Pueblo de San José, hereby acknowledge and state that the lots, seven and eight, deeded by the Alcalde to John W. Powell, and which lots were sold by—— to Henry M. Naglee, under a power of attorney of said Powell, which power is recorded, and as such attorney only was the above deed executed; and as such attorney, I do hereby bind John W. Powell, his heirs and assigns, to the within agreement, having received the consideration as within specified.

"In witness whereof, I have hereunto set my hand and seal.
(Signed:) "ROBERT B. NELEIGH, Attorney."

That neither Neleigh, nor Naglee, nor any one claiming under them, or either of them, occupied or improved said lots, but the lots remained open and uninclosed until 1856, when the father of defendants entered into possession, without right or title, and erected a mill on one of the lots; that he remained in possession a few years, when he delivered the exclusive possession to his sons, Charles and David B. Moody, and on 3d September, 1858, he and his said two sons acquired, by mesne conveyances from Naglee, all the right, title and interest of Naglee in the premises, for the sum of seven hundred and fifty dollars, which was a fair

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price; that in 1859 the other defendant, Volney D. Moody, acquired an interest under one of the other defendants, and the defendants have been continuously in possession from the time of their entry, during which period they have erected valuable improvements on the premises, worth from eight to fifteen thousand dollars, and at the commencement of this action they were, and yet are, in possession, claiming title under Naglee adversely to the plaintiff; that in 1866 the defendants commenced an action against Powell, to quiet title to said premises, which action was pending when the plaintiff purchased from Powell, and he had full notice of it at the time of his purchase; that Powell never had the grant in his possession, but it was recorded in the Alcalde's book of grants; that Powell did not know until 1865 that the lots had been granted to him; and when the plaintiff applied to him to purchase, he refused to make any other conveyance than a release of whatever right, title, or interest he might have in them; that in August, 1866, Powell sold the lots to the plaintiff for eight hundred dollars, of which three hundred dollars was paid in cash, and the balance was to be paid when the plaintiff recovered the lots.

As conclusions of law, the Court finds:

First—That the plaintiff does not hold the legal title in trust for the defendants, because, first, a resulting trust in favor of Neleigh did not arise at the time of the grant to Powell, by reason of the previous consent of Powell to take a grant for Neleigh's benefit; second, the grant is a gift, and not a purchase.

Second—That the plaintiff cannot, in equity, be compelled to convey the legal title to the defendants, on the ground of perfecting a supposed parol contract for the purchase of the premises, between Naglee and Neleigh, or his principal, because:

1st. There was no parol contract between them in relation to the land under which Naglee paid the purchase money,

and entered into the lands, and made improvements on them; and without possession taken and maintained, under such contract, there can be no pretense of part performance.

2d. The purchase by Naglee was fully performed by the payment of the purchase money by him, and the execution and delivery of a deed of bargain and sale by Neleigh.

3d. The deed was ineffectual to pass the title of Powell to Naglee.

4th. The defendants did not enter under any parol contract with Powell, or Neleigh, as his agent, on the faith of which they made improvements. They took possession under their father, and, being in possession, they acquired whatever title Naglee had; but as Naglee had neither title nor possession under any contract with the owner, they did not acquire from him, or by their own possession, any equity which can be enforced against the legal title of the plaintiff.

Third — But if any equities did arise in favor of Naglee, or the defendants claiming under him, out of the transaction between Naglee and Neleigh, the same have become barred by the statute of limitations.

The Court thereupon entered judgment against the defendants on their equitable defense; and after a motion for a new trial, which was denied, the defendants have appealed. We have stated thus minutely the pretensions of the parties and the findings of the Court, because, in our opinion, if it be assumed that all the facts are correctly embodied in the findings, the Court erred in the conclusions of law which it deduced from the facts found.

It is found as a fact that Powell made a power of attorney to Neleigh, whereby he authorized him "to make, execute, sign, seal, and deliver any and all deeds or other instruments of writing which may be necessary to convey and assure title to any and all my real and personal estate in said Pueblo San José, for the absolute disposal thereof, or any part of it." It also appears from the power itself, a copy of

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which was put in evidence, that it contained an additional clause, as follows: "Hereby, ratifying and confirming all such deeds, conveyances, *sales*, etc., which shall at any time hereafter be made by my said attorney touching or concerning the premises." It further appears that very shortly after the execution and delivery of the power of attorney, Neleigh sold the lots to Naglee for a full, fair price, and conveyed them to him by his own deed, in which no reference is made to Powell; but about one year thereafter, and while the power of attorney remained in full force, he indorsed on the deed a writing to the effect that the lots were intended to be sold to Naglee under the power of attorney, and that he executed the deed only as the attorney for Powell: "and as such attorney I do hereby bind John W. Powell, his heirs and assigns, to the within agreement, having received the consideration as within specified." Signed: "ROBERT B. NELEIGH, Attorney."

In order to ascertain the intention of the parties, these two papers must be construed together; and when thus considered, and in view of the surrounding circumstances, it is obvious that however inartificially the papers were worded, the two, taken together, constitute an attempt by Neleigh to make a conveyance to Naglee under the power of attorney. It is but the ordinary case of the defective execution of a power, and in such cases Courts of equity always afford the appropriate relief. In arriving at the intention of the parties in making these instruments, we interpret them, as all other writings ought to be interpreted, in the light of the surrounding circumstances. In view of the fact that Powell claimed no interest in these lots, and held only the naked legal title for the benefit of Neleigh, who had a power of attorney from Powell, authorizing him to convey them, it would not be a forced or unnatural interpretation of the transaction to hold, that, by his own deed to Naglee, Neleigh intended to convey his own supposed interest in the lots, and

by the subsequent writing, indorsed on the deed, to release the legal title held by Powell. It may be that the writing is so unskillfully drawn as not to have that effect; but if it was operative in law to convey the title, it would not need the aid of a Court of equity to give it vitality. It is only where there has been an unsuccessful *attempt* to execute a power in proper form that the interposition of the Court is properly invoked. We are satisfied that this is a case of that character. (*Beatty v. Clark*, 20 Cal. 35; *Love v. Sierra Nevada L. W. & M. Co.*, 32 Cal. 654; Story's Eq. Secs. 169, 170; *Barr v. Hatch*, 3 Ham. 529.)

But it is urged that the defendants do not occupy such a position as entitles them to demand the interposition of a Court of equity, because, as it is said, they originally entered under their father, who was a mere intruder, without title; and because Neleigh, under whom they claim, very soon after the conveyance to Naglee, took back from him a conveyance of one of the lots for a nominal consideration. This latter fact does not appear in the findings; but if it did, neither that nor the other fact relied upon could impair the defendants' equities. When they succeeded to Naglee's rights, they became entitled to enforce them as he might have done, without reference to the manner in which they had acquired the possession; and if Neleigh practiced any fraud on Powell in taking the conveyance from Naglee, there is no proof that the defendants were privy to it or had notice of it. But the fact that Naglee reconveyed one of the lots to Neleigh, under the facts proved, does not establish or tend to establish any fraud in Neleigh.

The only point remaining to be considered is whether or not the defendants' right of action is barred by the statute of limitations. We are satisfied it is not. After the sale and attempted conveyance to Naglee, Powell held the legal title in trust for Naglee and his assigns; and the defendants' cause of action did not accrue, in a legal sense, until after a

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refusal by Powell or the plaintiff, his vendee, to convey the title. There is no proof of any refusal by Powell until after he conveyed to the plaintiff in 1866, and the only proof that the plaintiff refuses is the fact that he denies the defendants' right to a conveyance in the pleadings in this cause.

Our conclusion is that the defendants were entitled to a judgment, as prayed for, on the findings.

The judgment is therefore reversed and the cause remanded, with an order to the District Court to enter judgment on the findings for the defendants, with the relief which they demand in their answer.

[The foregoing opinion was delivered at the January Term, 1869; and after a reargument of the question, as to the operation of the statute of limitations, the following opinion was given at the April Term, 1871.—REPORTER.]

By the Court, CROCKETT, J.:

In this case a reargument was ordered of the question arising under the statute of limitations; and since the reargument we have had occasion, in the case of *Love v. Watkins*, decided at the last January Term, to consider carefully whether in an action by the vendor of lands, holding the naked legal title, against his vendee to recover the possession, the vendee having paid the purchase money, and being rightfully in possession under his contract of purchase, the statute of limitation is a bar to the equitable defense of the vendee, and to his right to affirmative relief. We decided this proposition in the negative, and held that the rights of the defendant in such a case were not barred by the statute. The present case comes fully within that decision, which we are satisfied is a correct exposition of the law. The opinion heretofore delivered in this case will, therefore, stand as the opinion of the Court, except in so far

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as that portion thereof which relates to the statute of limitations is inconsistent with the decision in *Love v. Watkins* and with this opinion; and on that branch of the case we adopt the views expressed herein and in *Love v. Watkins*, in lieu of those contained in the original opinion.

Judgment reversed, and cause remanded, with an order to the Court below to enter a judgment for the defendants on the findings, with the relief demanded in their answer.

[No. 2,310.]

THE PEOPLE OF THE STATE OF CALIFORNIA v.
EDWARD WHYLER AND CERTAIN REAL ESTATE.

TAX AND ASSESSMENT.—A charge imposed on all the property of a district, to be used in constructing levees to protect the district from overflow, is a tax, and not an assessment.

INEQUALITY OF TAXATION.—The fact that levees built to protect the land of a district from overflow, injure some of the land instead of benefiting it, does not render the tax unequal or void for want of uniformity.

UNIFORMITY OF TAXATION.—If the property of a district is taxed to build levees to protect it from overflow, the fact that land which is injured by the levee is assessed at its former value, and land benefited by the levee is also assessed at its former value, do not render the tax liable to the objection of want of equality and uniformity.

RESISTING PAYMENT OF TAX.—The payment of a tax cannot be resisted on the ground that the property on which it was levied was not assessed at its true value. One whose property is not assessed according to its true value, must apply to the Board of Equalization.

TAX MUST BE LEVIED ON ALL PRIVATE PROPERTY.—An Act taxing the property of a district for a local improvement, which exempts personal property from its operation, is unconstitutional, because not levied on all the property in the district.

TAXATION FOR LOCAL IMPROVEMENT.—A tax levied on the property of a given district, to pay for a local improvement, which is assessed upon the parcels of property in the district, in proportion to the benefits each parcel derives from the work, is unconstitutional. Such tax must be levied on all property according to its value.

Argument for Respondent.

REMISSION OF TAX.—A clause, in an Act imposing a tax, which allows the Board of Supervisors to remit the tax upon such property as they may deem just, does not render the whole Act unconstitutional.

APPEAL from the District Court of the Tenth Judicial District, County of Sutter.

The plaintiff recovered judgment in the Court below, and the defendant appealed.

The other facts are stated in the opinion of the Court.

J. O. Goodwin, for Appellant.

First—The Act under which this suit is brought is unconstitutional.

1. It provides for a local improvement and prescribes the mode in which moneys shall be raised to make such improvement. Now, if the mode prescribed is a tax, then the law is obnoxious to the tenth section of the first Article of the Constitution, which provides that "all laws of a general nature shall have a uniform operation;" and, also, to the thirteenth section of Article XI, which provides that "taxation shall be equal and uniform." If the Act is to be construed as similar in principle to that authorizing the widening of Kearny street, in San Francisco (Stats. 1863-4, p. 347), then, under the decision of this Court construing the latter, the former cannot stand. (*Appeal of N. B. & M. R. R. Co.*, 32 Cal. 504.)

2. On the other hand, if it is not a tax, but an assessment, as the latter has been defined, and contradistinguished from the former by this Court, then the only basis on which an assessment for the purpose this one was authorized to be levied for can constitutionally rest and be apportioned, is one of benefits received. (*Taylor v. Palmer*, 31 Cal. 254.)

S. J. Stabler, and *Beatty & Denson*, for Respondent.

The demand is a special tax, and not an assessment. The Act provides for the taxation of all the property in the dis-

trict to be benefited at a rate the limit of which is fixed by the Act, and not according to the benefit to be derived to each piece of property to be taxed. The chief distinction between a tax and an assessment is in this, that an "assessment" is a duty or fine laid upon particular property to raise money with which to accomplish some work that will add to the value of the property itself, while a "tax" is levied upon the citizen according to the value of his property—or what is the same thing, his ability to pay—without reference to any increase of value upon the particular property taxed. (*People v. Coleman*, 4 Cal. 46; *Smith v. Judge of Twelfth District Court*, 17 Cal. 547.)

If an unconstitutional provision is contained in section twenty, it is not so interwoven with the balance of the Act as to mar the meaning, defeat the objects, or in any way impair the act by striking it out. The Court will not in such case declare the whole Act unconstitutional, but will strike out the obnoxious provisions and sustain the balance. (See *People v. Hill*, 7 Cal. 103; *Reed v. Omnibus R. R. Co.*, 33 Cal. 219; *State of Nevada v. Easterbrook*, 3 Nev. 180.)

By the Court, RHODES, C. J.:

The Act of March 25th, 1868 (Stats. 1867-8, p. 316), set off a certain portion of Sutter County, as Levee District No. 1, and provided for the levying of a tax on all the property within the district, to provide the means for the construction of levees, etc., to protect the district from overflow. This action was brought for the collection of the tax assessed for that purpose, on the property of the defendant. The action is defended on two grounds. It is insisted that the charge is not a tax, but an assessment; and, also, that if it is a tax, the Act is unconstitutional, because it is not equal and

uniform, within the meaning of section thirteen, of Article XI, of the Constitution.

The principal reason urged in support of the position that the charge is an assessment, is that it is levied for the purpose of making a local improvement. Acts almost innumerable have been passed, levying taxes for such purposes, and no cases are called to our attention which hold, that by reason of the purpose for which they were levied, they became assessments. Taxes for the construction of roads, bridges, and school houses are familiar instances. The funds to pay for the grading of a street, may be raised by taxes levied upon all the property of a town, should the law so direct; but the tax does not become an assessment, because the latter is the mode usually adopted to raise the funds for that purpose. There is no sufficient reason for holding that the charge is not, what the Legislature declared it to be — a tax.

I see no valid objection to the tax, on the alleged ground of a want of equality and uniformity. In this connection the answer may be noticed, as the alleged inequality of the tax is there relied on, as a defense to the action. It is alleged that by the construction of the levee, the defendant's property, instead of being benefited, is greatly damaged. It is scarcely possible that any work of public improvement of considerable magnitude can be constructed, that will not affect injuriously the property of some one; and the fact that such a result has accrued, is not a valid objection to the tax.

It is also alleged, that while the property of other persons, which was greatly benefited by the construction of the levee, was assessed at its former value, that of the defendant was assessed at its former value, without regard to the injury occasioned by the construction of the levee. Those were matters to be regulated by the Board of Equalization; but if, on application to the Board of Equalization, the defendant

failed to obtain the proper relief, he is not, on that ground, enabled to resist the payment of the tax, nor for that reason can he allege that the tax is not equal and uniform.

It is also alleged, that this tax was also levied on his personal property. Had personal property been exempted by the Act from taxation, that provision (if valid) would have furnished an unanswerable objection to the Act—that it did not impose the tax on *all* the property within the district.

It is further alleged, that the tax was levied to pay for a local improvement, and was not assessed upon property in proportion to the benefits derived from the work. If the Legislature intended that a tax should be levied, and if it may be levied, to pay for a local improvement, it is not only no objection to the Act, or the proceedings that were had under it, that it is not levied upon property in proportion to the benefits received by means of the improvements; but if a tax should be levied on that principle, it would be fatally defective, because lacking the constitutional qualities of equality and uniformity. A tax is equal and uniform, which reaches and bears with the like burden upon all the property within the given district, county, etc. It bears the like burden, when the valuation of each parcel is ascertained in the same mode—the mode prescribed by law—and when it is subject to the same rate of taxation as other property within the district, county, etc. Absolute equality is unattainable, and the benefits derived, or to be derived, from the expenditure of the tax, cannot be taken into the account.

It is further objected, that the twentieth section of the Act authorizes the Board of Supervisors to remit the taxes upon such property as they may deem just and proper. It is not alleged that they have remitted such taxes. When a case of that character is presented, it will be a question whether the action of the Board in that respect is not unauthorized and void—whether the section alluded to is

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not unconstitutional—but that provision does not render the whole Act void.

Judgment affirmed.

[No. 2,584.]

THE CALIFORNIA PACIFIC RAILROAD COMPANY
v. L. C. FRISBIE ET AL.

ASSESSMENT OF DAMAGES IN TAKING LAND FOR RAILROAD.—If Commissioners appointed to assess damages and benefits in an application to condemn land for a railroad assess the cost of fencing separately from the estimate of damage to land not taken, there is no substantial error, although the directions of the statute are not technically complied with; and, in such case, the Court may enter judgment for the value of the land taken and the cost of fencing, and the excess of damages over benefits to land not taken, if there are any.

INDM.—If such Commissioners, in a case where the damages exceed the benefit to land not taken, assess the value of the land taken, and then the gross amount of damages to land not taken over the benefits to land not taken, it is a substantial compliance with the statute requiring them to ascertain and assess the damages to land not taken, and the benefits to land not taken.

APPEAL from the District Court of the Seventh Judicial District, Solano County.

This was a petition filed by the plaintiff in the District Court, to condemn the land of Frisbie and some fifty others for the track of a railroad, from the Straits of Carquinez to Sacramento.

The Commissioners, in their report to the Court, included the testimony taken before them. On the filing of the report of the Commissioners, the plaintiff's attorney excepted to the same, and filed a bill of exceptions, which was settled by the Court. The Court confirmed the report, and entered judgment. The plaintiff appealed, without moving for a new trial.

The other facts are stated in the opinion.

Wm. S. Wells, for Appellant.

The authority given to Commissioners is in derogation of the common law. All the requirements of the statute authorizing its exercise must be strictly pursued. (*Adams v. Saratoga and Washington Railroad Company*, 6 Selden, 328; *Sharp v. Spier*, 4 Hill, 76; *Striker v. Kelley*, 2 Denio, 323; *Dyckman v. The Mayor of New York*, 1 Selden, 439; *Central Pacific Railroad Company v. Pearson*, 35 Cal. 257.)

L. C. Hays, and Pendegast & Stoney, for Respondents.

Appellant's points are all confined to alleged omissions and informalities in the report, and errors in the mode of ascertaining the damages. There was no error in not making, under the head of damages, a lumping assessment of the damages proper and the cost of fences. The meaning of the statute is that the cost of fences is to be included in the sum of damages from which the benefits are to be subtracted, and not that such costs must be assessed under the name of damages. In all cases the damages and the cost of fencing, being distinct and unlike things, must be separately estimated; and when the benefits equal the damages, why go through the form of adding them before subtracting the benefits?

By the Court, CROCKETT, J.:

We deem it unnecessary to decide whether the exceptions of the appellant to the report of the Commissioners were made in such form that we could consider them on this appeal. But we think the exceptions to the report are purely technical, and that the appeal is devoid of merit. It is not alleged that any injustice has been done to the appellant, but only that the Commissioners have not strictly pursued the statute in the mode of stating the result at which they arrived. It

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is objected, in respect to several of the respondents, that the Commissioners ascertained and assessed: First, the value of the land taken; second, the cost of the fencing which would be necessary; third, that the benefits to the land not taken were equal to the damages to the land not taken; and, in one case, that the damages exceeded the benefits two hundred dollars; whereas the appellant contends that the cost of fencing ought to have been included in the estimate of damage to the land not taken. The Court understood the report to mean, in the cases first referred to, that the damage, exclusive of fencing, was equal to the benefits to the land not taken; and in the last case that the damage exceeded the benefits by two hundred dollars. In accordance with this view of the report, the Court entered judgment in the first class of cases for the value of the land taken and the cost of the fencing; and in the other case, in addition thereto, for two hundred dollars, being the excess of damage over benefits to the land not taken. We think the Court correctly construed the report, and entered the proper judgment. The statute, it is true, requires the Commissioners, in assessing the damage to the land not taken, to include therein, as part of the damage, the cost of necessary fencing, and to deduct from the aggregate amount of damage the benefits to the land not taken, if the former shall exceed the latter. But there is no substantial error in stating the cost of fencing separately from the other damage, as was done in this case. The result, practically, is precisely the same as if the cost of fencing had been included as part of the damage, and the benefits had been deducted therefrom. In the case of two of the respondents the Commissioners reported, first, the value of the land taken; and second, that the damage to the remainder of the tract exceeded the benefits by a specified sum; and it is claimed that they erred in not stating separately the gross amount of damages and benefits and then subtracting the one from the other. But the stat-

ute apparently contemplates that the report need state only the results at which the Commissioners arrived, and not the details by which the result was reached. It requires them to ascertain and assess, first, the value of the land taken; second, the damages to the land not taken, including the cost of fencing; third, the benefits to the land not taken (Stats. 1867-8, p. 705); and provides that if the benefits are equal to the damages no damages shall be awarded; but if less than the damages, then damages shall be awarded only for the excess. The Commissioners in this case must of necessity have assessed the damages and benefits separately; otherwise they could not have ascertained that the former exceeded the latter by a specified sum.

The statute requires them to append to their report all the evidence, together with their rulings and the exceptions thereto, in order that the Court may be enabled to review their proceedings, and to determine whether their conclusions were justified by the facts.

In respect to damages and benefits, the only question of interest to the railroad company and to the land owner is, whether the benefits are equal to the damages; and, if not, by how much do the latter exceed the former. The Commissioners have answered this by stating the exact amount of the excess, which is a substantial compliance with the statute. If they erred in the amount, the Court, with all the evidence before it, had the means of detecting the error.

Judgment affirmed, with twenty per cent damages.

Mr. Justice TEMPLE, being disqualified, did not participate in the decision.

Mr. Justice RHODES did not express an opinion.

Statement of Facts.

[No. 2,668.]

O. L. ROUSSEL v. MICHAEL KELLY AND JANUS FRIST.

UNLAWFUL DETAINER AGAINST TENANT.—If a tenant fails to pay rent when it falls due, and for three days after a demand thereof, and for possession of the premises by the landlord, his subsequent tender thereof, with interest and costs, is no defense in an action of unlawful detainer.

APPEAL from the County Court of the City and County of San Francisco.

On the first day of July, 1867, the plaintiff leased to the defendant Kelly, a lot in San Francisco, for the term of five years, at a monthly rent of thirty-five dollars for the first two years, and forty-five dollars for the remaining three years. Kelly afterwards sublet to defendant Frist. The rent for the months of January, February, and March, 1870, amounting to one hundred and thirty-five dollars, was not paid; and on the 8th day of March, 1870, the plaintiff served a written demand on the defendants to pay the rent, and to deliver up possession of the premises. Defendants having failed to pay the rent, this action was commenced on the 12th day of March, 1870.

The defendants, in their answer, admitted that the rent was due, and the demand made; but averred that four or five days before the summons was served on them they tendered to the plaintiff one hundred and thirty-five dollars, and that he refused to receive the same; and that, on the 1st day of April, 1870, they tendered to the plaintiff the rent and interest, and all cost which he also refused, and that they now brought into Court the same. The answer further alleged that the lot was unimproved when the lease was made; but they had since erected buildings thereon, at an expense of two thousand and five hundred dollars; and that, by the terms of the lease, the improvements could not be removed during the term of the lease.

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On the trial the defendants offered to pay all rent then due, and interest, and all cost and expenses; but the plaintiff refused to receive it. The plaintiff then moved for judgment on the pleadings. The defendants offered to prove the matters set up in the answer; but the Court refused to receive the evidence, and sustained the plaintiff's motion.

The defendants appealed.

Quint & Hardy, for Appellants.

Sidney V. Smith & Son, for Respondent.

By the Court, SPRAGUE, J.:

The record in this case presents the question whether, in an action under the Act of April 27th, 1863, "concerning forcible entries and unlawful detainers" (Stats. 1863, p. 652), for the recovery of possession of leased premises, with rents due, by the landlord against the tenant, on the ground of failure by the tenant to comply with the covenant of his lease, as to payment of rent, and his further failure to pay the rent due within three days after demand thereof, and for possession of the premises by the landlord, a subsequent tender by the tenant to the landlord of the full amount of rent due, with interest and costs and expenses of suit, set up in the answer, is any valid or permissible defense to such action.

It may be admitted that, at common law, in an action by the landlord to recover from his lessee the possession of the leased premises, and enforce a forfeiture of the tenant's estate therein, by reason of his breach of a covenant in his lease to pay rent, a defense of the character here set up would be good and valid. But the remedy sought to be enforced in the present action is provided by statute, which definitely fixes and prescribes the rights and responsibilities

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of the parties in the premises and it is not within the legitimate province of a Court to limit or enlarge the remedy, or to restrict or extend the rights of parties clearly within its provisions.

The third section of the statute declares that "it shall be unlawful for any person to hold over any lands, tenements, or other possessions * * * contrary to the covenants of the lease or agreement under which he or she holds, or after any rent shall become due according to the terms of such lease or agreement, and shall remain unpaid for the space of three days after the same shall become due as aforesaid."

Section four provides that "in all cases specified in the preceding section, the landlord may, at any time within one year after such rent shall become due and remain unpaid, * * * make demand, in writing, of such tenant or tenants, that he, she, or they deliver the possession of the premises held as aforesaid; and if such tenant or tenants shall refuse or neglect, for the space of three days after such demand, to quit the possession of such lands or tenements, * * * or to pay the rent, in case the term has not expired, but rent remains unpaid, then such tenant or tenants shall be deemed guilty of an unlawful detainer."

Thus, it will be seen, by the third section of the Act it is declared unlawful for the tenant to hold the possession of the leased premises for more than three days after rent shall become due from him by the terms of his lease and remain unpaid. And the fourth section declares that if the tenant shall, after rent is due from him and remains unpaid, refuse or neglect, for the space of three days after demand by his landlord, in writing, that he deliver possession of the premises to quit such possession, or to pay the rent due, in case his term has not expired, he "shall be deemed guilty of an unlawful detainer."

The allegations of the complaint in the present case are clearly sufficient, if admitted, to place defendant in the posi-

Points decided.

tion denounced by the statute as guilty of unlawful detainer. The answer of defendant Kelly, admits the material allegations of the complaint, and asks the Court to withhold the sentence of the law upon his admitted guilt, and condone his offense, upon the grounds that, subsequent to the commencement of the suit, he had tendered to the plaintiff, and brings into Court, with his answer, to be paid to plaintiff, a sum of money sufficient to satisfy the full amount due plaintiff for rent, with interest thereon, and plaintiff's costs and expenses of suit, and that he is now willing to pay such further sum to plaintiff as the Court may adjudge him entitled to.

The sentence of the law upon the admitted facts of this case is defined and fixed by the thirteenth section of the Act, and no provision is made by this or any other statute which would authorize the Court to render or pronounce any other or different judgment *in this action*.

If the law is harsh, and in its practical application in some instances may seem to be used as an instrument of oppression and injustice, a means of escape from or modification of its rigors should be sought at the hands of the Legislature.

Judgment affirmed.

[No. 1,724.]

JOHN DOWNS WILSON v. GEORGE K. FITCH,
JAMES NISBET, JAMES W. SIMONTON, AND
FRANKLIN TUTHILL.

ARTICLE LIBELOUS ON ITS FACE.—When an article in a newspaper imputes to a person grave offenses and dishonest practices, which, if established, would bring him into general contempt and disgrace, it is actionable on its face.

PROOF OF COLLOQUIUM.—When an alleged libel is actionable *per se*, and still a colloquium is inserted in the complaint, it is unnecessary to prove the colloquium.

Points decided.

WHEN COLLOQUIUM NOT NECESSARY.—A colloquium is not necessary, except when the libel is not actionable on its face, but has a covert libelous meaning.

EVIDENCE OF BELIEF IN ACTION FOR LIBEL.—In an action for damages for publishing a libel, in which it is stated that the owners of a mine believe that they have been swindled by the plaintiff, testimony that such owners, at the date of the publication, believed that they had been swindled, is not admissible, either in justification or mitigation of damages.

IDEM.—If the libel assert the defamatory matter, not as a fact, but only as the belief of the author, or as a rumor, or general suspicion, the libel cannot be justified by proof that the author believed it to be true, or that there was such a rumor, or general suspicion.

IDEM.—In order to justify such publications of the belief of the author or of others, the defendant must prove the truth of the matter published.

PRIVILEGED COMMUNICATION.—PROOF OF MALICE.—The trustee of a private corporation is not a public officer in such a sense as to enable the publishers of a newspaper to claim an article published concerning him, and criticising his conduct as trustee, as a privileged communication, and therefore compel such trustee, in an action for libel, to prove express malice.

DEFAMATORY PUBLICATION NOT PRIVILEGED.—A defamatory publication in a public journal, concerning a private person, is not privileged, so as to require proof of express malice on the part of the plaintiff, simply because it relates to a subject of public interest, and was published in good faith, without malice, and from laudable motives.

IDEM.—In such case the publisher, in order to rebut the presumption of express malice, should be allowed the fullest opportunity to show the circumstances under which the publication was made.

EVIDENCE OF DEFENDANT IN ACTION FOR LIBEL.—In an action for libel, the defendant cannot introduce in evidence libelous articles, published by other persons, before the publication of the alleged libelous article, whether they refer to the same transactions spoken of in the article published by the defendant, or to other matters.

IDEM.—In an action of libel, the defendant cannot introduce evidence to show that prior to and up to the time of the publication by defendant, the plaintiff had been generally reported and suspected to have been guilty of the acts imputed to him in the libel.

VERDICT AGAINST WEIGHT OF EVIDENCE.—The appellate Court will not disturb the verdict of a jury on the ground that it was not justified by the evidence, when there was a substantial conflict in the testimony, even though it is greatly against the weight of evidence.

VERDICT FOR EXCESSIVE DAMAGES.—In an action for a libel, if there is no proof of malice or ill-will toward plaintiff, and the publication is made in the usual course of defendants' business as public journalists, in the full belief that the article was true, after a careful inquiry from an apparently reliable source, the plaintiff is not entitled to punitive damages.

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APPEAL from the District Court of the Twelfth Judicial District, City and County of San Francisco.

The defendants were the editors and proprietors of the *Evening Bulletin*, published in San Francisco. The plaintiff and several others owned a silver mine in the State of Nevada, and were incorporated under the name of the Santiago Mining Company, and the plaintiff became one of the trustees of the corporation. The plaintiff owned and sold stock in the corporation. On the 3d day of November, 1863, the following article was published in the *Bulletin*:

“THE STORY OF A PROMISING MINE.

“A year ago, or more or less, a Mr. Wilson came to town from Washoe, bringing some beautiful specimen bricks and rocks, and a straight story, as to a mining claim (the Zouave) that he owned, convenient to the Carson River. He was not anxious to sell, though he had some two thousand eight hundred feet in his claim, and it was undoubtedly rich. He had no objection, however, to impart to a few friends the intelligence of the brilliancy of his own prospects. He told his story to Mr. Peachy, of the firm of Halleck, Peachy & Billings, who induced him to let him have, for a short time, the refusal of some four hundred and fifty feet, at sixty-five dollars a foot. Mr. Peachy got the foreman of the California Mine (Virginia City) to take a look at the ground, who reported that the prospect was good, and at that price the investment would probably be safe. Mr. Peachy then called upon Lafayette Maynard, telling him that if he would take half of the shares at the price named, he would close the bargain with Wilson. Mr. Maynard consented, and the bargain was completed. A corporation was formed, and the new company, under the name of the Santiago, elected Mr. Maynard its President, who at the time was at Washoe, and, if we are not mistaken, in company with some of the partners,

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visited the old Zouave, now the Santiago Mine, descended its incline, entered its galleries already excavated, and saw the gray rock which was alleged to be full of silver. Certainly they saw nothing to make them doubt that everything was as promising as had been represented; for, say what you will, except to experts in rock, the barren and the rich look exceedingly alike, when underground, by the flickering light of a candle, and even experts speak cautiously on such points when any great responsibility attaches to their word. The company was soon under full headway, with, as he deserved to be, Mr. Wilson one of its trustees.

“Measures were taken at once to develop the mine; Mr. Wilson knew of an admirable man for Superintendent. The others had no men to name, and Mr. Wilson’s man was chosen. He was instructed to push work with vigor — no capital should be lacking — but to practice economy in all his operations, and faithfully report all that he did or learned. He was to write frequently to the company, and his letters the Secretary was ordered to keep in an open drawer, where every stockholder could see them all. Other San Francisco capitalists heard of the good thing, and induced Wilson to let them in. Pioche & Bayerque bought some. The Barrons, who have been for years in mines, got not a little. Men connected with their house, the Barrons, Mr. Bell, and Mr. Young, the Superintendent of the New Almaden, took among them some eight hundred shares, buying generally at a much higher figure — from one hundred dollars up to one hundred and seventy-five dollars a share. Hall McAllister got some shares, but his were paid for in legal services. Judge Lake got some to the extent of the value of his handsome house on Lombard street. Judge Hoffman bought some. Other men of smaller means, seeing what kind of citizens were putting their money in, bought Santiago, sometimes with all their earnings. The richer owners could not keep them out. When inquired of, they gave the usual

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advice: 'Don't touch anything in the way of mines, unless you can afford to lose all you invest; it is a lottery.' But they had not the heart to keep a good man poor because he was poor, and, being pressed, they confessed that they believed in Santiago fully, and so the poor men invested, saying example was more cogent than precept, bought as deeply as they could, always of Wilson, but not generally at the highest rates, for Wilson seemed to have a heart under his ribs, and was willing to favor a friend who was struggling. One worthy bookkeeper put in thirteen thousand dollars that he had saved at the desk. The Superintendent's reports were always favorable. He generally obeyed orders, and left the adjectives out of his dispatches. He gave 'bare facts,' but the bare facts were heavy with silver and weighted with gold; some six hundred feet of the mine had been developed; none of the rock was poorer — most of it richer — than had been anticipated. The company, determined not to be misled, ordered him to take seven hundred tons of the rock from the open galleries and have it crushed at various mills; let there be no picking — let every pound that went to the surface be ground; they would have an assay on a grand scale that would faithfully show the average yield of their rock. The Superintendent soon reported that he had obeyed orders, and the result was forty dollars to the ton! That was magnificent. The buyers at the highest figure wished they had more stock. No one but Wilson would sell an inch, and he was rather yielding, in the goodness of his heart, to the importunities of friends, than selling of his own wish, or in accordance with the dictates of his judgment. Mr. Peachy bought more shares, paying at a higher figure this time, and giving for it the house on Rincon Hill which he had purchased of Mr. Tucker, the jeweler, giving him Wide West Stock. The owners thought if custom mills give us forty dollars a ton, with a mill of our own we can get better than that; for such is the faith concerning

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custom mills the whole land over. They cheerfully agreed to buy, and soon negotiated for a mill on the Carson River, owned by Raymond & Thompson — a mill of fine facilities, convenient to their mine, and of abundant water-power. In the mine was an engineer formerly of the California Mine, and the old and trusted acquaintance of some of the heaviest owners. This gentleman wrote down to the President that he had taken the responsibility of sending a ton of the average rock to the Mexican Mill, which, since the Mexican Mine had caved in, was crushing some for customers. This announcement was not welcomed by Wilson. He said the Mexican Mill, holding its head very high, refused the privilege, accorded by all others, of allowing a representative from the mine whose ore it crushed to stand by and see that a fair return of the silver and gold was made. He prophesied that if the order was not countermanded, the rock would be reported to yield less than its true measure. He protested against exposing the credit of the mine by any such experiment. The company decided otherwise, however. They knew the Mexican Mill owners; they believed they would deal honorably with their customers; if the rock would not stand its test they wanted to know it. They could pay their debts; they could meet their notes; the stock was not on 'change; they wanted no more credit than the rock entitled them to have. The Mexican crushed its ton, and reported a yield of only thirteen dollars to the ton! This was an eye-opener. The mills charge twenty-five dollars a ton for crushing, and it is said to cost full thirteen dollars a ton for a mill to run out a ton. Unless there was some mistake, their mine would ruin them. Investigations followed. It came out that Wilson had sold his shares so far down that, of his original twenty-eight hundred feet, he had but nineteen left! Either he must have lacked the ambition of his fellow owners, or he was trying to get out of a concern which he had all along represented as the richest thing

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east of the Sierras. Further examination showed that the Superintendent and Director Wilson had been in daily confidential correspondence. Wilson said they owned together many other interests, and had a right to correspond freely concerning them. The other Directors thought it a suspicious circumstance, a breach of faith, if this correspondence concerned Santiago; a reason for the Superintendent's removal if he was dividing his time with other enterprises, when the company thought they had the monopoly of his services. Still further investigations revealed that the seven hundred tons of rock which yielded the forty dollars a ton were not, as was specifically ordered, taken from the whole exposed face of the mine, but picked from one rich spot, if not absolutely salted at the mills. The investigations are not yet ended, but the chief owners believe that they have been outrageously swindled.

"Meanwhile the assessments were thickening to pay thirty-five thousand dollars every sixty days, towards the mill purchase. Some of the heavier owners proposed to ease the burden of the lighter shareholders, and save their own credit, by buying the mill, at the cost to the company, for the use of another company in which they were interested. But this alarmed the small holders. 'A freeze out!' they exclaimed; 'none of that; we want the mill; we believe in the mine!' So, the heavy men, to keep the peace, and save their honor, vote to keep the mill, and the assessments go on. How they are borne may be guessed by the following advertisement which appears in a morning newspaper, and which we insert free, as a part of the story. Wilson's number of shares is set down as greater than is stated above. The explanation of that, however, is not difficult; it is small as here given:

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“ ‘SANTIAGO MINING COMPANY.

“ ‘OFFICE: SAN FRANCISCO, November 2d, 1863. }

“ ‘Notice is hereby given that, in accordance with the laws of the State of California, and pursuant to an order of the Board of Trustees of said Company, there will be sold at public auction, at the salesroom of Jerome Rice & Co., No. 327 Montgomery street, San Francisco, on Saturday, the fifth day of December next, at twelve o'clock, noon, to the highest bidder, for cash, in United States gold coin, so many shares of the capital stock of the company standing in the names of the following shareholders as will be necessary for the payment of an assessment levied October 3d, 1863, together with expenses of advertising and sale, to wit:

NAMES.	Shares.	Amount.
J. B. Bayerque.....	89	\$890
A. C. Peachy	400	4,000
S. Heydenfeldt	175	1,750
L. Maynard	220	2,200
Eug. Celle	50	500
E. A. Breed	50	1,000
J. K. Whittaker	40	800
G. T. Knox	50	1,000
W. E. Barron	10	100
Barron & Co.	405	4,000
Hall McAllister	37	740
R. Bayerque	24	240
A. Borel	20	200
C. H. Reynolds	10	200
J. C. Badarous	4	80
N. Larco	10	100
C. Bonner	30	600
T. Bonacina	10	100
R. J. Moritz.....	7	140
J. Young	80	800
Thos. Bell	193	1,930

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SHAREHOLDERS — Continued.

NAMES.	Shares.	Amount.
Juhn. McAllister.....	24	\$480
Ogden Hoffman.....	65	650
D. Lake.....	70	1,400
E. Barron.....	112	1,120
J. B. Shaw.....	10	100
J. D. Wilson.....	54	890
F. L. A. Pioche.....	100	1,000
Chas. Hosmer.....	20	200
P. W. McKay (assessments Nos. 1 to 10 included)	50	2,650

“By order of the Board of Trustees.

“EDWARD A. BREED, Secretary.”

“There may be some who, having no faith in mankind, will insist that this is a gigantic game of freeze out. Citizens generally will believe it to be one instance out of many that seldom come to light, where the shrewdest and most careful and honorable business men are led into operations whose results are more regretted by them on account of the mortification they must feel at seeing poor men ruined by being drawn into enterprises on the strength of their names, than for the thousands of dollars that are taken out of their own coffers and sunk. If that is the case, society is indebted to the capitalists in the ‘Santiago’ who allow the story to be told for the warning of a mining-mad community.

“Every honest exposure of the operations of a mining company or its agents, helps to break up the schemes of swindlers, which are doing more than anything else to prevent the development of the resources of the mineral States. Let the honest men who are diddled, thoroughly sift the

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method of the deceit that makes them suffer, and with all the appliances of the law prosecute those who deceive them, and prospecting will be put on a firm basis, and California and the territories adjacent will continue every year to astonish the world with the bounty of their newly developed treasures. Meanwhile, every citizen finds a lesson in the story of the Santiago. Whether it was only a mistake or something worse, it is clear that it is not safe for any man to invest his all in any one mining speculation, however promising it may be, nor though the ablest business men in the community believe in it. Let the prospecting go on, but let no man stake his all on the realization of any one prospect that is not absolutely in the line of his own business."

This action was commenced to recover damages for the libel.

The defendants in the answer set up, among other defenses, the truth of the alleged libel. They also averred in the answer, that at the time of, and before the publication, the matters therein contained were commonly reported and generally believed, and that they published the same believing it to be true, after careful inquiry, and without malice, and that it referred to transactions and conditions of a public or general corporation, of which the plaintiff was a trustee and member, and that he was referred to in that capacity only, and that the publication was made in the usual course of defendant's business as public journalist, without ill-will or intent to defame the plaintiff.

On the trial one McCulloch was called as a witness for defendants, and he testified that he was a chemist and had obtained a patent for a process for reducing silver ore; that Wilson had obtained the right to use it in 1861 in Nevada. The counsel for defendants then offered in evidence a pamphlet, published by McCulloch in 1862, in which he had spoken of the plaintiff, and accused him of having tried

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to induce the witness to make experiments with the process, and falsely represent it as a failure, so that the plaintiff might profit by a depreciation in mining stocks caused thereby. The plaintiff's attorney objected, and the Court ruled out the pamphlet. There was a daily paper published in San Francisco called the *Daily Morning Call*. On the 31st of October, 1863, the *Call* published an article in relation to the plaintiff's connection with the Santiago Mine, reflecting severely upon him. The defendants' attorney offered this article in evidence, and the plaintiff's attorney objected, and the Court ruled out the article. The jury found a verdict in favor of the plaintiff for seven thousand five hundred dollars, and the Court rendered judgment for that amount. The defendants appealed from the judgment and from an order denying a new trial.

The other facts are stated in the opinion.

J. W. Winans, for Appellants.

The Court erred in refusing to allow defendants to prove their assertion that: "The investigations are not yet ended; but the chief owners believe that they have been outrageously swindled." The evidence was competent in justification. The charge complained of was a distinct part of the alleged libel, and divisible from the rest. It could, therefore, be separately justified. (2 Selwyn's *Nisi Prius*, 1053; *Mowbray v. Walton*, 2 Barn. & Ald. 673.) Section thirteen of the Practice Act provides that: "The defendant may, in his answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages; and whether he prove the justification or not, he may give in evidence the mitigating circumstances." But this doctrine of justification, by proving the truth of the charge, is sustained fully by the authorities. (*Commonwealth v. Snelling*, 15 Pick. 341; *Bisbey v. Shaw*, 2 Kernan, 72; *Stow v. Converse*, 4 Conn. 33; *Thrall v. Smi-*

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ley, 9 Cal. 536; *Vanwyck v. Guthrie*, 4 Duer, 274; *True v. Plumley*, 36 Maine, 466, 481; 1 Hilliard on Torts, 340; 1 Starkie on Slander, 233; *Steele v. Southwick*, 1 Am. Lead. Cases, notes, 116; Voorhees' New York Code, Sec. 165, and notes.) Again, if the evidence of the truth of the charge, that the chief owners believed themselves to be outrageously swindled, did not constitute a justification, it was clearly admissible in mitigation of damages, yet the Court ruled it out on this ground also, although the point was expressly presented. (1 Maule & Selw. 284; *Earl of Leicester v. Walter*, 2 Campbell, 251; Anthon's Nisi Prius, notes, 38-40; *Gilman v. Lowell*, 8 Wend. 582; *Hanson v. Veatch*, 1 Black. 371; *Dewitt v. Greenfield*, 5 Ohio, 225; *Jenks v. Backhouse*, 1 Binney, 92; *Bailey v. Hyde*, 3 Conn. 466; *Bush v. Prosser*, 1 Kernan [11 N. Y.], 355; *Heaton v. Wright*, 10 How. Pr. 83.) And in *Stanley v. Webb*, 21 Barb. 148, a case very similar in principle to that we are considering, the court say: "The rule of law allowed the defendant to prove anything, under the general issue, which does not tend to a justification, but which falls short of that." That was an action for libel, and the attention of this court is invoked to it as being strongly similar in its facts, as well as in its principles, to that under review. (*Remington v. Congdon*, 2 Pick. 315; *Bisbey v. Shaw*, 2 Kernan, 72, 73; *Weed v. Bibbins*, 32 Barb. 321; *Mapes v. Weeks*, 4 Wend. 662; Starkie on Slander, vol. 2, p. 95, note 2; *Root v. King*, 7 Cowan, 616, 617; *Chalmers v. Shackell*, 6 Carr. & P. 475; *Kennedy v. Gregory*, 1 Binney, 85.) The alleged libel constitutes a privileged communication. Its publishers, the defendants, were not, therefore, liable without proof of express malice. For a clear statement of the doctrine of privileged communications we refer to the opinion of an eminent jurist, Judge PARKER, of New Hampshire. (*State v. Burnham*, 9 N. H. 41; *Bradbury v. Heath*, 12 Pick. 165; *Perkins v. Mit*

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chell, 31 Barb. 467; *Kelly v. Tingling*, 1 Queen's Bench, 699; *Garrett v. Gilbert*, 6 Gray, 97.)

The words complained of are not libelous, *per se*, as (in themselves) they cannot be said to import anything of a defamatory character concerning the plaintiff. They make no direct charge against him of any kind whatever. It follows that what the defendants intended and understood them to mean, and what they were understood by those to whom they were published to mean, must be a matter of averment and proof. (*Gilman v. Williams*, 4 Wend. 320; *Andrews v. Woodmansee*, 15 Wend. 232; *Woolnoth v. Meadows*, 5 East, 463; *Dexter v. Taber*, 12 Johns. 239.)

Evidence of previous publication in other newspapers or journals, containing the same charges, was admissible to disprove malice, and in mitigation of damages. The Court erred in excluding the article in the *Daily Morning Call*, and that in McCulloch's pamphlet. (*Wyatt v. Gore*, 1 Holt's Nisi Prius, 299; *Romayne v. Duane*, 3 Wash. C. C. Rep. 246; *Morris v. Duane*, 1 Binney, 90; *Burns v. McCarkle*, 2 Browne, 80; *Wilson v. Apple*, 3 Ohio, 270.)

In *Morris v. Barker*, 4 Harrington, 521, the Court says it is reasonable "that although a man may not justify the uttering of a slander, nor attempt to prove its truth upon a plea of not guilty, yet with a view to mitigate the damages, and disprove malice, he might show that before the uttering of the slander by the defendant it was generally reported and spoken of by others." In the case of *Bailey v. Hyde*, 3 Conn. 463, the Court thus declares: "Or if the fame of a person is disparaged by there having been reports in the neighborhood that he had been guilty of practices similar to those imputed to him, it is admissible." (*Treat v. Browning*, 4 Conn. 408; *Earl of Leicester v. Walter*, 2 Camp. 257; *Wyatt v. Gore*, 1 Holt's N. P. 299.)

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Wilson & Crittenden, for Respondent.

The charge contained in the article was virtually one of swindling. The mere form of expression, "I *believe* he is a swindler," or "it is believed he is a swindler," does not alter the character of the libel. It would be remarkable if in actions of libel in the above instances, a man could either justify or mitigate the wrong of such publication in a newspaper, by himself taking the stand and swearing that he did believe it, or calling Smith or others to swear that they believed it. Private character is afforded a weak protection if such is the law. A sure mode of contumely and degradation is presented; easy of infliction, easy of justification, and impossible of refutation. The *belief* of a man's enemy concerning his conduct and principles would at once furnish the sword with which to assault, and the shield to avoid punishment in return. The charge, though made under the form of the belief of other persons, is in the eye of the law a direct charge of swindling, and therefore the only proof admissible in justification would be proof of *the fact* of swindling, and not merely the *belief* of others. (Heard on Libel, Sec. 176; *Waters v. Jones*, 3 Porter's Ala. R. 448; *Logan v. Steele*, 1 Bibb. 593; *Brooks v. Bemis*, 8 Johns. 455; *Root v. King*, 7 Cowen, S. C., 15; 4 Wend. 113; *Skinner v. Powers*, 1 Wend. 451; *Miller v. Miller*, 8 John. 74; *Stick v. Wisdome*, Cro. Eliz. 348; *Brown v. Lamberton*, 2 Binn. 34; *Nye v. Otis*, 8 Moss, 122; *Kennedy v. Gifford*, 19 Wend. 301; *Inman v. Foster*, 8 Wend. 603.)

It is now the established rule that to publish a libel, giving the name of the author, is as actionable as if no author's name was mentioned. And the proof that the person named told the publisher of the fact published is not even admissible in mitigation of damages.

The very clear and able opinion of KENT, Ch. J., in *Dole v. Lyons* (10 Johns. 449, *et seq.*), settles these questions on

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principle forever, and has remained the settled law of New York, and we believe of the United States, ever since.

Evidence that a defendant had been told by another what he uttered against the plaintiff is as inadmissible in mitigation of damages as it is in justification, whether the author's name was given at the time of publication or not. (*Mapes v. Weeks*, 4 Wend. 659; *Inman v. Foster*, 8 id. 602; *Kennedy v. Gifford*, 19 Wend. 301; *Austin v. Hanchette*, 2 Root, 148; *Treat v. Browning et al.*, 4 Conn. 408.)

It is well settled that neither particular reports nor public reputation of the truth of the slander, nor of kindred charges against the plaintiff, are admissible. (*Inman v. Foster*, 8 Wend. 608; *Kennedy v. Gifford*, 19 Id. 301; *Watson v. Buck*, 5 Cow. 499; *Root v. King*, 7 id. 613; *Fry v. Bennett*, 3 Bosw. 201; *Sheckel v. Jackson*, 10 Cush. 25.) This is not a privileged communication. A private person complains of a libel published in a newspaper, concerning him as a man. The authorities cited are utterly inapplicable. Mining is said to be a matter of great public interest. True, but not more so than agriculture, or commerce, or transactions in city property. Is a newspaper privileged to charge a man with being a swindler in town lots, because the sale of town lots is now a matter of great public attention? (*Littlejohn v. Greeley*, 13 Abb. Pr. R. 48, 49; *Root v. King*, 4 Wend. 122; *Sheckel v. Jackson*, 10 Cush. 26.) In the libel in the *Bulletin* no reference is made to the article in the *Call*. As was said in *Bond v. Kendall*, 36 Vt. 743, "it lacks the *salvo* which has characterized all the cases in which it has been permitted to show that the defendant was reporting what had been told him by another, viz.: the giving the name of the author." Evidence that the defendant had been previously told of the slander by another, was rejected when offered in mitigation of damages in the following cases, also:

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(*Mapes v. Weeks*, 4 Wend. 659; *Gilman v. Lowell*, 8 id. 581; *Walcot v. Hall*, 6 Mass. 514; *Clark v. Munsel*, 6 Metc. 389; *Anthony v. Stevens*, 1 Mo. 256; *Moberly v. Preston*, 8 id. 462; *Thompson v. Bowers*, 1 Doug., Mich. 327; *Sheckel v. Jackson*, 10 Cush. 25; *Leister v. Smith*, 2 Root, 24; *Lewis v. Niles*, 1 id. 346; *Jackson v. Stetson*, 15 Mass. 57; *Bond v. Wendel*, 36 Vt. 743; *Talbutt v. Clark*, 2 M. & Rob. 312.)

Were the damages excessive, or given under the influence of passion or prejudice? On this subject the code of civil practice in this State is very plain. It is not merely "excessive damages" which afford a sufficient ground of new trial, but they must be so excessive as to appear "to have been given under the influence of passion or prejudice." (Prac. Act, Sec. 193, cl. 5.)

The Court below, in the broad discretion which it exercised in determining the motion for a new trial, did not see any evidence of this passion or prejudice. (*Hall v. Bark Emily Banning*, 33 Cal. 525.)

By the Court, CROCKETT, J.:

If the alleged libel was actionable *per se*, it was unnecessary to prove the colloquium in order to make out a *prima facie* case for the plaintiff. When a libel is not actionable on its face, but has a covert, libelous meaning, a colloquium is necessary to explain the subject matter, and to bring to light the true interpretation of the libelous words. In such cases the colloquium must be proved. But in the present case the alleged libel is actionable on its face, and it was unnecessary to prove the colloquium. No unprejudiced person of ordinary intelligence can read the publication complained of, and avoid the conclusion that it imputes to the plaintiff grave offenses and dishonest practices, which, if established, would justly bring him into general contempt

and disgrace. The motion for a nonsuit was therefore properly denied.

The alleged libel contains a paragraph in these words: "The investigations are not yet ended, but the chief owners believe they have been outrageously swindled." The defendants offered to call the chief owners of the mine, to prove by them that at the date of the publication they believed they had been outrageously swindled. The Court excluded this proof, but decided that defendants were entitled to prove all the facts and circumstances tending to show that the owners, or any of them, had been swindled, and all facts and circumstances tending to create such belief. The defendants excepted, and assign this ruling as error. They claim that the proof was admissible, both in justification of that portion of the alleged libel and in mitigation of damages. But it was clearly inadmissible for either purpose. It cannot be denied, and the counsel for the defendants concedes to the fullest extent that it is well established, both on reason and authority, that if a libel assert the defamatory matter, not as a fact, but only on the belief of the author, or as a rumor or general suspicion, the libel cannot be justified by proof that the author believed it to be true, or that there was such a rumor or general suspicion.

In order to justify a publication, purporting to be made on the belief of the author that the fact was true, the defendant must prove the truth of the fact, and not merely that he believed it to be true. If one publish of another that he believes he was guilty of murder or arson, it is no justification to prove that he did in good faith believe it; but to make good the justification he must prove that the plaintiff was, in fact, guilty of murder or arson. This is conceded on all sides to be the law; and it results necessarily that if the publication complained of here had asserted that the author of it believed the chief owners of the mine had been swindled, it would not have been a justification to

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prove that he did so believe. To justify the publication he must have proved that they had, in fact, been swindled. But how can it vary the principle which underlies this rule of law, that the charge is made, not as a matter of belief on the part of the author, but as the belief of other persons? If there be any difference in principle between the two propositions, more plausible reasons can be adduced why proof of the belief should be held to be a justification in the former case rather than in the latter. When the author publishes his own belief that a fact exists, he knows the sources of his information, and whether they are apparently reliable, and whether the conclusion drawn from the facts is reasonable. But these elements may all be lacking in respect to the belief of another. He may have had no plausible grounds whatever for the belief; and to permit a defamatory charge published as the belief of some other person, to be justified by proof that such person did believe the fact to be as stated, would subvert one of the most thoroughly well established rules of the law of libel, and break down one of the chief safeguards of private reputation. The proof which was offered and excluded was obviously inadmissible as a justification. Nor was it competent evidence in mitigation of damages. The "mitigating circumstances" which are permitted by section sixty-three of the code to be pleaded and proved, must be such as tend to rebut the presumption of malice, or to reduce its degree. All libels are conclusively presumed to be, in some degree, malicious; but there are different degrees and phases of malice; and some actionable defamatory publications (all of which the law deems to be malicious, except privileged communications), are in fact published without actual malice. It is eminently just, therefore, that the defendants, with a view to reduce the damages, should be allowed to rebut the presumption of malice by the proof of what the statute terms "mitigating circumstances;" that is to say, the cir-

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circumstances under which the publication was made, and the real motives which induced it.

In this case the defendants were permitted to show the sources of their information as to the alleged facts, the circumstances under which the publication was made, and the real motives which led to it; and they did, in fact, prove by the witness, Nisbet, that Maynard, one of the chief owners of the mine, stated to the defendants, or one of them, that he and the other principal owners believed they had been swindled. They were further permitted to show that they believed this information to be perfectly reliable, and published the facts as related to them by Maynard, in the full belief that they were true, and not from any malice or ill will toward the plaintiff, but only as a matter of general public interest. Could it, in any possible view of the subject, have tended further to extenuate the publication, if it had been proved that the chief owners did, in fact, then believe they had been swindled? It cannot, I think, be doubted that, so far as the conduct and motives of the defendants are concerned, the actual belief of the owners that they had been swindled is a wholly immaterial circumstance. The defendants were informed, from an apparently reliable source, that they did so believe; and they acted in good faith on this information, believing it to be true. Would it render the conduct of the defendants either more or less reprehensible if it afterwards appeared that the chief owners did or did not believe they had been swindled? In deciding on the conduct or motives of the defendants, the belief of the owners of the mine that they had been swindled was a false quantity. It in no respect touched the question at issue, to wit: the conduct and motives of the defendants in making the publication. If the defendants were credibly informed, from an apparently reliable source, that the owners did so believe, and if they acted on this information, believing it to be true, the extenuation was none the more

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complete from the fact that the owners did so believe, nor would have been any less complete if they had not so believed. The fact of their belief was wholly immaterial, and could have no effect either the one way or the other toward elucidating the conduct or motives of the defendants. The proof was, therefore, properly excluded.

Another point made by the defendants is that the publication was privileged, and that the defendants could not be held liable, except on the proof of express malice, of which, it is claimed, there was no evidence whatever. It is said to be privileged, because it was published by public journalists as a matter of general and peculiar public interest, and related to the conduct of the plaintiff in his capacity of trustee of a mining corporation. But this was a private and not a public corporation. The plaintiff was in no sense a public officer, and was responsible only to the stockholders and creditors of the corporation for the fidelity of his conduct as a trustee. His office was no more a public office than that of a trustee of a private corporation to build a bridge or construct a wagon road. Officers of this character have never been deemed public officers in such sense as to render them amenable to criticism, as in case of persons filling public offices of trust and confidence, in the proper administration of which the whole community has an interest. In the latter class of officers public policy demands that their official conduct should be open to unrestricted criticism, in which no malice is implied by law; and express malice must be proved to render the author liable. No case has been cited, nor am I aware of any, which holds that a trustee of a private corporation is a public officer in the sense claimed by the defendants. Nor can a defamatory publication in a public journal be said to be privileged simply because it relates to a subject of public interest, and was published in good faith, without malice, and from laudable motives. No adjudicated case, that I am aware of, has

ever gone so far. But whilst such publications cannot be deemed privileged, so as to require proof of express malice, the publisher, in order to rebut the presumption of malice, should be allowed the fullest opportunity to show the circumstances under which the publication was made, the sources of his information, and the motives which induced the publication. The public interest, and a due regard to the freedom of the press, demands that its conductors should not be mulcted in punitive damages for publications on subjects of public interest, made from laudable motives, after due inquiry as to the truth of the facts stated, and in the honest belief that they were true. On the other hand, if the rule were further relaxed, so that such publications in respect to private persons would be deemed privileged, thereby shifting the burden of proof from the defendant to the plaintiff, in respect to malice, there would be but little security for private character.

It is easy for the publisher to show the circumstances under which the publication was made, the sources of his information, and the motives for the publication, and thus to rebut the presumption of malice. But if the burden of proof was on the plaintiff, it would often, and perhaps generally, be very difficult, if not impossible, to prove express malice. I think the present rule, which allows to the publisher the fullest opportunity to rebut the presumption of malice, secures to him all the protection which is consistent with a due regard to the safety of private character.

There was no error in excluding from the jury the article from McCullough's pamphlet, or the publication in the *Morning Call*. The former had no reference whatever to the transactions referred to in the present case, and must be deemed libelous, inasmuch as the Court had no means of determining its truth or falsity by a judicial investigation. A former distinct libel on the plaintiff by another person ought not, on any principle of reason or justice, to be held

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to be an extenuation of the second libel. If the rule were otherwise, the more frequently an innocent person was libeled, the less would be his chance for redress against each successive libeler; and the more flagrant his wrongs, the less remedy would the law afford him. It has often been decided that it is not admissible to prove in mitigation that prior and up to the time of the publication the plaintiff had been generally reported and suspected to have been guilty of the acts imputed to him in the libel. Some of the earlier cases hold such proof to be admissible. (*Earl of Leicester v. Walter*, 2 Camp. 251; 1 Maule & Selw. 284; Anthon's Nisi Prius, 38-40, and notes; *Noble v. Fuller*, Peak's Add. Cases. 139.) But the current of modern authorities is to the contrary. (*Treat v. Browning*, 4 Conn. 415; *Jones v. Stevens*, 11 Price, 82; *Mills et al. v. Spencer et al.*, 1 Holt, 53; 3 Engl. C. L. R. 177; *Inman v. Foster*, 8 Wend. 606; *Saunders v. Mills*, 6 Bing. 215, 220; 19 Engl. C. L. R. 104, 106; Hare & Wallace Notes, 1 Am. Leading Cases, 201, *et seq.*; Townsend on Slander and Libel, 504, *et seq.*)

These decisions proceed on the theory that public policy, the good order and repose of society, and a due regard for the protection of private character, demand that no one should be permitted to excuse or palliate the offense of defaming the reputation of another on so slight a ground as public rumor or general suspicion, which are often wholly unfounded, and the result either of malice or misapprehension. If the defendants had offered to prove, in mitigation, that the plaintiff was commonly reported and generally suspected to have been guilty of the acts imputed to him in the alleged libel, I think the proof would not have been admissible in mitigation of damages, under the rule established by the almost unbroken current of modern decisions.

Assuming that the article in the *Morning Call* related to the same transactions referred to in the publication in the *Bulletin*, it must be deemed libelous, for the reasons already

stated in respect to the article from McCullough's pamphlet; and it is not pretended that the publication in the *Bulletin* was founded in any degree on the information derived from the *Morning Call*, or any one connected with it. On the contrary, the defendant, Nisbet, testifies that he made an unsuccessful effort to obtain information from that source before the article in the *Bulletin* was written, and, failing to obtain it in that quarter, the publication was based on the information derived from Maynard, which was deemed entirely accurate and thoroughly reliable. The article in the *Call* performed no other office than to direct his attention to the subject, and to stimulate further inquiry. A general rumor on the street would have led to the same result, and proof of the rumor would have been as admissible in mitigation as the publication in the *Call*, which, as here presented, can be treated in no other or more favorable light than as a printed rumor; and, as already stated, proof of rumors or general suspicion is not admissible in mitigation of damages.

It is also assigned as error that the evidence did not justify a verdict for the plaintiff; but there was some evidence tending to support the plaintiff's case, and it was the province of the jury to weigh the testimony. We never disturb the verdict on the ground that it was not justified by the evidence when there was a substantial conflict in the testimony, even though we may consider it to be greatly against the weight of evidence.

We are also urged to reverse the judgment on the ground that the damages are so grossly excessive as to raise a reasonable presumption that the verdict was rendered under the influence of passion or prejudice in the jury. After a careful examination of the evidence, it is impossible, I think, to resist the conclusion that the damages are for a larger sum than the facts justified.

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There was no proof of special damage, and it was satisfactorily established that the publication was made after careful inquiry from an apparently reliable source as to the truth of the facts, and in the full belief that the publication was true. And there was not only no proof of express malice, but it was clearly shown that the defendants had no malice or ill will toward the plaintiff, and made the publication in the usual course of their business as public journalists, believing the matter to be one of special interest to the public at that time. It was, therefore, not a case calling for punitive damages. Nevertheless, the law implies that every libelous publication causes some damage to the injured party, and it is the peculiar province of the jury to estimate the amount. The Court will not interfere in such cases unless the amount awarded is so grossly excessive as to shock the moral sense, and raise a reasonable presumption that the jury was under the influence of passion or prejudice. In this case, whilst the sum awarded appears to be much larger than the facts demanded, the amount cannot be said to be so grossly excessive as to be reasonably imputed only to passion or prejudice in the jury. In such cases there is no accurate standard by which to compute the injury, and the jury must, necessarily, be left to the exercise of a wide discretion; to be restricted by the Court only when the sum awarded is so large that the verdict shocks the moral sense, and raises a presumption that it must have proceeded from passion or prejudice. As already stated, the verdict in this case is not so grossly excessive as to raise that presumption.

Judgment affirmed.

Statement of Facts.

[No. 2,822.]

E. H. HILDEBRAND v. C. E. STEWART.

LOCATION OF SIXTEENTH OR THIRTY-SIXTH SECTION.—A location and entry of any portion of a sixteenth or thirty-sixth section, made under the Act of April 27th, 1863, is invalid, and fails to vest any title in the locator, provided there was a settlement, by occupation or improvement, on any part of the section, owned by another, who had acquired no preëmption right to a specific part of the section, and the locating agent did not give the occupant or claimant of such improvement the notice of sixty days required by the fifth section of said Act.

ISSUE.—A house and corral are improvements of the character contemplated by the fifth section of the Act of April 27th, 1863, providing for the sale of certain lands belonging to the State.

ISSUE.—The location and entry of any portion of a sixteenth or thirty-sixth section is invalid, if the affidavit of the locator, or his application to locate and purchase, does not state that he is desirous to purchase the land, and does not give a description thereof by legal subdivisions. A statement, signed by the applicant and not sworn to, containing the same matters required in the affidavit, and accompanying the affidavit, does not render the entry valid.

RIGHT TO PURCHASE PUBLIC LANDS.—When the law, under which public lands are sold, requires certain acts to be performed as a prerequisite to the right to purchase, the Courts cannot dispense with the performance of those acts by legalizing an entry made without complying with them.

APPEAL from the District Court of the Tenth Judicial District, Colusa County.

The following is the application made by defendant, November 20th, 1867, and the affidavit accompanying the same:

“MARYSVILLE LAND DISTRICT, }
November 20th, 1867.”

“Location No. 491.

“TO STATE LOCATING AGENT: I, Charles E. Stewart, of Colusa County, State of California, do hereby apply under the provisions of an Act entitled ‘An Act to provide for the sale of certain lands belonging to the State,’ approved 27th April, 1863, to purchase and locate the following described land in Colusa County: the southwest quarter and northwest

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quarter, and the northeast quarter of the southwest quarter of section sixteen, township fourteen north, range three west, Mount Diablo base and meridian, containing one hundred and twenty acres according to the returns of the U. S. Surveyor General, and which I agree to accept in lieu of the full amount of one hundred and twenty acres, for which I agree to pay to the State of California one dollar and twenty-five cents per acre, in the following manner, viz.: twenty per cent. of the purchase money, together with interest on the balance at the rate of ten per cent. per annum in advance, from the date of location in the Locating Agent's office.

"This location has been made by me in lieu of

"CHARLES E. STEWART."

"AFFIDAVIT OF LOCATION.

"Location No. 491.	}	STATE OF CALIFORNIA,
MARYSVILLE LAND DISTRICT,		

"I, Charles E. Stewart, of Colusa County, State of California, being duly sworn, depose and say, that I am a citizen of the United States, and resident of the State of California, of lawful age; that I am an applicant for the purchase and location of the above described lands; that the same are unoccupied by any person other than myself; and that, to the best of my knowledge and belief, there is no valid claim existing upon the lands so described adverse to the claim I hold and apply to be located; and that there is no improvement of any description upon said land other than my own.

"Witness my hand,

CHARLES E. STEWART.

"Sworn and subscribed to before me this nineteenth day of November, A. D. 1867.

"J. G. TREADWAY, Notary Public."

The fifth section of the Act of April 27th, 1863, provides that "whenever a settlement is or has been made by occu-

pation or improvement upon any portion of a sixteenth or thirty-sixth section of any of the public lands in this State, the locating agent of the district in which such land is situated shall, if such occupant has not acquired a preëmption right to such land, notify such occupant or claimant of the fact that he is upon lands belonging to the State, and that he must make application to purchase the same of the State within sixty days, or forfeit all rights to the land. If such occupant or claimant shall neglect or refuse to make such application to purchase within sixty days above named, said land shall be subject to location and sale in the manner provided for the sale of other sixteenth and thirty-sixth sections, with the exception that the affidavits in regard to occupancy and improvement may be omitted."

The other facts are stated in the opinion.

W. C. Belcher and W. F. Good, for defendant Stewart.

C. D. Semple, for plaintiff Hildebrand.

By the Court, SPRAGUE, J.:

This was a contest arising before the Surveyor General, between two conflicting applicants for the location and purchase of the west half of section sixteen of the school lands of this State, situate in Colusa County, which was, under the statute of the State, transferred for adjudication to the Tenth District Court, where the questions were litigated between the applicants — Hildebrand as plaintiff, and Stewart as defendant — and judgment was rendered in favor of plaintiff for the southeast quarter of the southwest quarter of said section, and in favor of defendant for the residue of the half section in controversy, from which judgment both parties appeal.

From the findings of the Court contained in the record, it appears that defendant endeavored, by two separate applica-

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tions, to locate the southwest quarter of said section, under the act of April 27th, 1863, entitled "An Act to provide for the sale of certain lands belonging to the State." (Statutes of 1863, p. 591.) The first application by defendant was made November 20th, 1867, for the location of the southwest quarter and northwest quarter, and the northeast quarter of the southwest quarter, of said section sixteen, which application was accepted by the State Locating Agent on the 17th of December, 1867, approved by the State Surveyor General April 8th, 1868, and a certificate of purchase issued by the State Register to defendant therefor July 20th, 1868.

The second application of defendant was made May 6th, 1868, for the southeast quarter of the southwest quarter of said section, which application was approved by the Surveyor General on the 5th day of January, 1869.

That defendant, on the 9th day of June, 1863, made application to locate and purchase the northwest quarter of the same section, under the Act of March 28th, 1868, entitled "An Act to provide for the management and sale of the lands belonging to the State" (Statutes of 1867-8, p. 507), which application was accepted by the Surveyor General on the 12th day of June, 1868; and thereafter, in December, 1868, a certificate of purchase was duly issued therefor, to defendant, by the State Register. These several locations of defendant embraced the entire west half of said section sixteen.

That on the 6th day of February, 1869, plaintiff made application to locate and purchase the same half section, under said Act of March 28th, 1868, which application was duly accepted by the Surveyor General of the State, upon condition that applicant comply with all the provisions of said Act of March 28th, 1868.

It further appears that, as early as 1860, a house and corral were built upon said half section, being upon the southeast

quarter of the southwest quarter thereof, but by whom they were built does not appear; that said house was occupied, at various times, by sheep shearers and other lessees of an adjoining tract of land, owned by a company known as the "French Company;" that about the 1st of November, 1868, the plaintiff leased the adjoining tract of land, owned by the French Company, and thereupon entered into the possession of said house, which was then vacant, and continued to occupy it until the 5th day of February, 1869, when he bought of W. H. Good, who claimed, in selling it, to be acting for one Chamin, who had succeeded to the title of the French Company to said adjoining tract of land; that Good supposed the house was on the land of the French Company until after December 1st, 1868.

It further appears that no notice was given by the State Locating Agent, as provided by the fifth section of the Act of April 27th, 1863, above referred to.

From the foregoing facts, it seems very clear that the locations of the southwest quarter of section sixteen, attempted by defendant in his separate applications of the 20th of November, 1867, and 6th of May, 1868, under the said Act of April 27th, 1863, were both invalid and ineffectual to vest in him any right to the lands described in his applications, by reason of the absence of the notice to the occupant or claimant of the house and corral then located upon said section sixteen, as required by section five of said Act of 1863. That a house and corral are improvements of the character contemplated by the statute, requiring such notice, we have no doubt; and under this statute, during the existence of such improvements upon any portions of a sixteenth or thirty-sixth section of the public lands, unless the party occupying or claiming such improvements has acquired a preëmption right to some specified part of such section, no valid location of any portion of such section can be made by a stranger to such improvements until sixty days shall have

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elapsed after the notice required by section five has been given, and the evidence of such notice having been given must accompany the application.

The statute of March 28th, 1868, above referred to, in direct terms repeals the said Act of April 27th, 1863, but protects parties who were in the occupancy of any portions of sections sixteen or thirty-six at the date of the passage of the Act, by giving them six months from the date of its passage within which to make location and purchase under the new Act. (Statutes of 1867-8, p. 522, Sec. 23.)

This Act took effect May 28th, 1868, sixty days after its passage.

Defendant's application to locate and purchase the northwest quarter of said section sixteen is defective and invalid, by reason of the affidavit upon which the application was made failing to state the facts required by section fifty-two of the Act.

The statute requires the applicant who desires to purchase any portion, not less than the smallest legal subdivision, of a sixteenth or thirty-sixth section, to make affidavit stating certain facts, among which are, "that he or she is desirous to purchase said lands (giving a description thereof by legal subdivisions) under the provisions of this Act."

The affidavit of defendant of June 9th, 1868, for the northwest quarter, fails to state that he desired to purchase the land under the Act of March 28th, 1868, and fails to describe the land by legal subdivision, or otherwise. This positive requirement of the statute being omitted, or not complied with, the application was invalid and nugatory.

The Legislature has thought proper to require the above facts to be embodied in an affidavit of the applicant, and it is not for the Court to determine that the same items may as well be embodied in a statement of the applicant *not* verified by his oath, or to sanction a different form or mode of

Points decided.

proceeding in the purchase of these lands from that prescribed by the legislative department.

The second application of defendant for the purchase of the southeast quarter of the southwest quarter of said section sixteen, made January 11th, 1869, the Court below finds to be "the same in form and substance" as the one of June 9th, 1868, just commented upon; hence, as appears by the record, the defendant has never made application for the purchase of any portion of the lands in controversy in conformity with the law in force at the time such application was made, and is not entitled to purchase any portion thereof by virtue of such application.

The application of plaintiff of the *sixth* of February seems to have been strictly in conformity with the Act of March 28th, 1868, and entitles him to purchase the entire west half of section sixteen, in township fourteen north, of range three west, Mount Diablo base and meridian.

The judgment of the District Court is therefore reversed, and said Court is directed to enter judgment for plaintiff Hildebrand in accordance with this opinion.

Mr. Justice TEMPLE did not express an opinion.

[Nos. 2,116, 2,117.]

JAMES F. HARRIS, ADMINISTRATOR OF THE ESTATE OF
N. CHATEL, DECEASED, v. THE SAN FRANCISCO
SUGAR REFINING COMPANY, GEORGE GOR-
DON, AND JAMES B. BOND.

PRACTICE IN LAW AND EQUITY.—The mode of reviewing the action of the Court upon an issue of fact is the same, whether the case is at law or in equity.

REVIEW OF QUESTION OF FACT.—In order to review a question of fact, there must be a motion for a new trial.

Points decided.

REVIEW OF ACTION OF REFEREE.—If a referee tries a question of fact raised by the pleadings, the Court cannot review his action on such issues, unless a motion is made for a new trial.

IDEM.—If a referee tries a collateral question, not made an issue of fact by the pleadings, his action thereon may be reviewed by the Court, by exceptions to the report, without a motion for a new trial, and his report is not binding on the court until adopted by it.

QUESTION DISCUSSED.—Is not the manner of bringing the testimony before the court in case of such exceptions to be regulated by rules to be adopted by the Court?

REPORT OF REFEREE ON A COLLATERAL QUESTION.—When a collateral question, not made an issue by the pleadings, is referred to a referee, his finding of the facts does not take the place of a special verdict, as provided in section one hundred and eighty-seven of the code, and is not binding on the Court until adopted by it.

REPORT OF REFEREE.—When a referee reports his decision upon the whole case, his report stands as the decision of the Court; when he reports the facts only, his report is a special verdict.

NOTICE OF MOTION FOR NEW TRIAL.—If, in an action to obtain the specific performance of a contract, and to have an account taken, the principles upon which the account is to be taken are not raised, as issues in the pleadings, but an issue is made only on the plaintiff's right to have the account taken, and the court enters an interlocutory judgment, that the plaintiff is entitled to a specific performance, and to have an account taken, and orders a reference to take the account on principles fixed in the order, a notice of motion for a new trial need not be given until ten days after the confirmation of the report of the referee.

A FINAL JUDGMENT.—The confirmation of the report of a referee, and an order that judgment be entered for the plaintiff, without annunciation of judgment upon the facts found, and a determination of the particular relief to which the plaintiff is entitled, is not the rendition of the judgment from which an appeal may be taken.

UNDIVIDED PROFITS OF A CORPORATION.—In an action against a corporation and the officers controlling the same, to compel the specific performance of a contract to issue a portion of the stock to the plaintiff, and for an account of the dividends and profits on the stock, it is erroneous to give the plaintiff his share of the stock, and also the same proportion of the undivided profits of the company.

STOCK OF CORPORATION—UNDIVIDED PROFITS.—The stock of a corporation represents its undivided profits, and one who receives his share of the stock, acquires by virtue of the stock, his due interest in the undivided profits.

DIVIDEND OF CORPORATION PAYABLE IN STOCK.—In an action against a corporation and its officers, to recover or have issued to the plaintiff a certain proportion of the stock of the corporation, and to have an ac-

Statement of Facts.

count taken of the profits and dividends on the stock, if a dividend of the company has been paid to the stockholders, by an increase in the capital stock, and an issuance of new shares to those to whom the dividend was due, the plaintiff cannot, in taking the account, recover, in money, the dividend thus declared, especially, if he also recovers his proportion of the stock thus divided.

APPEAL from the District Court of the Twelfth Judicial District, City and County of San Francisco.

This action was commenced by Nathaniel Chater, in May, 1858, who died during the pendency of the action, and the administrator of his estate was substituted as plaintiff.

The agreement between Chater and defendants Gordon and Bond was dated New York, April 4th, 1856. The agreement provided that the parties should form a corporation in San Francisco, to be called the San Francisco Sugar Refining Co. The corporation was formed the last of May, 1856, in San Francisco, with a Board of three trustees, and the trustees named to manage the affairs of the corporation the first three months were, Chater, Gordon, and Bond. The plaintiff, for several months after the corporation was formed, was actively employed in its business, but became paralyzed in October.

The complaint averred that the plaintiff believed that one third of the stock was issued to him on the books of the company, but was not delivered to him, and that he demanded one third of the stock from the company, and an account of his portion of the profits or dividends therefrom. There were further averments, that Gordon and Bond, owning two thirds of the stock, controlled all the proceedings of the company, and were seeking to become the exclusive owners of all the property and effects of the company, and to exclude plaintiff from all his interest therein. That in December, 1856, without the plaintiff's knowledge, they had declared his trusteeship vacant, and that the defendants refused to account to him, or deliver him his stock, and that

Statement of Facts.

the profits or dividends of the company had exceeded one hundred and fifty thousand dollars, and that the plaintiff's share thereof exceeded the principal and interest on the notes given by him. The prayer asked for judgment that the plaintiff owned one third of the stock, property, and effects of the company, and that the defendants be compelled to issue, transfer, and deliver the same to him, and that they be compelled to state an account of all the profits or dividends made or received by the defendants, or either of them, upon one third of the stock, and that defendants be compelled to pay the same, less the principal and interest of the promissory notes.

On the 26th of May, 1859, the capital stock of the company was increased to three thousand shares, of one hundred dollars each, being an addition of two thousand shares. The referee took the account up to February 18th, 1860, the date of the interlocutory decree. He found that one third of the profits of the company were twenty-eight thousand four hundred and sixty-five dollars and seventy-five cents; and that after deducting the note and interest, there was due the plaintiff eight thousand seven hundred and eighty-five dollars and fifty cents. In this account of profits he included a dividend of one hundred and three thousand six hundred and seventy-six dollars and fifty-four cents, which had been declared by the following resolution, passed August 18th, 1859:

"Resolved, That these profits be divided amongst the shareholders of the company, as follows: three thousand six hundred and seventy-six dollars and fifty-four cents in cash, and one hundred thousand dollars in the increased capital stock of the company."

A preceding resolution, adopted at same meeting, set forth this to be the condition of the company, as appeared from the balance sheet of May 31st, 1859:

Statement of Facts.

Assets of the company.....	\$321,577 33
Consisting of good debts and mer-	
chandise	\$119,339 58
Buildings, machinery, and equip-	
ment of refinery, at cost.....	202,137 75
	<hr/> \$321,577 33
Liabilities amounting to.....	\$117,900 79
Made up of amount due to credit-	
ors	100,396 60
Amount due stockholders for loans.	17,504 19
	<hr/> \$117,900 79
	<hr/> \$203,676 54

Showing a surplus of two hundred and three thousand six hundred and seventy-six dollars and fifty-four cents, viz: the original capital stock subscribed, one hundred thousand dollars, and one hundred and three thousand six hundred and seventy-six dollars and fifty-four cents of profits.

The Court gave judgment against the defendants for eight thousand seven hundred and eighty-five dollars and fifty cents, on the report of the referee. The first part of the interlocutory decree read as follows:

"It is ordered, adjudged, and decreed that plaintiff owns and is entitled to one third, or three hundred and thirty-three and one third original shares, of the capital stock of the San Francisco Sugar Refining Company, and all duplications, increase, profits, and dividends made or accrued upon said one third since the organization of said company; and said San Francisco Sugar Refining Company is ordered and directed to issue said stock to said plaintiff, subject to the restriction that he is not allowed to sell the said stock prior to the 4th day of April, 1861.

"And it is further ordered, adjudged, and decreed that said San Francisco Sugar Refining Company is entitled to have and receive from said plaintiff, for his said one third,

Argument for Appellants.

the sum of twelve thousand and five hundred dollars, with interest from the 1st day of September, 1856, at the rate of two per cent per month, subject to the accounting between the said plaintiff and said company, as hereinafter ordered."

The defendants appealed.

The other facts are stated in the opinion.

Doyle & Barber, and J. P. Hoge, for Appellants.

The decree is simply a decree of specific performance of the contract of April 4th, 1856, making the company liable, in the place of Gordon and Bond, who contracted for it. That was the whole object of the complaint, and is the whole scope of the decree.

The respective rights of the parties being thus declared by the interlocutory decree, the taking of two accounts became necessary, viz.: an account of what dividends, profits, gains, or advantages of any kind the stockholders in the company had derived from the ownership of their shares, in order that the like might be decreed to the plaintiff or his stock; and second, a debtor and credit account between the plaintiff and the company, in order that the balance due by the one to the other, whichever way it was, might be decreed. So far all seems plain enough, and the decree provided accordingly. It is clear enough, too, that so far as the dividends due the plaintiff on his shares of stock consisted of cash, they were to be credited to him in the second account above mentioned, because such application of them had been expressly contracted for, and was provided in the decree.

Now, on carrying this decree into the master's office, what account was he required first to take? In other words, what were the profits, increase, and dividends on the three hundred and thirty-three and one third original shares of stock belonging to the plaintiff, whereof he was to take an account? Obviously, the dividends declared by the company from time

Argument for Appellants.

to time on that number of shares, and which he would have received had they been issued to him at first, as contracted for. The only share of profits which a stockholder is entitled to receive from a corporation is the dividends declared from time to time on the stock he holds. All shares in the same company are of equal rank and right. Whatever advantage or profit the holder of one share derives from its ownership, the holder of another is entitled to the like; and neither is entitled to participate in the company's profits, except to the extent of the dividends declared on the stock. For such dividends he can maintain assumpsit against the company, and, of course, they form the subject of set-off against any money demand the company may seek to enforce against him.

It was suggested to the Court, however (and truly), at the time of pronouncing the interlocutory decree, that this company had, pending the suit, enlarged its capital stock, augmented the number of its shares, and declared a stock dividend; and that suggestion, or even the possibility that profits or advantages might have been divided to its stockholders in stock, or in some form other than cash, led the parties in drawing their decree, and the Court in adopting it, to introduce in it the words "profits," "increase," "duplications," "dividends," etc., in order to express in the fullest manner that the plaintiff being entitled to have his stock, as of the date of its original creation, was entitled to have with it all the fruits, of every kind, it would have borne him had it been issued and delivered to him at that time. Such is the whole meaning of those pleonasms in the decree.

The master or referee, however, on considering the decree, fell into the error of attributing to these words of amplification—"profits," "duplications," etc.—a significance entirely beyond their import, or the sense intended to be given them. He construed them to mean that he was to take an account of the profits which the company had gained in the course

Argument for Appellants.

of its business, and credit the plaintiff with one third thereof, just as if he had been a copartner instead of a stockholder. The interlocutory decree established the plaintiff's right to the stock and its profits, on paying for it the agreed purchase money and interest. The dividends due the plaintiff on the stock were to be applied on the sums due by him on the purchase money, and the balance, whatever it might be, was to be paid by the one party to the other. This operation involved a debtor and creditor account between the parties, the result of which was necessary for the information of the Court, to enable it to render its final judgment.

The reference to Mr. Thornton, directed in the decree, was under the second subdivision of section one hundred and eighty-three of the Practice Act. It was to take an account which was necessary for the information of the Court before judgment.

The report on such a reference is strictly analogous to a master's report on a reference to take an account; when filed it is open to objection by either party, and before further proceedings can be founded on it, requires the assent or confirmation of the Court. In this case, all further directions were expressly reserved in the interlocutory decree till the coming in of the report.

The proper mode of objecting to a report on such a reference is, and always has been, not by motion for a new trial, but by exceptions to the report. On the argument of those exceptions, the Court examines the proceedings of the referee, and corrects any errors into which he may have fallen. It may confirm or overrule the report, in whole or in part; send it back to the referee for further evidence; or if that be unnecessary, make the necessary corrections in it, and confirm it as corrected. For the purpose of examining the referee's conclusions, the Court must have the same light in all respects that he had. The evidence taken before him is deemed to be taken before the Court itself for that purpose.

Argument for Respondent.

The precise manner of bringing the testimony taken before the referee, in such cases, to the knowledge of the Chancellor, in connection with exceptions to the report, is matter of practice, and discretionary; it is usually regulated by general rule. There being no general rule for such cases in the Court below, it properly adopted the practice which the circumstances of the case suggested as most convenient, by its order of December 19th, 1864, under which the referee reported the substance of all the testimony taken before him.

G. F. & W. H. Sharp, for Respondent.

The statute not only fails to countenance the theory adopted by the appellant as to the effect of a reference, but the decisions of the Court upon this subject have been uniformly against this theory. As early as 1852 the Supreme Court of this State said: "Upon the report of a referee under the statute, if it contain sufficient on which to base a judgment, it is the duty of the Court to enter judgment; and it has no right to entertain any objections whatever. After the rendition of the judgment the Court may order a new trial, and set aside the report. (*Headley v. Reed*, 2 Cal. 325.) Here the referee reported that Chater was entitled to a certain sum of money. Manifestly, upon its face it contained sufficient matter whereon to base a judgment, and was, therefore, directly within the spirit and text of the foregoing decision. In *Grayson v. Guild*, 4 Cal. 125, the doctrine of *Headley v. Reed* was affirmed, the Court holding in that case, which was a bill in equity for an accounting, that when an action is referred to a referee, who files a report upon the face of which there is either no error of law or fact, or, if any, no exceptions taken before him, it was error to grant a new trial in the Court below.

(*Tyson v. Wells*, 2 Cal. 131.) The report of the referee upon the facts must be considered like the verdict of a jury. (*Walton v. Minturn*, 1 Cal. 362.) And, like a verdict, where the testimony is conflicting, will not be disturbed. (*Ritchie v. Bradshaw*, 5 Cal. 228; *Peck v. Vanderberg*, 30 Cal. 11.) The presumption is in favor of the findings. (*Donahue v. Cromartie*, 21 Cal. 80.)

To adopt the remedy of exceptions in equity cases is to hopelessly unsettle this system of practice, and in effect bring us back to the old chancery rules. From the able and ingenious argument of the appellants' counsel, one would suppose that our code not only sanctions this result, but adopts the practice laid down by Mitford, Tidd, Daniel, and Norbury. (*Allen v. Hill*, 16 Cal. 113; *Hutchinson v. Bours*, 13 Cal. 50; *Casement v. Ringgold*, 28 Cal. 340; and *Hihn v. Peck*, 30 Cal. 287.)

By the Court, TEMPLE, J.:

This is a bill to obtain specific performance of a contract between Chater, Bond, and Gordon, whereby they agreed to incorporate for the business of refining sugar in San Francisco, with a nominal capital of one hundred thousand dollars, divided into one thousand shares. Each party was to take three hundred and thirty-three and one third shares, and pay twelve thousand five hundred dollars. Chater, having no means, was to give his notes for the amount, drawing interest at two per cent. per month, and Gordon and Bond were to receive his stock as collateral, and thereupon raise or advance his share. The dividends on Chater's stock were to be applied to paying the interest and principal on his notes. The plaintiff asks a decree for one third of the stock, and the profits and dividends upon the stock.

An interlocutory decree was entered, adjudging that Chater was entitled to recover one third of the stock, and all

“duplications, increase, profits, and dividends made or accrued upon said one third since the organization of said company.” That the plaintiff should pay twelve thousand five hundred dollars, with interest at two per cent. per month, from the 1st day of September, 1856, and that an account be taken between Chater and the company, to ascertain the balance which might be due to either, and, thereupon, a referee was appointed “to take the account of the profits, increase, and dividends of said stock belonging to plaintiff under his decree, and to state an account between the San Francisco Sugar Refining Company and plaintiff.”

And it is further ordered that all further “directions be reserved until after said referee makes his report, when either party is at liberty to apply to the Court, as occasion may require.”

The referee filed his report November 3d, 1864, which he stated on account, and ascertained a balance due plaintiff of eight thousand seven hundred and eighty-five dollars and fifty cents. No motion for a new trial was made upon the filing of this report, but within ten days after notice of the filing the defendants filed exceptions to the report, and on the nineteenth of December following obtained an order requiring the referee to file a statement of the evidence before him. This additional report was filed July 1st, 1865. On the 21st of August, 1865, the exceptions to the report were overruled and the report confirmed. On the thirty-first of the same month notice of motion for a new trial was given. Upon this motion a statement was prepared and filed, and the motion denied on the 8th of February, 1868. An appeal was taken from this order, and is the first appeal in this case.

Afterwards, on the 26th of October, 1868, a final decree was entered, and thereupon defendants made another motion for a new trial, which was also denied, and the last appeal is taken from this order, and also from the judgment.

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Objection was made in the Court below to the consideration of the exceptions, on the ground that the action of the referee can only be reviewed on motion for a new trial under the one hundred and ninety-fifth section of the Practice Act. This position was sustained, and the Court refused to consider the exceptions. The Court also, acting upon the suggestion in *Quivey v. Gambert*, 32 Cal. 304, overruled both motions for a new trial, on the ground that notice of motion was not given in time, holding that the notice should have been given within ten days after notice of filing the report of the referee.

The interesting question of practice presented is to be decided entirely by the provisions of the Practice Act, unless that act is silent as to the mode of proceeding in this particular case. It is thoroughly settled in this state that the mode of reviewing the action of the Court upon an issue of fact is the same, whether the case is at law or in equity — there must be a motion for a new trial; and the only question upon this point is, whether the proceeding before the referee was a trial within the meaning of the one hundred and ninety-fifth section of the Practice Act. That section, as it stood when these proceedings were had, provided that notice of intention to move for a new trial should be given, when the action has been tried by a jury, within five days after verdict; when tried by the Court, a Commissioner, or referee, within ten days after the notice of the decision of the Judge, or of the filing of the report of the Commissioner or referee. A trial may be said to be an examination and determination of an issue of law or fact. An issue arises when a fact or conclusion of law is maintained by one party, and is controverted by the other in the pleadings. (Sec. 153, Practice Act.) A determination of an issue of fact is the verdict or decision, which is sought to be set aside when a new trial is asked under the code. There must have been a trial of an issue raised by the pleadings, or the provisions

of the Practice Act, in regard to new trials, do not apply to the report of the referee. Evidently, therefore, if a collateral matter not raised by the pleadings be sent to a referee for the information of the Court, under the second and third subdivisions of section one hundred and eighty-three of the Practice Act, a motion for a new trial is not necessary to bring the action of the referee before the Court for review. In case, for instance, of an action by the vendor to compel the specific performance of a contract for the sale of land, all the issues might be tried before the Court; and, in case the performance of the contract be adjudged, a referee might be appointed to ascertain if the property had been incumbered. The referee might be called to try a contested question; but it would not be the trial of an issue, and the decision of the referee would not be binding upon the Court until adopted by it. It would not be such a decision as would necessitate a motion for a new trial by the aggrieved party, within ten days after notice of the filing of the report. So of the numerous cases cited by the counsel for appellant, where a collateral matter is sent to a referee or Commissioner for trial. The finding of a referee in such a case is not the finding of the facts, which takes the place of a special verdict, as indicated in section one hundred and eighty-seven of the code. That section distinctly provides for a different practice, where the issue is upon the whole case, and where the referee reports the facts. In the former case the report stands as the decision of the Court; in the latter it has the effect of a special verdict. The necessary inference is, that in other cases, not mentioned in the section, the report has neither the effect of the decision of the Court nor of a special verdict. The provision in that section, that the decision of the referee may be excepted to and revised in like manner as if made by the Court, has reference to what immediately precedes

it, and is confined to those cases where the report stands as the decision of the Court.

The only difficulty in this case is in determining whether the matter referred was the trial of an issue made by the pleadings. It may be argued, with plausibility, that the taking of an account, and the ascertainment of a balance due, was within the issues made by the pleadings, and that when the case had been partially tried by the Court, and the interlocutory decree entered, it was sent to the referee to complete the trial; that upon the filing of the referee's report all the issues of fact had been tried, and the findings of facts made, upon which a judgment could be entered. Under the ruling of *Crowther v. Rowlandson*, 27 Cal. 376, then was the time when proceedings for a new trial should have been commenced, dated from the notice of filing the report.

It is very true that an accounting was contemplated by the plaintiff, and is a portion of the relief sought by him. Still the issue raised by the pleadings upon this subject was his right to have an account taken, and the principles upon which the account should be taken, if at all, was not settled by the pleadings, but the accounting ordered may have been very different from that claimed. In this case the plaintiff might have claimed an account of the profits made by the company, while the accounts ordered may have been the dividends made. The referee, in taking the account and stating a balance, was not governed by the pleadings, but by the interlocutory decree. The question as to the correctness of his report was not, whether he had correctly tried the issue made by the parties, but whether he had correctly tried the question referred to him by the Court. His guidance was not the pleadings, but the order of reference. The issue had not been sent to him to try, but he examined a certain matter of fact under the instructions of the Court, and for the information of the Court before whom the trial

was being had. If his report furnished the information sought, the Court could act upon it; otherwise a new reference might have been made, and so on, until the desired information was had. I think, therefore, the proceedings before the referee in this case was not a trial within the meaning of the one hundred and ninety-fifth section of the Practice Act. The motion for a new trial, therefore, made upon the confirmation of the report, was in time. If the report of the referee required confirmation, there was no irregularity in interposing objections to its confirmation. No method is provided for bringing the facts before the Court upon the hearing of such objections, and in the absence of any legislation upon the subject, the Court can, by its rules, provide the mode of doing so. It is not necessary to pass upon this question, however, in this case, as all the questions necessary for the determination of this appeal arise upon the motion for a new trial and upon the appeal from the judgment.

The confirmation of the report and the order that judgment be entered for the plaintiff was not the rendition of the judgment within the meaning of the three hundred and thirty-sixth section of the Practice Act, and of the decision in *Gray v. Palmer*, 28 Cal. 416. Something more remained to be done than the mere clerical duty of entering judgment. The Court had not pronounced judgment upon the facts found, or determined the particular relief to which they entitled the plaintiff.

The final decree, taken in connection with the report of the referee, plainly shows that the relief granted is inconsistent with the pleadings and with the interlocutory decree. The referee committed a palpable error in crediting the plaintiff with the undivided profits of the company. The plaintiff only asks to be placed in the position he would have been in had the stock been issued to him as provided in the agreement between Chater, Bond, and Gordon. In

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that case he would have received only one third of the dividends, while his share of the undivided profits would be represented by his stock. So now, if he receives his share of the stock, he, by virtue of that stock, acquires his due interest in the undivided profits. The referee, however, has taken a profit and loss account of the transactions of the company, and credited the plaintiff with one third of the profits, irrespective of the question as to whether they have been divided, or are still retained by the company. The report shows that a small amount of profits only have been divided. Much the larger portion are still retained by the company, and is claimed to have been expended in improvements and in adding to the capital of the company. It is true the interlocutory decree speaks of "duplications, increase, profits, and dividends" made or accrued upon said one third of the stock. The words "duplication and increase" may have been intended to refer to the addition to the capital stock of the company, but still it refers to the duplications, increase, profits, and dividends of the one third of the stock, which should have been issued to Chater. There is a manifest difference between profits upon certain shares of stock and the profits of the company. If the language of the decree, however, were doubtful, the relief asked in the pleadings and the nature of the action should remove all question as to what was intended.

The alternative report of the referee is also manifestly erroneous. I cannot comprehend upon what principle it can be claimed that a dividend of stock can be charged as so much money, especially when the plaintiff recovers in this very action his share of the stock divided.

The final decree is reversed, the report of the referee is set aside, and the case remanded for further proceedings in accordance with this opinion.

Statement of Facts.

[No. 1,659.]

THE PEOPLE OF THE STATE OF CALIFORNIA EX
REL. J. T. THOMPSON AND J. S. DOWNES, v. J. B.
HOLLOWAY, JUDGE OF LAKE COUNTY, ET AL.

MANDAMUS — MOTION FOR NEW TRIAL.— In a suit for mandamus brought in the Supreme Court, where questions of fact are referred to a District Court, a motion for a new trial must be made in the Supreme Court.

THE relators filed a petition in the Supreme Court, in which they allege that, at an election held in accordance with an Act of the Legislature for the purpose of determining the location of the county seat of Lake County, the officers of the election in certain precincts and the Board of Canvassers were guilty of fraudulent conduct, whereby it was made to appear that Lower Lake had received a majority of votes over Lakeport, when in fact the latter town had received a majority of twenty-one votes; and that the Board of Supervisors, acting upon returns so made, had issued an order removing the county seat from Lakeport to Lower Lake. They asked the Court to set aside the order of the Board of Supervisors, to decree that Lakeport be the county seat, and to issue a writ of mandamus requiring the county business to be transacted at Lakeport. After issue joined the questions of fact were referred to the District Court of the Seventh Judicial District, and upon trial a verdict was rendered in favor of Lakeport.

The other facts are stated in the opinion.

Attorney General Jo Hamilton, R. McGarvey, and Bayle & Pendegast, for Relators.

J. McM. Shafter, for Defendants.

By the Court, RHODES, C. J.:

The issues in this cause having been referred to the District Court for Napa County for trial, and the jury in that Court having rendered a verdict, which was thereafter duly certified to this Court, the respondents moved in the District Court for a new trial, and the petitioner moved in this Court for judgment, ordering the writ of mandate to issue as prayed for in the petition.

We are of the opinion that the motion for a new trial should have been made in this Court, and not in the District Court. The petitioner is therefore entitled to judgment on the verdict. Since the verdict was rendered, the Act of March 29th, 1870, to locate the county seat for the County of Lake, was passed, by which another election was ordered to be held in that county, to determine whether the county seat should be at Lakeport, or at Lower Lake. The decision of the case is of no moment, except that thereby the liability of the parties for the costs of the action may be determined. The petitioner was entitled to judgment on the verdict, and will therefore recover his costs.

Mandate ordered; and it is further ordered that the service of the writ be stayed until the further order of this Court and that the petitioners recover their costs.

[No. 1941.]

JANE SCOTT, CHARLES E. SCOTT, AND INDIANA
SCOTT v. DAVID UMBARGER, PETER SWALLS,
AND WILLIAM SWALLS.

PURCHASE BY AN ADMINISTRATOR AT HIS OWN SALE.—If a person procures himself to be appointed administrator of an estate, and at a sale of the property of the estate purchases the same through a third person, who pays no money, and agrees to hold the title for the adminis-

Statement of Facts.

trator, the sale is a fraud on the heirs, and such third person, and all who buy from him with notice, hold the property in trust for the heirs.

DENIALS IN ANSWER.—K. acquired the legal title to land under such a state of facts as made his purchase fraudulent, and made him the trustee of S. U. bought from K. S. commenced an action against U., to have him declared his trustee, and to compel him to convey the land. In his complaint he averred the facts, showing K.'s fraud, and which, in law, made him the plaintiff's trustee. S., in his answer, admitted these facts and his knowledge of them, but denied that he became the trustee of S., or that there was anything unfair or fraudulent in the facts alleged. *Held*, that the answer admitted the trust.

PURCHASE FROM ONE WHO HOLDS IN TRUST.—One who purchases land from another who acquired the title fraudulently, and thereby became a trustee, in order to protect himself in his purchase, must have been ignorant of any of the facts constituting the fraud, not only at the time of his purchase, but when he paid the purchase money and obtained his deed.

CONSTRUCTIVE TRUST.—If a party who is in possession of land, without right, legal or equitable, is fraudulently deprived of the possession by one who does not deprive him of any right at law resulting from his prior possession, and the one who thus obtains possession then purchases the title from the true owner, he does not hold this title in trust for the prior possessor, and cannot be compelled to convey it to him.

APPEAL from the District Court of the Fifteenth Judicial District, City and County of San Francisco.

Charles G. Scott and the plaintiff Jane Scott were husband and wife, and the plaintiffs Charles E. Scott and Indiana Scott were their only children. Charles G. Scott purchased the land and took the conveyance in the name of his wife. In June, 1856, the wife, who was in the State of New York, executed an instrument, making the husband her agent to sell or lease and collect the rents. Under this instrument the husband substituted Frederick D. Kohler as agent, and Kohler took possession. In 1857, Scott left California, to join his family in New York, and died intestate in Nicaragua. Kohler became administrator in November, 1858. Kohler obtained an order to sell the land for a debt he alleged the deceased owed him. Kohler sold the land to Umbarger in April, 1863, and Umbarger conveyed one half of it to the other defendants in May, 1863. This suit

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was commenced November 25th, 1863. That part of the cross complaint, setting up title in the City of San José, was as follows:

"That heretofore, to wit: on the 21st day of April, A. D. 1858, and for a long time prior thereto, the City of San José, a municipal corporation, by virtue of an Act of the Legislature of the State of California, were the owners in fee (as successors to the former Pueblo de San José) of a large tract of land lying and being in the County of Santa Clara, and State of California, and which said larger tract of land includes within its boundaries the premises hereinafter mentioned and described, and being the land sued for. That on the 21st day of April, A. D. 1858, the Legislature of the State of California passed an Act entitled an Act to authorize the funding of the unfunded debt of the City of San José, and to provide for the payment of the same, passed April 21st, 1858, and which said act is referred to, and made a part of this answer. That afterwards, to wit: on the 4th day of August, A. D. 1858, in accordance and pursuance of the provisions of said Act, the said City of San José did sell and transfer the tract of land, and the whole thereof, to Lawrence Archer, Sherman O. Houghton, and James C. Cobb, as the Board of Commissioners of the Funded Debt of the City of San José."

The answer then averred that on the 27th day of June, 1864, the Commissioners of the Funded Debt sold the land to them.

The answer to the cross complaint admitted those allegations, and then proceeded as follows:

"But these plaintiffs deny that they acquired the same, otherwise than in trust for these plaintiffs; and they allege that at the said several dates, when said defendants acquired the said title, they were the trustees, as to these plaintiffs,

Argument for Appellants.

of the premises in the complaint herein, and in said answer described, by reason of the facts alleged in the complaint herein; and that the title so acquired by said defendants was acquired for the benefit and to the use of these plaintiffs; and that said defendants are, and were at said dates, by reason of their said position as trustees of these plaintiffs, estopped from buying or setting up any outstanding title adverse to the title of these plaintiffs."

The Court below adjudged that the defendants held the legal title in trust for the plaintiffs, and that they convey the same. The defendants appealed.

The other facts are stated in the opinion.

S. O. Houghton, for Appellants.

The order of sale of the Probate Court having been made without authority and without notice to plaintiffs, the sale by Kohler was void, and neither the title of the estate nor of the heirs was affected thereby. The legal title is in the heirs, and they may recover possession in an action at law. A Court of chancery has no jurisdiction where the complaint shows that the plaintiff has a complete remedy at law. (*Van Doren v. The Mayor, etc., of New York*, 9 Paige, 388.) The complaint, therefore, does not state a cause of action. After the estate has been fairly divested of its title to real estate through a legal, bona fide sale and conveyance to a stranger, the administrator may as freely purchase such property as any other property. The general equitable rule is, that a trustee shall not deal with the trust estate for his own profit; that he shall not place himself in a position in which his interest conflicts with his duty; but he may purchase trust property, subject to the right of the *cestui que trust* to avoid the sale at his election, such a sale not being void, but voidable. (*Story's Equity Jurisprudence*, Sec. 322; *Giddings v. Eastman*, 5 Paige, 561; *Devone v. Fanning*, 2 Johns. Ch. R.

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252.) Even though the interest in the land acquired by the defendants under the deed from Kohler should be considered as held by them under a constructive trust, such trust must be limited to the interest so acquired. Neither Jane Scott nor Charles G. Scott ever had any title, legal or equitable, to the premises. Where a trustee owes any duty toward the property of the beneficiary, or there is any special trust or confidence reposed in the trustee, he cannot buy in an outstanding title to the property which is the subject of the trust, and hold it against the claims of the beneficiary. But that rule does not extend to a bare trustee, or to cases where the trust is purely constructive. The admitted nullity of the sale made by the administrator precludes the possibility of the defendants being chargeable as trustees; for if the sale was without authority, and void, they hold nothing acquired from the estate of Scott, and there is nothing in their hands which can be the subject of a trust in favor of his heirs.

William M. Pierson, for Respondents.

The sale by Kohler was voidable, if not absolutely void. (*Boyd v. Blankman*, 29 Cal. 19.) The burden of the defense of being a bona fide purchaser without notice rests upon the purchaser. He should also aver, in his pleading, want of notice, and deny all knowledge of the facts charged from which notice could be inferred. (*Woodruff v. Cook*, 2 Edw. Ch. 264; *Galatian v. Erwin*, Hopk. Ch. Rep. 55, 56, citing Mitf. 215, 216, and cases cited; 2 Maddock Ch. 322-324, and cases; 1 Johns. Ch. 302, 575; 2 id. 157; 3 id. 345; see, also, *Galatian v. Erwin*, 8 Cow. 374; *Tompkins v. Ward*, 4 Sandf. Ch. Rep. 594, 610-612; *Grimstone v. Carter*, 3 Paige, Ch. 421, 437; *High v. Batte*, 10 Yerger, 335; *Wigg v. Wigg*, 1 Atk. 384; *Hardingham v. Nichols*, 3 id. 304; *Tourville v. Naish*, 3 Pr. Wms. 307; *Tiffany and Bullard on Trustees*, 199.) If Kohler could not buy an outstanding title and set it up against the heirs, neither can his vendees, with notice; and that he could

not is elementary law. (Leading Cases in Equity, 56; *McClanahan v. Henderson*, 2 A. K. Marsh. 388, 389; *Morrison v. Caldwell*, 5 Monroe, 426, 435; *Kellogg v. Wood*, 4 Paige, 578, 621; *Wilson v. Castro*, 31 Cal. 435, 436; *Page v. Naglee*, 6 Cal. 245; *Salmon v. Symonds*, 30 id. 306; *Bludworth v. Lake*, 33 id. 263.) It is alleged in the complaint that the defendants claim under the sale, and entered into possession under it, and have received the rents and profits of the land. Now, admit the sale to be absolutely void. The complaint charges a conspiracy between Kohler, Bodley, and Hosmer to cheat the heirs out of their property, and that the defendants had notice of it. It alleges the success of that conspiracy, and that the defendants enjoy the possession of the land as the result of it. If it was done by imposition on a Court, and without giving the heirs an opportunity to defeat the fraud, it strikes us it places the defendants in a much worse position, and makes their liability to the plaintiffs the more emphatic.

By the Court, TEMPLE, J.:

The complaint shows that Jane Scott, while a married woman, the wife of Charles G. Scott — purchased for a valuable consideration the premises in controversy and received a conveyance therefor; that Charles G. Scott took immediate possession of the premises, which he retained until his death, in 1856; that at the time of and immediately before his death he was a resident of San Francisco, in this State, and plaintiffs are his only heirs at law. In 1860, one Frederick D. Kohler, designing to defraud plaintiffs out of the described premises, procured letters of administration upon the estate of Charles G. Scott, deceased, in Santa Clara County, and in pursuance of such fraudulent design made several unsuccessful efforts to procure an order of sale of the property for pretended debts and expenses of administration, and finally

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succeeded in obtaining such order in December, 1861; that the order was made without legal notice to plaintiffs, and without authority on the part of the Court; that a pretended sale was made under this order, without notice given, at which Thomas Bodley was the purchaser, in February, 1862, which sale was afterward confirmed by the Probate Court, and conveyance made by the administrator; that the sale was wholly fictitious and for the benefit of Kohler, no money being paid; that Bodley took the conveyance for Kohler, and at his instance and request, and agreeing to hold the title for Kohler; that Bodley had notice of the fraud contemplated by Kohler, and that the land was then worth nine thousand dollars — the purchase money being one thousand three hundred and fifty dollars. On the 19th day of April, 1862, Kohler being still administrator, with the view of further concealing his designs, caused a conveyance to be made by Bodley to one Charles Hosmer, for a nominal consideration of one thousand five hundred dollars, although no consideration was paid. Hosmer also took the conveyance at the instance and request of Kohler, agreeing to hold the same for him, with full notice of all the acts of fraud on his part. On the 21st day of June, 1862, Kohler caused the property to be conveyed to himself for a nominal consideration of one thousand five hundred dollars; that this conveyance was wholly fictitious — no money being in fact paid — Kohler at the time being and acting as administrator of Charles G. Scott, deceased. Kohler afterwards conveyed to defendant Umbarger, who was then in possession as his tenant in his capacity of administrator, and who had full notice of all the acts of fraud on the part of Kohler, Bodley, and Hosmer. Umbarger afterward conveyed to the other defendants portions of the premises, who also took with full notice.

The answer fails to deny the fraud on the part of Kohler, Bodley, and Hosmer. In effect it admits that the pretended

sale was purely fictitious, and made for the purposes mentioned in the complaint. It denies, however, that Umbarger confederated with Kohler to conceal the fraud perpetrated by him, or to defraud the plaintiff in any way; and avers that he purchased in good faith, and for a valuable consideration, without any knowledge or suspicion that there had been any unfair, illegal, wrongful, or unlawful acts on the part of Kohler or any one else connected therewith, and denies that the property was at the time of any greater value than one thousand five hundred dollars, the price paid by him.

The answer also contains a cross complaint, in which it is averred that in 1858 the City of San José was the owner of the premises in controversy, and then sold and conveyed them to the defendants, who now claim to be the owners by virtue of the title derived from the City of San José. They ask to have their title quieted against the plaintiffs.

The answer to the cross-complaint admits that defendants acquired the title from San José, but claims that it was acquired in trust for plaintiffs — the trust arising from the facts alleged in the complaint. Plaintiffs offer to repay the amount paid for the title from the city, and ask that defendants be required to convey to them.

I have been thus particular in stating the pleadings, because, as I think, all the questions involved in the case arise upon them, the evidence not tending, so far as I can see, either to establish or rebut the presumption of notice on the part of Umbarger at the time he purchased or received his deed, except, perhaps, that it shows that Umbarger was in possession under Kohler, as administrator, and knew that Kohler was administrator.

The first question that arises from the pleadings is, whether Umbarger has sufficiently denied notice of the fraud in the title of Kohler.

Opinion of the Court—Temple, J.

He admits, by failing to deny, the fact that Bodley did, in fact, purchase as the agent of Kohler, with full knowledge of his fraudulent designs. That the conveyance to Hosmer was also merely colorable. That Kohler was, in fact, the purchaser at the administrator's sale, made by himself as administrator. The sale was, then, a fraud upon the heirs, and the defendants can only be protected upon the hypothesis that Umbarger was a purchaser for a valuable consideration, in good faith, without notice. The fact of notice is clearly charged in the bill, and is not specifically denied in the answer, but there is an affirmative averment that for "valuable consideration, to wit: one thousand dollars, and in good faith, and without any knowledge or suspicion on his part that there had been any unfair, illegal, or wrongful acts on the part of said F. D. Kohler, or any one else connected therewith, he made a purchase of the interest of the said F. D. Kohler in and to the lands set forth in said complaint; and he denies that he had any knowledge whatever of any illegal or wrongful act of said Kohler." He also denies knowledge that the property was held in trust by Kohler, and denies notice of any fraudulent or wrongful acts on the part of Kohler or any other person, or that they are or ever were the trustees. The defendants do not deny that Bodley purchased at the instance of Kohler, and for his benefit, or that Hosmer took the title for Kohler, as charged in the complaint. The most these denials can be held to amount to is, that neither Bodley, Hosmer, nor Kohler, in taking the title as alleged, did thereby become the trustee of plaintiffs, and that there was nothing unfair, illegal, wrongful, or fraudulent in Kohler's purchasing the property in that way. They admit the fact that Kohler did purchase at his own sale, *per interpositam personam*; that they knew of these facts, but were not aware that there was anything unfair, illegal, wrongful, or fraudulent about it, and deny that Kohler thereby became trustee for plaintiffs. Under

the circumstances it was incumbent upon the defendants to deny specifically knowledge of the alleged facts, or of any facts which would have put them upon inquiry, not only at the time of the purchase but at any time before they paid the purchase money or received their deeds. I, therefore, agree with the learned Judge before whom the case was tried, that notice of the frauds perpetrated by Kohler is not sufficiently denied.

A more important question arising in the case is, whether the facts admitted in the pleadings constituted the defendants the trustees of plaintiffs, and whether they can be compelled to convey to plaintiffs the title acquired from the City of San José.

Although it is alleged in the complaint that Jane Scott, while the wife of Charles G. Scott, acquired title in fee simple, yet it is admitted in the answer to the cross-complaint that the title was afterwards acquired by the defendant from the City of San José; in other words, that Scott had no title whatever, and it does not, therefore, appear that he had any equities with reference to the land.

It is also alleged in the complaint that the order of sale was unauthorized and the sale illegal and of course void. From this it appears that even the rights which Scott had, arising from possession, did not pass under the pretended probate sale. Kohler remained in possession, as administrator, and at least as soon as the administration was closed the heirs could have recovered the possession in an action at law. Therefore the defendants have never taken the legal title or any rights to the premises in trust for plaintiffs.

Were the trust fully established, it would constitute a constructive trust, and unless by reason of the position thus obtained they were enabled to acquire the outstanding title, I do not see how it would be a fraud upon the rights of the plaintiffs. No relation of confidence existed between them which imposed duties upon defendants in defending the

Points decided.

rights of the plaintiffs or tended to induce plaintiffs to rely upon them. Defendants, by the sale, acquired no equity which was afterwards ripened into a title, nor does it appear that the possession of the property aided in any way the acquisition of the title. A party in possession without right, legal or equitable, is fraudulently deprived of the possession, without, however, depriving him of any right of possession at law resulting from his actual prior possession, and then the wrongdoer purchases the title from the lawful owner. I know of no principle upon which he can be compelled to convey it. I therefore think the title acquired did not inure to the benefit of plaintiffs, and that the defendants cannot be compelled to convey to them.

Judgment reversed and cause remanded for further proceedings.

Mr. Justice WALLACE, being disqualified, did not sit in this cause.

Mr. Chief Justice RHODES did not express an opinion.

[No. 2,231.]**MAX ENGLANDER v. J. P. ROGERS.**

OBLIGATIONS OF PARTIES TO CONTRACT.—The obligations of the parties to an agreement for the sale of land are mutual and dependent, where one is to convey, and the other at the same time to pay the purchase money; and neither can put the other in default, except by tendering a performance on his part, unless the other party waives the tender, or by his conduct renders it unnecessary.

CONTRACT — AVERMENT IN COMPLAINT.—If a party pay a sum as part of the purchase money for land, under an agreement that the sum paid shall be retained by the vendor in case he shall convey a good title to the vendee, the latter, in order to maintain an action to recover the amount paid, must aver in his complaint a tender of the unpaid portion of the purchase money, or give some sufficient excuse for the omission to tender it.

INSUFFICIENT COMPLAINT.—In such a case, an averment that the plaintiff has been ready and willing, and has offered to accept a conveyance ac-

Statement of Facts.

according to the agreement, and to pay the balance of the purchase money, is not an averment that he tendered the purchase money.

VALID TENDER OF PURCHASE MONEY.—To constitute a valid tender, the party must have the money at hand, immediately under his control, and must then and there not only be ready and willing, but produce and offer to pay it to the other party, on the performance by him of the requisite condition.

APPEAL from the District Court of the Fourth Judicial District, City and County of San Francisco.

The complaint alleges that the plaintiff, on the 9th of May, 1867, entered into an agreement with the defendant to purchase from him a lot of land in San Francisco, for two thousand two hundred dollars, and paid him four hundred and eighty-one dollars and eighty-five cents as part of the purchase money, to be retained by the defendant if he should convey a good title to the plaintiff, but to be returned if the defendant should fail to make such a conveyance; that the defendant failed to convey the premises according to the agreement, although the plaintiff had waited a reasonable time — six months — and had been “ready and willing during all the time aforesaid, and offered to accept and take said conveyance, pursuant to said agreement, and to pay the balance of said purchase money;” and that on the 21st of November, 1867, the plaintiff demanded a return of the amount paid to defendant, but the defendant refused to return it. The complaint demands judgment for the four hundred and eighty-one dollars and eighty-five cents. The defendant demurred to the complaint that it did not state facts sufficient to constitute a cause of action, and specified as one of the particulars of insufficiency that it failed to show the plaintiff had, prior to the bringing of the action, tendered to the defendant the portion of the purchase money remaining unpaid. The demurrer was overruled, and the plaintiff had judgment. From the judgment and an order denying a new trial the defendant appealed.

James B. Townsend, for Appellant.

The complaint is insufficient, because it does not show that the plaintiff ever, prior to the commencement of this action, tendered to the defendant the balance of the purchase money, demanding such conveyance. (Dart. on Vend. and Purch. *449, *450, note 2, and cases therein cited, and *451.)

James C. Carey and Julius George, for Respondent.

By the Court, CROCKETT, J.:

The demurrer to the complaint ought to have been sustained. On the facts averred in the complaint, the payment of the remainder of the purchase money by the plaintiff, and the execution and delivery of a proper deed of conveyance by the defendant, were concurrent acts, to be simultaneously performed. The covenants of the vendor and vendee were mutual and dependent, and neither could put the other in default, except by tendering a performance on his own part, unless the other party either waived the tender, or, by his conduct, rendered it unnecessary. To entitle the plaintiff to maintain the action on the contract set out in the complaint, he should have averred a tender of the unpaid portion of the purchase money, or some sufficient excuse for the omission to tender it. The only allegation of the complaint on this point is that the plaintiff "has been ready and willing during all the time aforesaid, and has offered to accept and take said conveyance, pursuant to said agreement, and to pay the balance of said purchase money." This is not an averment that he tendered the purchase money. To constitute a valid tender in such a case, the party must have the money at hand, immediately under his control, and must then and there not only be ready and willing, but produce and offer to pay it to the other party, on the performance by him of the requisite condition. (15 Wend. 637; 6 id. 22, n. a. 35;

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Strong v. Blake, 46 Barb. 227.) There is in this complaint no sufficient averment of a tender, nor of any excuse for the omission, and the demurrer ought to have been sustained on this ground.

Judgment reversed and cause remanded, with an order to the Court below to sustain the demurrer to the complaint.

[No. 2,286.]

DAVID MAHONEY v. THOMAS I. BERGIN.

AGREEMENT BETWEEN CLIENT AND ATTORNEY.—An agreement made by an attorney with a client to render his professional services "in the Courts of this State," in actions to test the validity of the client's title to certain real estate, in consideration of a conveyance by the client to the attorney of a portion of the land, does not bind the attorney to render his services in an action brought to test the validity of the same title in the Circuit Court of the United States for this State.

ISSUE.—If such agreement was fair and free from fraud, and the land conveyed by the client a reasonable fee for the services agreed to be rendered, the attorney will not be compelled to reconvey the land, upon the payment of a reasonable fee for his services rendered, because, by reason of the suit in the Circuit Court, the client compromised with the opposing parties, and paid a large sum of money to acquire opposing claims; and the attorney was not compelled to render the full amount of services expected.

APPEAL from the District Court of the Fifteenth Judicial District, City and County of San Francisco.

The Court below rendered judgment for the defendant, and the plaintiff appealed.

The other facts are stated in the opinion.

W. H. Patterson, for Appellant.

If the defendant intended by this writing to restrict any demand upon his services excepting in the State Courts, in respect of the matters mentioned in it, then it is conclusive upon the plaintiff's proof, which is uncontradicted on this

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point, that the agreement did not express his understanding of the agreement he had made with his attorney, and on the faith of which he made his deed of the land. And if the defendant's construction of it was an afterthought with him, occurring only when the "Galindo title" was set up in the United States Circuit Court, it speaks unmistakably the language of exaction, and strongly manifests the intention to shirk a fair and professional discharge of the duty of an attorney to his client. It is, moreover, evidence of an original intent, and, taken in connection with the tenor of his testimony on the point, is conclusive that he intended, by the writing, to restrict his services to the State Courts; and we have a right to infer, as a just inference, that, so intending, he employed language ("in the Courts of this State") which, at least to the ordinary and unprofessional mind, would embrace all the Courts within this State in which the "Galindo title" could be asserted or attacked, but which he intended should bear the construction which he subsequently gave it, when the necessity arose for his services. The rule that obtains between contracting parties occupying the same relative positions toward each other is not that by which attorney and client are bound; but, as between the latter, the rule is reversed. It lies with the attorney, in all cases to show affirmatively that his dealings with his client are fair, just, and reasonable — the presumption being against the fairness of the transaction. (*Evans v. Ellis*, N. Y. Court of Errors, 5 Denio, 640; affirming Sup. Ct. in 11 Paige Ch. 467; *Poillon v. Martin*, 1 Sand. Ch. 569; *Howell v. Bansom*, 11 Paige Ch. 538; *Kisling v. Shaw*, 33 Cal. 435; *Valentine v. Stewart*, 15 id. 387; *Hatch v. Hatch*, 9 Vesey Jr. 297; *Wood v. Downer*, 18 id. 126; *Starr v. Vanderhagen*, 9 John. 258; *DeRose v. Fay*, 3 Edw. Ch. 369; *DeRose v. Fay*, 4 id. 40; *Lewis v. J. A.*, 4 id. 599.)

T. I. Bergin, for himself.

It will be borne in mind that all the instruments out of which the present action grows, were executed years ago—the land conveyed and professional services rendered on the faith thereof, that the referee finds that these were reasonably worth the fee agreed upon, i. e., four thousand dollars in coin, and therefore, the case falls within the rule of equity in reference to executed contracts.

In *Nace v. Boyer*, 30 Pa. St. 109, the Court again says: "The grounds upon which Courts of equity proceed in rescinding or canceling executed contracts, is much more narrow and to be more carefully trodden than that upon which they refuse specific performance of unexecuted contracts, or even decree their cancellation. Nothing but fraud or palpable mistake is ground for rescinding an executed conveyance."

The evidence of fraud or mistake must be clear and convincing, making it out to the entire satisfaction of the Court, and not leaving it open to doubt. (1 Story Eq., Secs. 152, 157, 176.) Had the agreed fee been paid in cash, would any one have pretended an action would lie for recovery thereof after the performance of the services, and especially where the services performed were reasonably worth as much as had been paid?

By the Court, TEMPLE, J.:

In November, 1866, the plaintiff, claiming to be the owner of the "Rancho Laguna de la Merced," against which there was an adverse claim called the Galindo claim, employed the defendant, who is an attorney and counselor at law, to test the validity of the Galindo title, and also to defend the plaintiff against a certain action then pending against him,

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brought by one Nuttman. This contract was reduced to writing, and is in the words and figures following:.

“In consideration of David Mahoney conveying in fee twenty acres of land in the Rancho Laguna de la Merced to me, Thomas I. Bergin, I, Thomas I. Bergin, an attorney and counselor at law, do undertake and agree with said Mahoney to render my professional services in the courts of this State, in an action to test and determine the validity of the so-called Galindo deed, and also to defend the action of *James E. Nuttman v. David Mahoney and Richard O'Neill*, Twelfth District Court of this State.

“In witness whereof, I have hereunto set my hand, this 21st day of November, 1866.

“THOMAS I. BERGIN.”

At the same time, in pursuance of the terms of the agreement, plaintiff executed to defendant a deed for twenty acres of land, valued at two hundred dollars per acre. Thereupon the defendant took charge of the Nuttman case for plaintiff, and shortly after brought a suit in the Twelfth District Court to quiet the title of plaintiff against the claimants under the Galindo title. This action was diligently prosecuted by defendant, but demurrers were interposed, and the case thereby delayed. This action was commenced on the 28th of December, 1866, but no trial on the merits has ever been had. Some time afterwards an action was commenced in the Circuit Court of the United States, at San Francisco, by the claimants under the Galindo title, against Mahoney and others, to obtain a decree that the confirmation of the title under which Mahoney claimed should inure to the benefit of Marks—the claimant under the Galindo title—and that the patent should issue to him instead of Mahoney; and also to enjoin the prosecution of the action brought by Mahoney in the Twelfth District Court to quiet his title. When this action was brought, Mahoney requested the defendant to

appear and defend it, as his counsel; but this the defendant refused to do, alleging that his contract only required him to render his professional services in an action to test the validity of that title in the Courts of this State. Afterwards compromises were made in all these cases. Mahoney acquired by purchase whatever rights Nuttman had, and also the claim under the Galindo title. For all these compromises Mahoney paid, it is alleged, some sixty thousand dollars, thereby terminating the suits and rendering the services of defendant no longer necessary.

This suit is brought to compel the defendant to reconvey the twenty acres of land, upon being paid a reasonable sum for his services, and is based upon two propositions: First—That the deed was unfairly obtained; that is, that defendant took advantage of the relation of attorney and client; and while plaintiff supposed he had a contract which would compel defendant to defend his title against the Galindo claim, the contract was so worded by defendant as to require very little labor for him, and afford little benefit to the plaintiff. In other words, that the contract was obtained by fraud. Second—That the defendant has not performed his contract. It is also contended that the agreement, if properly construed by the defendant, did not express the intentions of the plaintiff, and was executed through a mistake, and ought, therefore, to be set aside or reformed.

The case was referred to a referee to find the facts, and he has found on all the issues for the defendant. He finds that the agreement was fair, and free from fraud; that the land conveyed was a reasonable fee for the services agreed to be rendered, and that the agreement was correctly reduced to writing, and correctly expressed the intention of the parties at the time. In this finding I think the referee is fully justified by the evidence. There is no evidence tending to show that the least advantage was taken of Mahoney in the matter; but the contrary clearly appears.

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His own evidence shows plainly that he knew what he was about, and indicates both the ability and disposition to take care of his own interests, and no inclination to repose unusual confidence in any one.

Nor do I think the evidence clearly shows a mistake in the terms of the contract. The undertaking was not to defend the plaintiff's title against the Galindo claim, even in the State Courts, but to render his services in an action to test the validity of the Galindo deed. It was probably supposed by both parties at the time that this could be done in a suit to quiet title in the State Courts, and both seem to have spoken with reference to such a suit, and probably neither contemplated the possibility of such a suit as was brought. They failed to provide for such a contingency; and had it been considered, we cannot know that the contract would have been executed by Bergin.

I do not understand that it is charged that the defendant failed to perform his contract, except by refusing to defend the suit brought in the United States Circuit Court.

The suit in the Circuit Court, although intimately connected with the subject-matter of the contract, and having a direct bearing upon the suit brought by Bergin in pursuance of it, was not within the terms of the contract, or contemplated by either of the parties at the time. The contract was not obtained through fraud or mistake, and plaintiff cannot complain if the defendant declines more than a literal compliance with it.

Judgment and order affirmed.

Neither Mr. Justice WALLACE nor Mr. Justice SPRAGUE expressed an opinion.

[No. 2,592.]

**THE PEOPLE OF THE STATE OF CALIFORNIA v.
EDWARD MCGUNGILL.**

CHALLENGE OF JUROR FOR IMPLIED BIAS.—A challenge of a juror for implied bias must state some one of the causes enumerated in section three hundred and forty-seven of the Criminal Practice Act. To say a juror is challenged for implied bias is no challenge.

DISALLOWANCE OF CHALLENGE AS PREJUDICE.—If a party attempt to challenge a juror for implied bias, and, the challenge being disallowed, he then challenge peremptorily, and if it does not appear affirmatively that he had exhausted his peremptory challenges at the time a full panel was sworn, he is not prejudiced by the disallowance of his attempted challenge.

DEFENDANT AS A WITNESS FOR HIMSELF.—The fact that a defendant offers himself as a witness in his own behalf does not change or modify the rules of practice, with reference to the proper limits of a cross-examination, and does not make him a witness for the State against himself.

COMMENTS OF COUNSEL TO JURY.—In such a case, it is irregular for the counsel for the prosecution, against the objections of the defendant's counsel, to comment, in his argument to the jury, upon the refusal of the defendant to be cross-examined to the whole case; and for the Court to permit a continuation of such comments, against such objection, is erroneous, and prejudicial to the rights of the defendant.

PRINCIPAL AND ACCESSORY.—Under an indictment which charges a defendant as principal, he cannot be found guilty, if the evidence shows him to have been an accessory before the fact.

APPEAL from the County Court of Mendocino County.

The defendant was convicted of the crime of grand larceny, and appealed from the judgment and order denying a new trial.

The other facts are stated in the opinion.

McGarvey & Carothers, for Appellant.

Attorney General Jo Hamilton, for the People.

By the Court, **SPRAGUE, J.:**

The error assigned for disallowance of defendant's challenges of R. H. Anderson and S. S. Baechtel, as trial jurors

Opinion of the Court — Sprague, J.

"for implied bias," cannot be considered upon the record as presented. Neither challenge appears to have been made for any specific cause authorized by statute. To simply state that "the juror is challenged for implied bias" is no challenge. A challenge for implied bias must state some one of the nine causes enumerated in section three hundred and forty-seven of the Criminal Practice Act. (*People v. Hardin*, 37 Cal. 258; *People v. Dick*, id. 379.)

Again, it appears that neither of the persons so attempted to be challenged served on the trial, having been peremptorily challenged by defendant; and it does not affirmatively appear that defendant had exhausted his peremptory challenges at the time the full panel was accepted and sworn; hence he was not prejudiced by the action of the Court in disallowing his attempted challenge for implied bias.

The bill of exceptions does not purport to contain all, or any considerable portion, of the evidence presented on the trial; hence it is impossible for this Court to determine as to the competency of the evidence relative to the cattle of J. J. Thomas and J. Farley, not included in the indictment, but which seem to have been found with those described in the indictment, on their first discovery after the alleged larceny.

It appears from the bill of exceptions that "one Yates was called and sworn as a witness for the prosecution, and, among other things, stated that he had a certain conversation with the prisoner." This closed the evidence for the prosecution. The defendant was then placed upon the stand as a witness in his own behalf, and was asked if he had the conversation with Yates spoken of by Yates, and answered he did not, and was examined no further by his counsel than concerning said conversation, nor was he examined on any other point, but answered all questions required of him by the Court; that upon the argument of the case the counsel for the prosecution commented upon

Opinion of the Court — Sprague, J.

the fact before the jury; that the defendant refused to be cross-examined to the whole case; that defendant's counsel protested against such comments, but they were continued by permission of the Court. This conduct of counsel for the prosecution, under sanction of the Court, and against objections of the defendant's counsel, was irregular, and its permission by the Court erroneous, and manifestly prejudicial to the rights of defendant. (*People v. Tyler*, 36 Cal. 522.)

The fact that defendant offered himself as a witness in his own behalf, did not, as to him, change or modify the rules of practice with reference to the proper limits of a cross-examination of a witness; and, clearly, the prosecution could not legally claim that defendant should be made a witness for the State against himself. To attempt such an outrage of defendant's rights, and then, with the sanction of the Court, in argument to the jury, to comment upon the failure of such attempt as a circumstance tending to establish the guilt of defendant, cannot be justified or sanctioned.

The second, fifth, and eighth instructions, given by the Court at request of the prosecution, are obnoxious to the objection, of substantially asserting that under the indictment, which charges the defendant as principal, he should be found guilty, if the evidence shows him to have been an accessory before the fact, in "advising or encouraging" the commission of the offense. In this respect each of these instructions is erroneous. (*People v. Trim*, 39 Cal. 75; *People v. Campbell*, 40 Cal. 129.)

The judgment should, therefore, be reversed, and the cause remanded for a new trial. So ordered.

Argument for Appellant.

[No. 2,420.]

MICHAEL O'CONNOR v. WILLIAM KELLY.

LANDLORD AND TENANT.— If the landlord sells and conveys the leased premises, and assigns the lease, the grantee must inform the tenant of the sale before demanding rent, and if the tenant refuse to pay rent to the grantee, when he does not know of the sale the refusal is not a forfeiture of the lease.

EJECTMENT AGAINST TENANT.— The grantee cannot maintain ejectment against the tenant of the landlord, because the tenant has refused to pay him rent, unless the tenant had been informed of the sale, before rent was demanded.

DEMAND FOR RENT.— A demand for rent should be of the amount due. If the amount due is not demanded a refusal to pay does not work a forfeiture of the lease.

APPEAL from the District Court of the Fourth Judicial District, City and County of San Francisco.

The lease from Murphy to Kelly was dated August 25th, 1863, and was for a tract of land in San Francisco. Suit was brought before the termination of the lease, to wit: April 17th, 1868. The lease was not recorded. The deed from Murphy to O'Connor was dated April 16th, 1867, and was not recorded. The plaintiff recovered judgment in the Court below, and the defendant appealed from the judgment and from an order denying a new trial.

The other facts are stated in the opinion of the Court.

M. G. Cobb, for Appellant.

O'Connor having thus shown the relation of landlord and tenant between himself and Kelly, he was bound to prove that that relation had ceased — that Kelly had become a trespasser — in order to maintain his action. The demand for rent was not sufficient to make a refusal to pay work a forfeiture. Taylor on Landlord and Tenant (Sec. 493) states the common law rule thus: "In every case, before a landlord could enter for the non-payment of rent he must have

Argument for Respondent.

made a formal demand for the precise rent due for the last current quarter; and if the demand includes any portion of the rent of a previous quarter, it would have been bad. Kelly did not renounce his character of tenant either by setting up title in another or claiming title in himself. (*Doe ex dem. Williams v. Cooper*, 1 M. & G. 139 [39 E. C. L. R. 608].)

G. F. & W. H. Sharp, for Respondent.

If Kelly's refusal to pay rent was innocent, it behooved him to ascertain the true state of facts and then come into Court with a tender of his rent, thereby possibly averting the forfeiture, as was done in the case of *Atkins v. Chilson*, 11 Met. 112. (*Sampson v. Schaeffer*, 3 Cal. 203.) The law defines a disclaimer as any act of the lessee by which he disaffirms or impugns the title of his lessor. (1 Washburne on R. P. 362, and cases therein cited.) And, in consequence of such disclaimer, the lessee forfeits his estate, and the lessor may enter or bring ejectment or forcible detainer. (1 Washburne on R. P. 362, and cases therein cited; *Wall v. Goodenough*, 5 Ill. 415.)

The fact that the lessee was ignorant of his lessor's title is a circumstance which, while it does not prevent the forfeiture from attaching, might, if coupled with mistake or accident, be a ground for relief; but here the defendant, instead of making any such defense, and in entire harmony with his previous actions, comes into Court and contests our title, to the last extremity.

In 9 Carrington & Payne, 773 (38 E. C. L. R. 331), *Doe ex dem. Bennett v. Long*, the reply of a tenant to a demand for rent, "You are not my landlord—I am not your tenant," was held to be a disclaimer, and ejectment would lie without notice to quit. (See, also, *Doe ex dem. Grubb v. Grubb*, 10 Barn. & Cress. 816; *Calvert v. Frowd*, 4 Bing. 557.)

By the Court, TEMPLE, J.:

The defendant was the tenant of one Murphy, from whom he had a lease of the premises sought to be recovered in this action for the term of five years, paying a rent of six dollars per annum. Before the expiration of the lease, Murphy conveyed to plaintiff, who sent his clerk to defendant to demand the payment of rent, which being refused, this action was commenced, being ejectment.

It does not appear that the defendant had notice of the conveyance of the premises to the plaintiff, or that, at the time he refused to pay rent, he had any knowledge of that fact whatever. From the evidence of Ryan, through whom the demand was made, the contrary is to be inferred.

By the terms of the lease, Murphy could put an end to the term before the expiration of five years, upon the payment of a certain sum of money to Kelly. The lease, also, contained the usual covenant for a forfeiture in case of non-payment of rent. Demand was not made for any particular sum, nor was there any other refusal than a statement that he did not acknowledge O'Connor in the matter, and did not wish to pay rent to him. In fact, he did not know him. He was not informed of the conveyance to O'Connor, nor did he deny the tenancy or set up any claim in himself. He did just what any tenant ought to do when called upon to acknowledge the title of a stranger and pay rent to him. If leases could be forfeited by making a secret assignment of the lease and demand made by the assignee, without making known the fact of assignment, no tenant would ever be safe. By doing just what appears to be his duty to his landlord he might forfeit his estate.

The failure to make demand of the amount due was also fatal to the plaintiff's case. (*Guge v. Bates*, 40 Cal. 384.)

Judgment reversed and cause remanded for further proceedings

Statement of Facts.

[No. 2816.]

THE PEOPLE OF THE STATE OF CALIFORNIA v.
EDWIN HUNT.

REPEAL OF REPEALING ACT.—The repeal of an Act repealing a former Act does not revive the former Act, or give it any force or effect. To revive such former Act it must be re-enacted.

OFFICE REVIVED BY REPEALING ACT.—If a general Act creates an office in all the counties of the State, to be filled by election once in two years, and a special Act, passed afterwards, takes one county away from the provisions of the Act, and this special Act is afterwards repealed by an Act which restores the office as to that county, the provisions of the general Act are revived as to the office.

CASE AFFIRMED.—*Trout v. Gardiner*, 39 Cal. 386.

APPEAL from the District Court of the Fourth Judicial District, City and County of San Francisco.

The County of Alameda contains six townships. At the general election held in September, 1867, an Assessor was elected for each township. At the general election held in September, 1869, Edwin Hunt was elected County Assessor; but no Township Assessors were elected. Hunt received his certificate, qualified, and, on the first Monday in March, 1870, entered upon the discharge of his duties. No Township Assessors were elected to succeed those of 1867. The Act of 1864, referred to in the opinion, provided "that Township Assessors should be elected in 1865, and every two years thereafter, for Alameda County, to hold their offices two years from the first Monday in March succeeding such election, and until their successors should be elected and qualified."

The Attorney General filed his complaint, by way of information of quo warranto, against the respondent, Edwin Hunt, setting up the above matters of fact, and the facts stated in the opinion, and asked judgment of ouster against him.

Argument for Appellant.

The defendant demurred to the complaint, and had final judgment on the demurrer. The plaintiff appealed.

The other facts are stated in the opinion.

Clarke & Carpentier, for Appellant.

The Act of 1863 (Laws 1863-4, p. 243) abolished the office of County Assessor, and provided for District Assessors. The Act of 1868 did not abolish the office of Township Assessor, unless it was done by section twenty-four:

“SECTION 24. All Acts, and parts of Acts, in conflict with the provisions of this Act, are repealed, so far as they affect the provisions of this Act, to take effect from the first Monday in March, 1870, when this Act shall go into operation.”

From the language of this section twenty-four, two things are clear:

1. That the Act of 1868 was not to go into operation until the first Monday of March, 1870, nearly two years after its passage; and,

2. That none of the Acts, or parts of Acts, in conflict with its provisions, should be repealed until the first Monday of March, 1870.

Now, the first Monday of March, 1870, fell on the seventh day of that month. There can, therefore, be no question but that, up to the 7th of March, 1870, the “Acts, and parts of Acts,” within the purview of said section twenty-four, remained unaffected by its provisions. If, therefore, the Act of 1863, which abolished the office of “County Assessor for the County of Alameda,” be one of the Acts embraced within the provisions of said section twenty-four, it was not repealed by said section prior to the 7th day of March, 1870, but continued to be the law up to that date, and, as a consequence, the only Assessors known to the law, up to that date, were the Township Assessors, and the only election in 1869 for Assessors, warranted by law, was an election

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for Township Assessors, under the law of 1863. There can be no pretense, then, that Edwin Hunt ever became, or was, County Assessor prior to March 7th, 1870.

John W. Dwinelle, for Respondent.

The Act of 1863 was repealed in 1868, and the office of County Assessor of Alameda County restored, and the respondent, Edwin Hunt, lawfully elected to that office in 1869. Applying to the Act of 1868 the received principle of interpretation — that it must all be construed together — we find that by section three Township Assessors are established and County Assessors restored; the election of a County Assessor ordered for the Autumn of 1869; and, by section twenty-four, all other conflicting Acts repealed, “to take effect from the first Monday of March, 1870, when the new Act was to go into operation.” We interpret this to mean that no Township Assessors were to be elected in the Autumn of 1869, for the office was abolished; that a County Assessor was to be elected in the Autumn of 1869 to fill the office of County Assessor, which was created to succeed that of the Township Assessor from and after the first Monday of March, 1870; that until the first Monday of March, 1870, the Township Assessors were to continue in office, and act as such, and the Township Assessor system, meanwhile, continue “in effect;” but that after the first Monday of March, 1870, the County Assessor system was to “go into operation.” (*City of San Francisco v. Kelsey*, 5 Cal. 169; *City of Sacramento v. Bird*, 15 Cal. 294; *Burnham v. Hays*, 3 Cal. 115; *Cleaves v. Hays*, 3 Cal. 471; *Preble v. Waterman*, 31 Cal. 412; *Sartin v. The Sea Witch*, 1 Cal. 162; *Smith v. Randall*, 6 Cal. 47; *Seabury v. Arthur*, 28 Cal. 142; Appeal of N. B. & M. R. R. Co., 32 Cal. 499; *Burr v. Dana*, 22 Cal. 11.) Even granting that the law of 1868 does not provide for its own execution, still it does provide for the restoration of the office of County Assessor on and after the first Monday of March, 1870. Sup-

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pose it has only this effect: "Township Assessors are abolished, and the office of County Assessor restored, on and after the first Monday of March, 1870." Then here was an office created, an office to be filled, and to be filled in the first instance, only by election. (*People v. Kelsey*, 34 Cal. 470.) And how thus filled? Under the law of 1861, above cited, and never repealed, requiring all County Assessors to be elected every two years at the general election. (Laws 1861, p. 422, Sec. 6; 2 Hittell, 6,155.)

By the Court, RHODES, C. J.:

The question for determination is whether the defendant is the County Assessor of Alameda County. The Revenue Act of 1861 provided that County Assessors should be elected in 1861, and every two years thereafter, in each county. (Stats. 1861, p. 422.) In 1864 a special Act was passed for Alameda County, by which it was provided that Township Assessors should be elected in that county. (Stats. 1863-4, p. 243.) The Act of March 28th, 1868 (Stats. 1867-8, p. 448), contained a provision, in section three, that assessments should be made in all the counties by County Assessors, and that in counties wherein there were Township or District Assessors, County Assessors should be elected at the general election in 1869. The defendant was elected in 1869 as the County Assessor of Alameda County.

The Act of 1868 was expressly repealed by the Act of March 5th, 1870 (Stats. 1869-70, p. 198, Sec. 98), which took effect upon its approval. It is contended by the plaintiffs that the effect of the repeal was to leave in force the Act of 1864, providing for the election of Township Assessors in Alameda County.

It was held in *Trout v. Gardiner*, 39 Cal. 386, that the Act of March 28th, 1868, took effect for certain purposes before the first Monday — the seventh day — of March, 1870; and,

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among other things, that it authorized and required the officers to be elected as therein provided, which might be necessary in order that the Act might have full force and effect. It was provided by the Act that County Assessors should be elected at the general election in 1869, and for that purpose the Act took effect sixty days after its passage. That provision repealed the Act of 1864, providing for the election of Township Assessors for Alameda County. The repeal of the Act of 1868, two days before it took effect, *for all purposes*, by the Act of March 5th, 1870, did not revive the special Act of 1864. The repeal of an Act repealing a former Act does not revive the former Act, or give it any force and effect. This result can be accomplished only by the reenactment of the former Act. The repeal of the Act of 1864, by section three of the Act of 1868, worked the same result as would an Act directly repealing the Act of 1864; that is to say, the special Act having been repealed, a County Assessor was required to be elected for Alameda County in 1869, as provided by the general Revenue Act of 1861. The defendant was elected as such Assessor, and he was authorized and required to perform all the duties of County Assessor, as provided by the revenue laws.

Judgment affirmed, and remittitur ordered to issue forthwith.

[No. 2,675.]

M. J. DOOLY v. T. B. NORTON AND HENRICH UMLAUFF.

APPEAL FROM ORDER RETAKING COSTS.—An order on a motion to retax costs, if made after the entry of judgment, is a special order made after final judgment, from which an appeal lies.

REVIEW.—If such order is made before the entry of judgment, it may be reviewed by an appeal from the judgment, with a statement annexed to the record.

APPEAL from the District Court of the Fifth Judicial District, San Joaquin County.

The facts are stated in the opinion of the Court.

J. H. Budd, for Appellant.

There is no provision in the Practice Act in regard to a retaxation of costs, but the recognized practice has been to move the Court, on notice, to retax the cost, if deemed erroneous. (*Burnham v. Hays*, 3 Cal. 115; *Chapin v. Broder*, 16 Cal. 419; *Gay v. Franklin*, 5 Cal. 416.) The decisions are silent as to the time when the motion to retax should be made. There is nothing to indicate that it should be necessarily made during the term of the rendition of the judgment. In fact, should the judgment be rendered on the last day of the term, then a motion to retax could not in many cases be made at the term of the rendition of the judgment. A mistake or willful wrong in the memorandum of costs would be no ground for a new trial. (*Stevenson v. Smith*, 28 Cal. 105.) And unless the aggrieved party be allowed a reasonable time, even after the term of the Court had passed, to move to retax the costs, he would, in many cases, be without remedy.

Terry & Carr, for Respondent.

The motion to retax costs was properly refused; costs are included in and form a part of the judgment, and a motion to retax is in legal effect a motion to modify or amend the judgment. (*Lasky v. Davis*, 33 Cal. 677.) After the adjournment of the term at which a judgment is entered, the Court has no power to amend it, except to correct an error disclosed by the record itself. (*Hegeler v. Henkell*, 27 Cal. 491.) Except in the cases provided for in the sixty-eighth section of the Practice Act, a Court has no power to set aside or modify a judgment after the lapse of the term at which

it was rendered, unless some step was taken during the term to preserve its jurisdiction over the case. (*Carpentier v. Hart*, 5 Cal. 406; *Bell v. Thompson*, 19 Cal. 706; *Casement v. Ringold*, 28 Cal. 338; *De Castro v. Richardson*, 25 Cal. 49.)

By the Court, SPRAGUE, J.:

The judgment was rendered February 21st, 1870; and on the twenty-third of the same month the plaintiff filed his memorandum of costs, etc. At the next term of the Court, defendant Norton moved that the costs be retaxed. The motion was dismissed on the ground that the Court had no jurisdiction of the motion, as the judgment had been entered at a former term of the Court. The defendant appeals from the judgment and the order dismissing the motion.

Had the order dismissing the motion been made before the rendition of the judgment, it might have been reviewed under an appeal from the judgment, and might have been presented by a statement on such appeal. But the question here presented is, whether an appeal lies from the order, as a special order made after final judgment. In *Levy v. Getleson*, 27 Cal. 688, the order denying the motion to retax the costs was made before the judgment was entered, and it was held that the order was not appealable, as it was not made after the final judgment, and that the question of its correctness might be raised by a statement annexed to the judgment roll. It was also held in *Stevenson v. Smith*, 28 Cal. 105, that an error in the taxation of costs must be reviewed and corrected on an appeal from the judgment. In that case the motion and order were made before the entry of the judgment. In *Lasky v. Davis*, 33 Cal. 677, the costs were retaxed on the motion of the defendant. The order was made more than three months after the entry of the judgment, and from the order the plaintiff appealed. The

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appeal was dismissed on the ground that the order was not an order, after final judgment, within the meaning of section three hundred and forty-three of the Practice Act, but amounted to a modification or amendment of the judgment; that the order, though made after, will be deemed in law to have been made before the entry of the judgment. The authorities which are cited by the Court are those above mentioned and *Volan v. Reese*, 20 Cal. 90. The last mentioned case merely decided that the costs could not be considered in determining whether the matter in dispute was sufficient to give the Supreme Court jurisdiction of the appeal from the judgment.

The order made on the motion to retax the costs in an action is a proper subject for review, in some mode, in this Court. If made before the judgment is rendered, it may be reached by an appeal from the judgment; but if made more than twenty days after the entry of judgment, how is the question to be presented for review? It is very clear, upon the authorities in this Court, that it can be presented only by means of a statement on appeal. The statement cannot be annexed to the judgment, because more than twenty days have elapsed since the entry of the judgment. (Sec. 338.) If it is not annexed to the order it has no place in the record and cannot be brought before the appellate Court.

The motion to retax the costs is in effect a motion to modify the judgment, and however the order may be considered, when it is made before the entry of the judgment, it seems clear to me that when it is made after the entry of the judgment it is an order after final judgment as fully in every sense as an order modifying the judgment in any other respect. If this be not the true construction the party complaining of the order would, in many instances, be without redress.

No error appears in the judgment, and it is affirmed; the

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order appealed from reversed and cause remanded; and it is ordered that this judgment be entered as of the 25th day of February, 1871.

RHODES, C. J., dissenting:

The defendant appeals from the judgment which was entered at the February term of the District Court, and from an order made at the ensuing May term, dismissing his motion to retax the costs. The order is not appealable; but a review of the action of the Court, on a motion to tax or retax the costs, may be had upon an appeal from the judgment. (*Levy v. Getleson*, 27 Cal. 688; *Stevenson v. Smith*, 28 Cal. 105; *Lasky v. Davis*, 33 Cal. 677.) In *Lasky v. Davis* it was considered that the order retaxing the costs was not a special order, made after final judgment, within the meaning of section three hundred and forty-three of the Practice Act, though made after the judgment, in point of time.

It necessarily follows, from the doctrine of those cases, that if the order be made after the rendition of the judgment, the time for the filing of the statement on appeal, so far as respects the proceedings on the motion to tax or retax costs, will commence running from the entry of the order. The statement in this case was filed in due time.

The plaintiff's memorandum of costs was filed ten days before the adjournment of the February term; and the defendant, at the May term, moved that the costs be retaxed. The defendant did not show, as required by section sixty-eight of the Practice Act, that he had been unable to apply for a retaxation of the costs during the February term. The Court should, on that ground, have denied the motion. The dismissal of the motion may be accepted in this case as amounting to a denial of the motion; and although the decision was placed on the ground that the Court had no

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jurisdiction of the motion, because it was made after the adjournment of the term at which the judgment was rendered, yet, as the order was right, it should not be disturbed.

I am of opinion that the judgment should be affirmed, and the appeal from the order dismissed.

Mr. Justice CROCKETT did not express an opinion.

[No. 2,257.]

**C. L. PURDY AND C. MILLIKIN v. W. P. BULLARD
AND M. SULLIVAN.**

RESCISSION OF CONTRACT.—A party to a contract is not entitled to a judgment rescinding the same, on the ground of fraudulent representations, unless he has been injured by reason of his reliance on such representations.

COMPLAINT IN ACTION TO RESCIND CONTRACT.—In an action to rescind a sale of real estate, on the ground of fraudulent representations, security, averred in the complaint to have been given for the purchase money, will be presumed to be adequate unless the contrary is expressly averred.

RESCINDING PART OF A CONTRACT.—Where a contract is not severable, and there are good grounds for its rescission, one party is not at liberty to rescind one part of it, and leave the residue in full force. P. proposed to sell to B. a hotel, and to effect the sale, P. deeded the property to C., who paid him part of the purchase money, and C. contracted with B. to give him a deed when he was repaid the money thus advanced. B. then gave P. security for the remainder of the purchase money, and assigned his contract with C. to S. *Held*, that the whole matter constituted one entire contract.

MORTGAGE IN EQUITY—OFFER TO REFUND MONEY.—Where P. contracts with B. to sell him his hotel, and, to effect the sale, executes to C. a conveyance thereof, upon C. advancing to P. part of the purchase money, and C. gives B. a contract for a deed when the money he has advanced is repaid, and B. gives P. security for the balance, as between the parties, the sale and conveyance will be deemed, in equity, a mortgage to secure the payment by B. to C. of the sum advanced; and in such case a complaint, to set aside the contract for fraudulent representations to B., must aver an offer to refund C. his money.

Argument for Respondents

APPEAL from the District Court of the Seventh Judicial District, County of Sonoma.

The plaintiffs appealed.

The other facts are stated in the opinion.

F. D. Colton, for Appellants.

Bullard's representations were fraudulently made. The plaintiffs believed and relied on them. They now ask that the contract be rescinded so far as Bullard and his assignee with notice, Sullivan, is concerned. (*Gifford v. Carvill*, 29 Cal. 589.)

George Pearce, for Respondents.

An action cannot be maintained on a false representation as to the bare fact of title. (*Peabody v. Phelps*, 9 Cal. 213.) For aught that appears in the complaint, the cows and farming implements may have been worth more than four thousand dollars. If the deed and bill of sale to Millikin were taken as security, there can be no pretense for setting aside the contract of the parties, thus solemnly made, without some charge or allegations of misrepresentations as to the title, value, or condition of the cows or farming implements. (2 *Parsons on Contracts*, 60, 61.) The cows and farming implements may have been worth, and may now be worth, more than the sum of four thousand dollars, the complaint being entirely silent as to the value of either, and the complaint must be construed against the appellants.

F. D. Colton, in reply:

The point that the complaint does not aver that the cows and farming utensils were worth less than four thousand dollars, was not made below. Taking, however, the whole complaint together, we think it sufficiently appears they were worth less than that sum.

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Nathaniel Bennett, also for Appellants.

As to contracts voidable on the ground of fraudulent representations, we refer the Court to Chitty on Contracts, in the third subdivision of the section headed "Of Contracts Illegal at Common Law," commencing at page 678 of ed. 1844, and notes; and Sec. 12, entitled "Of Fraud," of Chap. 3 of 2d vol. of Parsons on Contracts, p. 265 of ed. 1860. The principles laid down and elucidated by these authors appear to us most clearly to sustain the principle on which our complaint is founded.

By the Court, RHODES, C. J.:

The leading facts stated in the complaint are as follows: The plaintiffs proposed to sell, and Bullard, one of the defendants, to buy, the New York Hotel, at Petaluma, with the furniture, bedding, etc., for nine thousand dollars, to be paid in the following manner: The plaintiffs were to convey to one Cobb the hotel and furniture, and Cobb was to pay the plaintiffs five thousand dollars, and to execute to Bullard a contract to convey to him the property on his paying to Cobb the five thousand dollars, with interest. The agreements, up to this point, were executed by the respective parties. The remaining four thousand dollars were to be paid as follows: Bullard represented that he was the owner of a certain farm, which was of the value of four thousand dollars; that he had bargained the farm to one Barlow for over three thousand dollars; that Barlow was to pay him in hand three thousand dollars, or give him his (Barlow's) note for that sum, with one Denman as surety; and that he was expecting Barlow daily to come to Petaluma to pay the money or give the note. This sum of money was to be paid to the plaintiffs, or the note last mentioned was to be assigned to them. Bullard was also to execute to them his

promissory note, with one Hill as surety, for the sum of one thousand dollars. Bullard represented that Barlow was prevented by the rain from coming to Petaluma, and Bullard, in order to secure to the plaintiffs the payment of the sum of three thousand dollars, to be paid by Barlow, or the assignment of the note of Barlow and Denman, conveyed to one of the plaintiffs the farm, and gave him a bill of sale of seven cows and all the farming utensils on the farm. It is alleged that Bullard neither paid the three thousand dollars, nor assigned the note of Barlow and Denman, nor made the note for one thousand dollars, nor paid that sum of money.

It is alleged that Bullard's representations, that he owned the farm, that the farm was of the value of four thousand dollars, that he had bargained the same to Barlow for a sum exceeding three thousand dollars, were false, and were made for the purpose of defrauding the plaintiffs, and that the plaintiffs believed those representations, and, relying on them, entered into the agreements above mentioned. The contract which was executed by Cobb to Bullard was assigned to Sullivan, who took it, with notice of all the facts relating to the whole transaction.

The plaintiffs seek to rescind the sale of the hotel property, on the ground of the false and fraudulent representations of Bullard. General demurrers to the complaint were interposed by the defendants; and the demurrers being sustained, and the plaintiffs declining to amend the complaint, judgment was rendered for the defendants. The fraudulent representations of Bullard, assuming that they are actionable, bear only on the matter of the payment of the sum of three thousand dollars. The plaintiffs are not entitled to rescind the contract, unless they have been injured by reason of their reliance on those representations. They accepted a conveyance of the farm, and a sale of the cows and farming utensils, as security for the performance of Bullard's agreement to pay that sum, or assign the note of Barlow and

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Denman. It does not appear from the complaint that the security was inadequate. The value of the personal property is not stated; nor is it averred that it is not ample to secure the payment of the sum of three thousand dollars. The Court is not at liberty to indulge in speculations as to its probable value. The statement as to its value should have been direct, or, at least, it should have been averred that its value, together with the value, if any, of Bullard's interest in the farm, was insufficient to secure the performance of his agreement in respect to the payment of the sum of three thousand dollars. The security will be presumed to be adequate until the contrary is shown; and if it is adequate, the plaintiffs have suffered no injury by their reliance upon Bullard's false and fraudulent representation.

There is another point in the case which, I think, deserves notice. The general rule is that a contract cannot be rescinded in part. Where the contract is not severable, and there are good grounds for its rescission, one party is not at liberty to rescind one part of it, and leave the residue in full force.

The sale and conveyance of the hotel property, and the agreements in respect to the payment of the purchase money, constituted one entire contract. As between the parties to the contract, the sale and conveyance of the hotel property will be deemed, in equity, a mortgage to secure the payment by Bullard to Cobb of the sum of five thousand dollars, with interest. The complaint does not aver an offer on the part of the plaintiffs to pay to Cobb the money so advanced by him. Their offer to Bullard "to free him from or amply secure him against said contract with Cobb" is not an offer to rescind that portion of the contract. The offer to rescind, to be effectual, should have extended to the whole contract.

Judgment affirmed.

Argument for Appellants.

[No. 2,326.]

WILLIAM ARAM, TRUSTEE OF THE ORCHARD STREET DISTRICT PUBLIC SCHOOL, JAMES MURPHY, BERNARD S. FOX, MARK FARNEY, AND JOHN R. MERRITT v. MOSES SCHALLENBERGER, HENRY ROBINSON, AND SAMUEL Q. BROUGHTON.

OBSTRUCTION TO PUBLIC ROAD.—A private individual cannot maintain an action to prevent or abate a nuisance, caused by obstructing a public highway, unless he shows some special damage to him, in addition to that received by the public.

WHO MAY SUE FOR OBSTRUCTING PUBLIC ROAD.—The facts that the parties who bring an action to prevent or abate a nuisance, caused by obstructing a public road, own land fronting on the road, and have no other means of access to their lands except over and along the road, do not show such special damage to the plaintiffs, in addition to that sustained by the public, as enables them to maintain the action.

APPEAL from the District Court of the Third Judicial District, Santa Clara County.

The plaintiffs alleged that the defendants were about to obstruct a public road by building a fence across the same, and asked for a preliminary injunction, and that, on the trial the injunction be made perpetual. The defendants demurred to the complaint, and the Court overruled the demurrer. A preliminary injunction was granted, and, the defendants having answered, on the trial a perpetual injunction was decreed. The defendants appealed.

The other facts are stated in the opinion.

Moore, Laine & Silent, for Appellants.

The Court erred in overruling the demurrer. The rule is universal that an injunction will not be granted to prevent a public nuisance, on the application of a private individual, unless the apprehended nuisance would be specially danger-

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ous to the person making the application, or injurious to his property; and it must be an injury distinct from that which he suffers in common with the rest of the public. The injury must be peculiar to the plaintiff, and not common to him and many others. If it operates equally or in the same manner upon many individuals, constituting a particular class, though a very small portion, of the community, it is not a special damage to each, within the rule. (Thompson on Highways, 256; Hilliard on Torts, vol. 1, pp. 637, 638; *Yolo County v. City of Sacramento*, 36 Cal. 193; *Proprietors of Quincy Canal v. Newcomb*, 7 Metcalf, 283.)

Alexander Yoel, for Respondents.

Any inhabitant has the right to forbid the erection of an obstruction on public places. (*New Orleans v. Garcia*, Lou. Cd. Rpt. 253.) An individual who complains of an obstruction to a highway may maintain an action for it. (Angell on Corp. 191, Sec. 206; 2 La. Con. Rep. 66.)

By the Court, TEMPLE, J.:

I think the demurrer to the complaint ought to have been sustained, on the ground that it shows no special damage to the plaintiffs. The road is alleged to be a public highway, and the action is to prevent an obstruction. No doubt a private individual may sue to prevent or abate a public nuisance; but he must always show some special damage to him in addition to that received by the public. The rule is plain, and has always, so far as I know, been adhered to; the questions most usually raised are as to the character of injury which will be considered a special injury to private individuals. In this case the only allegations which can be claimed to show special damage are, that plaintiffs each own tracts of land adjoining the alleged road, and have no other means of access to their lands except over and along said

road. No special injury to their property is averred, and although, from the facts stated, we may conclude that the inconvenience to them will be greater than to the general public, it results simply from the more frequent occasion they may have to travel the road, and is of the same nature as would occur to any other person who might have occasion to use it.

In the case of *The Proprietors of Quincy Canal v. Newcomb*, 7 Metc. 276, the defendant being sued for toll for the use of plaintiff's canal, set up that the canal had not been built according to the charter, and defendant was greatly damaged thereby, and could not have the same advantageous use of the canal which he might have had if it had been constructed as required by the Act of incorporation. Chief Justice SHAW says, in deciding the case, that even admitting the right to set up damages in mitigation, evidence to support this defense was properly refused; for, if he suffered damage from the failure to construct the canal as required, or from its filling up, it was damage in common with all the members of the community, and therefore redress must be sought in a public prosecution; that "where one suffers in common with all the public, although from his proximity to the obstructed way, or otherwise from his more frequent occasion to use it, he may suffer in a greater degree than others, still he cannot have an action, because it would cause such a multiplicity of suits as to be itself an intolerable evil." To the same effect is the case of *Sully v. Bishop*, 19 Conn. 128. *O'Brien v. Norwich and Worcester R. R.*, 17 Conn. 372, was a case in which a private individual attempted to enjoin the defendant from constructing its railroad across an arm of the sea, which is alleged to have been navigable and to have been used by the plaintiff and others, at their pleasure, for the purpose of passing up and down the cove connected by it with the River Thames, a navigable river; that by means of the road so constructed

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the navigation of the cove would be greatly obstructed and rendered almost wholly useless. The relief was denied, on the ground that the injury was the same that might occur to any one having occasion to pass up and down the cove. He showed no damage which was special to himself. (See, also, Hilliard on Torts, 686.)

These authorities are directly in point, and none have been cited to a contrary effect, although there are some where a very slight damage peculiar to the plaintiff has been held sufficient to enable him to maintain the action.

Judgment reversed and cause remanded, with directions to sustain the demurrer.

[No. 2,868.]

THE PEOPLE OF THE STATE OF CALIFORNIA v.
ANDREW JOHNSON AND GUNRALL OMEUS.

CONFESSION AS EVIDENCE.—The confession of a party, made to a Sheriff arresting him for grand larceny, after being told by the officer that it was useless to deny taking the property, that there was evidence to convict him, and that it would go lighter with him to confess, is not a voluntary confession, and cannot be properly given in evidence.

IDEM.—If such a confession be, in substance, repeated before an examining magistrate a few days after the arrest, and reduced to the form of a written statement, the statement is inadmissible as evidence, by reason of its having been originally made under such inducements as to exclude the first confession.

IDEM — PRESUMPTIONS OF LAW.—The law presumes the subsequent confession to have been made and influenced by the same hopes and fears as the first, and this presumption continues until it be affirmatively established by the prosecution that the influences under which the original confession was made had ceased to operate before the subsequent confession was made.

APPEAL from the County Court of the County of Contra Costa.

The facts are stated in the opinion of the Court.

James Voorhees, for the Appellants, argued that the statement made before the magistrate was inadmissible as evidence, because made under inducements held out to the defendants by the Sheriff immediately before their examination. (1 Greenl. Ev., Secs. 219, 222, 225; *People v. Ah How*, 34 Cal. 218; 1 Wharton Cr. Law, Sec. 698; *The State v. Phelps*, 11 Vermont, 116; *Hector v. The State*, 2 Wis. 165; 2 Hawk. 595.)

Attorney General Jo Hamilton argued that there was no evidence that the statement was obtained by undue influence.

By the Court, SPRAGUE, J.:

The defendants being on trial for grand larceny, the prosecution called as a witness the Justice of the Peace before whom the prisoners had had a preliminary examination upon the charge, and by whom they had been committed to answer before indictment. The witness having stated that the prisoners were brought before him, as a magistrate, for preliminary examination, "acknowledged that they took the property charged to have been taken," and made a statement, which he reduced to writing, and which they each signed, after it had been carefully read over to them, that "no inducements were held out to said defendants, then or at any time, to his knowledge, to get the confession of defendants, or to induce them to make a statement." The prosecution offered and proposed to read in evidence against the prisoners their statement so taken and reduced to writing by the examining magistrate, to which their counsel objected, until he should have an opportunity to show by other evidence that such statement was made under such influences as to render the same inadmissible as confessions. The Court overruled the objection, and the statement was read in evidence after the Court had further ruled that the

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defendants might thereafter introduce any testimony they might have touching the matter of inducements held out to them to make such statement. After the testimony for the prosecution was closed, defendants called Warren Brown, who testified that he was the Sheriff of Contra Costa County, and received the prisoners about six months ago from the Deputy Sheriff, and locked them up; that he had a conversation with them before their examination; Deputy Sheriff Cameron was with them when they made the statement; I did not caution them; there appeared to be three other parties; they did not deny that they took the grain; I told them it was no use to deny the charge; I might have told them it would be better to admit it; this was a few days before their examination; there was a day intervening; I think I told them there was no use fooling about it; they may as well confess, as there was evidence enough to convict them; I think I told them that if they would come in and confess that it would be lighter with them; I made the proposition before they told me about the grain.

This evidence conclusively shows that inducements were held out to defendants by the Sheriff having them in custody, two days before their preliminary examination, to confess. They were told by the Sheriff that it was no use for them to deny taking the property; that there was evidence enough to convict them; that it would go lighter with them to confess. And the evidence of the Sheriff sufficiently shows that, after he had thus threatened and advised the prisoners, they did confess to him; but the purport of such confession does not appear, further than they told him about the grain, and did not deny taking it.

It is very clear that any statements or confessions they may have then made to the Sheriff were not voluntary, and could not properly have been given in evidence against them on the trial. And is equally clear that if their confession or statement, made before the examining magistrate two

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days thereafter, was a repetition of the statement made to the Sheriff, or any material portion of such previous statement, the entire statement or confession made to and before the examining magistrate should have been excluded as evidence, by reason of the same having been originally made under such inducements held out to them as to exclude the first confession. The law presumes the subsequent confessions to have been made and influenced by the same hopes and fears as the first, and this presumption continues until it be affirmatively established by the prosecution that the influences under which the original confession was made had ceased to operate before the subsequent confession was made. (*State v. Roberts*, 1 Dev. 259; *Peter v. State*, 4 Sm. & Marsh. 3; *State v. Gould*, 5 Halstead, 163 *Deathridge v. State*, 1 Sneed, 75; 2 Russ. on Cr. 834; 1 Wharton Am. Cr. Law, Sec. 694.)

I am, therefore, of opinion that the statement of the prisoners, made before the examining magistrate, under the circumstances disclosed in this case, was erroneously admitted in evidence on the trial, and that the judgment should, on this ground, be reversed, and cause remanded for a new trial. So ordered.

Mr. Justice WALLACE dissented.

[No. 1,914.]

A. KOHLER v. T. R. HAYES.

SALE OF PERSONAL PROPERTY.—If the owner of a piano deliver the same to another person, under an agreement in writing, stating its value, and that such person agrees to pay a specified sum monthly for the use of it, and that it is to be sold for a price therein mentioned, and that a specified sum is to be paid each month until the agreed price is paid, when a bill of sale will be given, the agreement does not constitute an absolute sale of the piano.

Argument for Respondent.

IDEM.—Under such agreement the title does not pass, and the party receiving the piano cannot sell the same until the purchase price is paid.

APPEAL from the District Court of the Fifteenth Judicial District, City and County of San Francisco.

The plaintiff delivered the piano to Dowling on the 18th day of April, 1866. Dowling used the piano in his family; and on the 28th of July, 1866, and after he had paid the one hundred dollars, sold the same to Main & Winchester, of which firm the defendant was a member. The firm made the purchase in good faith, and had no notice of the terms of the agreement under which the piano was delivered to Dowling. As soon as Kohler knew of the sale to Main & Winchester, and in August, 1866, he demanded the piano from them, and, on their refusal to deliver it, he brought this action to recover possession of the same.

The Court below rendered judgment in favor of the defendant, and the plaintiff appealed.

The other facts are stated in the opinion.

Whiting & Naphtaly, for Appellant.

Dowling was not dealing in pianos, and was not intrusted with it for sale; and he could not transfer to a *bona fide* purchaser a title which he had not acquired. (*Wright v. Solomon*, 19 Cal. 64; *Putnam v. Lamphier*, 36 Cal. 151; *Coghill et al. v. Hartford & New Haven R. R. Co.*, 3 Gray, 545; *Piser v. Stearns & Marvin*, 1 Hilton, 86; *Andrews v. Dietrich*, 14 Wend. 32; and *Salters v. Everett*, 20 Wend. 373.)

A. J. Gunnison, for Respondent.

The instrument, taken as a whole, shows that Kohler sold absolutely the piano to Dowling for the sum of four hundred and eighty-five dollars, to be paid in installments of forty dollars per month. (*Miller v. Stein*, 30 Cal. 406; *Helm v. Dumars*, 3 Cal. 454.)

Purchasers without notice are not bound by the conditions of sale between vendor and vendee. (*Chapman v. Lathrop*, 6 Cowen, 114, note a; *Mowry v. Walsh*, 8 Cowen, 238; *McCarty v. Vickey*, 12 John. 348; *Hussy v. Thornton*, 4 Mass. 405; *Carleton v. Sumner*, 4 Pick. 516; and *Smith v. Dennis*, 6 Pick. 262.)

By the Court, RHODES, C. J.:

It appears, from the agreed statement of facts, that the plaintiff delivered to Dowling a piano under the following agreement:

"Received from Andrew Kohler, on rent, a certain piano-forte, which I agree to return in good order, and to be responsible for the value thereof, the same being of the value of five hundred dollars; and for the use of which I agree to pay said Andrew Kohler, or to his order, the monthly rent of thirty-five dollars or forty dollars, strictly in advance * * * This piano and stool to be sold for four hundred and eighty-five dollars, on the following terms: Forty dollars to be paid each month till the above sum is paid, when a bill of sale will be given; interest at one per cent per month, to be paid on the amount unpaid after ninety days.

"RICHARD DOWLING."

It also appears that "Dowling never paid the plaintiff upon or under said agreement, or in any way, any money, except the sum of one hundred dollars, which sum of one hundred dollars said plaintiff received thereon." But it does not appear whether that sum was paid as rent, or as a part of the purchase money. The question for solution is whether that instrument is evidence of an absolute sale of the piano. If the agreement fell short of an absolute sale, Dowling had not the capacity to transfer the title to the

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piano. The first portion of the written instrument, if it amounts to anything, shows that the parties intended to make a lease. The term is not stated, nor is the rent specified with certainty. It is unnecessary, however, to determine whether, for those reasons, it is void as a lease; for, whether void or valid, it does not constitute a sale, nor does it contribute to that purpose. The remaining portion of the instrument specifies the price and terms of sale; but it recites neither that the plaintiff had sold, nor that Dowling had purchased, the piano. It is either a specification of the terms of the sale, should Dowling elect to purchase, or, at most, a conditional sale. The provision for the giving of a bill of sale, upon the payment of the price of the piano, indicated that it was not the intention of the parties that the title should pass upon the making of the agreement.

Judgment and order reversed, and cause remanded for a new trial.

Mr. Justice CROCKETT did not express an opinion.

[No. 2,847.]

THE PEOPLE OF THE STATE OF CALIFORNIA v.
JAMES G. McCRORY.

CONTINUANCE ON ACCOUNT OF ABSENT WITNESSES.—Where there is a sufficient showing as to the materiality of absent witnesses, and no apparent lack of diligence in the effort to procure their attendance, a motion to continue a cause for the term, particularly if it be the first application, should be granted.

PLEA OF GUILTY TO AN EXPRESS.—The plea of a defendant confessing himself to be guilty of a crime should not be entered except with his express consent, given by him personally in direct terms in open Court.

WITHDRAWAL OF PLEA.—A party should not be permitted to trifle with the Court by deliberately entering a plea of guilty on one day, and capriciously withdrawing it the next.

PLEA — WHEN PERMITTED.—When there is reason to believe that a plea of guilty has been entered through inadvertence and without due delibera-

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tion, or ignorantly, and mainly from the hope that the punishment to which the accused would otherwise be exposed may thereby be mitigated, the Court should be indulgent in permitting the plea to be withdrawn. **JUDICIAL DISCRETION.**—In such cases the Court must necessarily exercise a sound discretion, and such discretion will not be interfered with, except when abused.

APPEAL from the District Court of the Thirteenth Judicial District, County of Tulare.

The defendant was indicted for murder at the January term of the Court, 1871, and a motion for a continuance until the first day of the succeeding May term, on account of the absence of material witnesses, was granted. A few days subsequently, at the same term, on motion of the District Attorney, the Court vacated the order of continuance, and set the case for trial on the twentieth of February following, the defendant excepting. When the case came on for trial, the defendant moved for a continuance until the May term, upon an affidavit as to the absence of witnesses by which he expected to show that he committed the homicide in self-defense. The Court overruled the motion, and set the case for trial on the twenty-third of February. On that day, the defendant's witnesses being still absent, his attorneys obtained leave to withdraw his plea of not guilty, and entered a plea of guilty of murder in the second degree. Before entering this plea, the Court, turning to the side of the room where the defendant and his attorneys were seated, asked if the defendant consented to it. The attorneys for the defendant replied that he did. The defendant himself, however, said nothing, but inclined his head in a manner indicating his consent. The Court set the twenty-fifth of February for pronouncing judgment. When that day arrived the defendant asked leave to withdraw the plea of guilty. The Court refused the request, and proceeded to sentence him to fifteen years imprisonment in the penitentiary. From this judgment the defendant appeals.

Coffroth & Spaulding and A. J. Atwell, for Appellant.

The motion for a continuance for the term should have been granted, because the witnesses were shown upon affidavit to be material. There was no laches in the effort to procure their attendance, and it was probable that the witnesses could be had at the time to which the trial was sought to be deferred. (1 Bl. Rep. 510; 3 Burroughs, 1,513; 2 Tidd, 208; 2 Chit. Cr. Law, 492.) When these ingredients are incorporated in an affidavit, it is the duty of the Court to continue the cause. (*People v. Dodge*, 28 Cal. 445; *People v. Vermilyea*, 7 Cowen, 383; *Foy v. The State*, 9 Geo. 373; *Gross v. The State*, 5 Ind. 533.) A plea of guilty can in no place be put in, except by the defendant himself, in open Court. (Cr. Pr. Act, Sec. 301; *People v. Thompson*, 4 Cal. 241; *Douglass v. The State*, 3 Wis. 820; *McQuillen v. The State*, 8 S. & M. 587; 1 Wharton Cr. Law, Sec. 530, and authorities quoted; Ch. Cr. Law, 416, 436, 472.) The Court should have permitted the defendant to withdraw his counsel's plea of guilty before judgment was rendered. The statute says the privilege may be granted, and we are inclined to think the word "may" should be construed to be "shall." (Cr. Pr. Act, Sec. 302.)

Attorney General Hamilton, for Respondent.

Defendant's motion for a continuance until the next term was made on the twentieth of February, and a continuance was ordered until the twenty-third of February. When the latter day arrived, the defendant did not ask a further continuance, but entered a plea of guilty. The Court, therefore, did not err in not granting that which was not asked for. The defendant, being present in Court, with full knowledge of the proceedings, and indicating his assent to the action of his attorneys, must be considered to have consented to the plea of guilty. The Court, having permitted the de-

fendant to change his plea once, did not abuse its discretion in refusing to allow another change.

By the Court, CROCKETT, J.:

The Court erred in denying the motion made by the defendant on the 20th February, 1871, to continue the cause for the term. There was a sufficient showing as to the materiality of the absent witnesses, and there was apparently no lack of diligence in the effort to procure their attendance. The Attorney General has failed to point out any particular wherein the affidavit was defective, and I discover none. I think the showing was sufficient, and the motion should have been granted; particularly, as this was the first application for a continuance. Nor can it be said that this error of the Court worked no injury to the defendant, inasmuch as he, thereupon, withdrew his plea of "not guilty" and entered a plea of "guilty of murder in the second degree." It may be, that finding himself forced into a trial in the absence of his witnesses, he deemed it politic to confess himself guilty of the lesser offense rather than incur the hazard of a conviction for the greater in the absence of his witnesses.

But I think the Court also erred in permitting the plea of "guilty of murder in the second degree" to be entered, and in refusing to allow it to be afterwards withdrawn, on the facts disclosed in this record. A plea confessing himself to be guilty of crime should not be entered except with the express consent of the defendant, given by him personally, in direct terms, in open Court. Nothing should be left to implication, and his confession of guilt should be explicitly made by himself in person in the presence of the Court. Assuming, however, that it sufficiently appears from the record in this case that the plea was entered with the consent of the defendant, given in open Court, he should have been permitted, under all the circumstances, to withdraw it

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when he applied for leave to do so. There is nothing to show that the application was not made in good faith, or that the entry of the plea and motion to withdraw it was a mere artifice, intended for delay. A party should not be allowed to trifle with the Court by deliberately entering a plea of "guilty" one day and capriciously withdrawing it the next. But when there is reason to believe that the plea has been entered through inadvertence, and without due deliberation, or ignorantly, and mainly from the hope that the punishment, to which the accused would otherwise be exposed, may thereby be mitigated, the Court should be indulgent in permitting the plea to be withdrawn. It must necessarily exercise a sound discretion in such matters; and this Court will not interfere except in a case of abuse of discretion. But, inasmuch as the Court had improperly denied the defendant's motion for a continuance and forced him to trial in the absence of his witnesses, and particularly as it is not altogether clear that the defendant consented to the entry of the plea of "guilty of murder in the second degree," he should have been allowed to withdraw it, and in denying his motion for leave to do so the Court abused its discretion.

Judgment reversed and cause remanded for a new trial, with leave to the defendant to withdraw his plea of "guilty of murder in the second degree."

Mr. Justice WALLACE did not express an opinion.

[No. 2,811.]

THOMAS J. CRANMER v. JAMES PORTER AND
MARY A. PORTER, HIS WIFE.

DESTRUCTION OR CANCELLATION OF DEED.—The destruction or cancellation of a deed, after it has been delivered, does not revert the title in the grantor, even if destroyed or canceled with the consent of all the parties for the express purpose of restoring the title to the grantor. The title cannot be restored to the grantor otherwise than by a reconveyance in writing.

Statement of Facts.

DEFENSE IN EJECTMENT.—If the plaintiff in ejectment relies on a paper title, the defendant may show the true title to be outstanding in a third person, without connecting himself with it.

NEW TRIAL ON NEWLY DISCOVERED EVIDENCE.—If the plaintiff in ejectment relies on a paper title, and recovers judgment, and after the trial the defendant discovers that prior to the commencement of the action the plaintiff had conveyed the title to a third person, a new trial should be granted.

APPEAL from the District Court of the Twelfth Judicial District, City and County of San Francisco.

The plaintiff, on the trial, introduced a deed of the demanded premises from the defendants to Elizabeth Osborn, their sister, dated December 15th, 1863, giving, granting, and conveying the premises to said Elizabeth, in consideration of love and affection. The *habendum* clause of the deed was as follows:

“To have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said Elizabeth Osborn, during the term of her natural life as aforesaid, for her own personal, separate, and independent use and behoof; and at her decease the said premises are to revert back to the said Mary A. Porter, who was the lawful and separate owner thereof at the time of the writing of these presents, or to her heirs or assigns.”

The plaintiff then introduced a deed of the premises from said Elizabeth to himself, dated November 18th, 1867.

The plaintiff was sworn as a witness on his own behalf, and, on cross examination, testified as follows:

“In the latter part of January, 1868 (January 27th), I sold the premises in controversy to Mrs. Julia Scheo for five hundred and fifty dollars, made and acknowledged a conveyance to her; did not deliver it to her; received no money. A man by the name of Mackin or MacMackin negotiated the sale for me. I never received Mrs. Scheo's promissory note for five hundred dollars, as part of the purchase money.

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Both deed and note remained in my said agent's hands, Mackin, with instructions not to exchange them unless the money was paid. He afterward gave me back the deed, and I destroyed it. I do not know Mackin's Christian name or where he lives. Did not deliver the possession of the premises to Mrs. Scheo."

The defendants contended on the trial that the deed to said Elizabeth only had the effect of giving her the use of the premises during her life, for a home, and that she had no interest which she could convey. The case was tried December 2d, 1868. The defendants, on motion for new trial, presented the affidavits of defendant Mary A. Porter, L. Mackin, and others, showing that the plaintiff made and delivered a deed of the premises to Julia Scheo and received a part of the purchase money and her promissory note for the balance, to wit: five hundred dollars, and that Mackin did not act as the plaintiff's agent in making the sale, and that the deed was dated January 27th, 1868. This action was commenced March 11th, 1868. The affidavit of Mackin stated that about the 1st of March, 1868, the plaintiff requested him to ascertain if Mrs. Scheo had put her deed on record, and if she had not, to induce her to give up the deed to plaintiff, and he would give up her note, and that Mackin declined. The affidavit of Catherine Turner showed that she accomplished for plaintiff what he had requested Mackin to do. The affidavit of Mrs. Scheo was not obtained, but it was shown that she was dangerously ill. The Court below denied a new trial.

The other facts are stated in the opinion.

Wm. P. Daingerfield and Warren Olney, for Appellants.

It is an elementary doctrine, that the surrender of a deed and its destruction, do not revest the title in the grantor. In ejectment, the plaintiff must recover on the strength of

his own title, and if he has none, of course he cannot recover. It is not necessary for the defendant to connect himself with an outstanding title, to defeat the plaintiff's recovery. (*Bird v. Lisbros*, 9 Cal. 6; *Moore v. Tice*, 22 Cal. 513; *Dyson v. Bradshaw*, 23 Cal. 528; *Welch v. Sullivan*, 8 Cal. 165; *Simson v. Eckstein*, 22 Cal. 580.)

Henry J. Howe, for Respondent.

The defendants having called out, on cross-examination of Cranmer, the new matter, are bound by it. The newly discovered evidence could not be introduced on a new trial. (*Carleton v. Townsend*, 28 Cal. 219.)

By the Court, CROCKETT, J.:

The action is ejectment, and at the trial the plaintiff relied upon a paper title, which was put in evidence. Judgment was rendered for the plaintiff, and the defendant moved for a new trial, partly on the ground of newly discovered evidence, to the effect that prior to the commencement of the action the plaintiff had sold, and by deed in due form, properly acknowledged, certified, and delivered, had conveyed the premises in controversy to another person, and at the time of the conveyance had received a portion of the purchase money, and had taken the promissory note of the purchaser for the remainder; that the purchaser retained the deed for about one month, when it was verbally agreed to cancel the contract of sale; and thereupon the plaintiff surrendered the promissory note, and the purchaser returned the deed to the plaintiff to be canceled; but no reconveyance was made by the purchaser. These facts are fully and satisfactorily established by affidavit, read in support of the motion, and clearly show that the legal title to the premises was not in the plaintiff at the commencement of the action.

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By his deed he had divested himself of whatever title or right of possession he previously had; and it is a familiar rule of law that the destruction or cancellation of a deed, after delivery, even though it be done with the consent of all the parties to it, and for the express purpose of restoring the title to the grantor, cannot work that result. The title had vested in the grantee, and could not be divested by a parol agreement, nor otherwise than by a reconveyance in writing. If the facts stated in the affidavits be true, the plaintiff, at the commencement of the action, had not either the legal title or the right of possession, and therefore could not maintain ejectment, even as against an intruder, without title. It is equally clear that when a plaintiff in ejectment relies upon a paper title the defendant may show the true title to be outstanding in a third person without connecting himself with it. It will be a sufficient defense, in such a case, that the title is not in the plaintiff. This rule of law is too familiar to require the citation of authorities. The newly discovered evidence was, therefore, material and competent, and I think the affidavits disclose sufficient diligence on the part of the defendants to bring them within the rule on that subject. The motion for a new trial ought to have been granted on this ground. We deem it unnecessary, on this appeal, to express any opinion as to the proper construction of the deed from the defendant to Mrs. Osborn, or whether the Court ought to have reformed it on the proofs and pleadings in the case.

Judgment reversed and cause remanded for a new trial.

[No. 2,378.]

MANUEL LORENZANA, AND JOSEFA G. LORENZANA, HIS WIFE, v. JUAN CAMARILLO.

GRANTING NEW TRIAL.—The granting of a new trial on the ground that the verdict of the jury was against the admissions of the defendant, who was called as a witness, is a decision of the Court that the evidence was insufficient to justify the verdict.

REVERSING ORDER GRANTING NEW TRIAL.—If the Court below grants a new trial on the ground that the evidence is insufficient to justify the verdict, the Appellate Court will not reverse the order, except in case of an evident abuse of discretion.

APPEAL from the District Court of the First Judicial District, Santa Barbara County.

This was an action to be allowed to redeem about four hundred and sixty-seven acres of land, the separate property of Josefa G. de Lorenzana, one of the plaintiffs. The plaintiffs had made a loan of money from the defendant, and, to secure the same, had given him a mortgage on the land. When the mortgage fell due it was canceled, and the plaintiffs executed to the defendant a deed of the land. It was alleged that the deed was intended as a mortgage to secure the old debt.

The question was submitted to the jury in this form: "Was the deed intended between the parties to be a mortgage, or an absolute conveyance?" The verdict of the jury was: "We, the jury, find the deed between the parties to be an absolute deed." The verdict, it will be observed, does not answer the question put to the jury, so far as the *intention* of the parties was concerned.

The defendant appealed from the order granting a new trial.

The other facts are stated in the opinion.

Haymond & Stratton, and *A. Packard*, for Appellant, argued, that the Judge had not disturbed the verdict because

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it was against the weight of evidence, but because the verdict was not responsive to the issues submitted, in this: that it had not found what was the intention of the parties to the deed; and that as the Court below had in effect held that the testimony justified the verdict, but had granted a new trial upon grounds not assigned in the statement, the order should be reversed.

Pringle & Pringle, and Fernald & Richards, for Respondents.

One of the grounds on which a new trial was granted was the insufficiency of the evidence to justify the verdict. The only inaccuracy of the Court below, if indeed it be an inaccuracy, is that instead of stating broadly the ground of insufficiency of the evidence to justify the verdict, it specifies the particulars in which the evidence is insufficient.

By the Court, CROCKETT, J.:

The question at issue in this cause was whether a deed made by the plaintiffs to the defendant was intended as a mortgage, or as an absolute conveyance in fee. At the trial the Court submitted this question to a jury. The verdict was: "We, the jury, find the deed between the parties to be an absolute deed." The plaintiffs moved for a new trial, assigning as one of the grounds therefor that the evidence was insufficient to justify the verdict, and specifying in the statement the particulars wherein it was insufficient. On the hearing of the motion the Court granted a new trial, assigning as one of the reasons therefor that the verdict is defective and not responsive to the issue, "and against the admissions of the defendant, who was called as a witness."

It is too plain to admit of debate that the motion was granted partly on the ground that the evidence was insufficient to justify the verdict. In holding that the verdict was

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“against the admissions of the defendant, who was called as a witness,” the Court clearly intended to say that these admissions furnished strong, if not conclusive evidence, that the verdict was erroneous; or in other words, that it was not justified by the evidence; and in this opinion we fully agree with the Court below. But if we did not, we would not disturb the order of the Court granting a new trial on this ground, except in the case of an evident abuse by the Court of its discretion.

Order granting a new trial affirmed.

[No. 2,120.]

FRANCISCO VILLA v. FRANCISCO PICO AND FRANCISCA PICO.

NOTICE TO SHERIFF AS TO SALE OF HOMESTEAD.—A notice to a Sheriff, before he makes a sale, that the premises he is about to sell are the homestead of the party giving such notice, does not render the sale void. Such notice does not create a homestead, nor is it evidence of the existence of a homestead.

APPEAL from the District Court of the First Judicial District, County of Santa Barbara.

Ejectment to recover a lot in Santa Barbara, described in the complaint as a “piece or parcel of land situated in the Town and County of Santa Barbara, California, commencing on the westerly line of Carrillo street, at the northeasterly corner of the lot of Rafael Valdez; thence running northeasterly on the line of Carrillo street one hundred and twenty feet; thence at right angles northwesterly one hundred and twenty feet; thence southwesterly parallel to Carrillo street one hundred and twenty feet; thence one hundred and twenty feet to the place of beginning.”

The plaintiff, to show title to the demanded premises,

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offered in evidence the record of a grant made by the Ayuntamiento of the Pueblo of Santa Barbara August 9th, 1849, of which the following is a translation:

"By a resolution of the Ayuntamiento, there was granted to Candelaria Canizares a lot of land forty yards square, adjoining the house of Manuel Cota. The Recorder gave her possession of it, and received the customary price for it."

The plaintiff also introduced a judgment in said Court in favor of the plaintiff and against Francisco Pico, and an execution issued on the judgment, and a sale thereunder of the premises and a deed of the Sheriff to the plaintiff.

The plaintiff also offered in evidence a deed from Candelaria to herself, dated June 17th, 1864, of a lot of land described as follows:

"All the right, title, and interest of the party of the first part in all that certain piece or parcel of land situate in the Town and County of Santa Barbara, State of California, bounded in front by Carrillo street; on the north by the land of Francisco Espinosa and others; on the west by open land of the Town of Santa Barbara, and on the south by the land of Rafael Valdez, being the same lot of land whereon is erected a dwelling house occupied by Francisco Pico, and the same lot of land which was granted to the party of the first part by the Ayuntamiento of Santa Barbara County, and the same piece or parcel of land which was regranted to the party of the first part, by deed from the Mayor and Common Council of the City of Santa Barbara, dated February 16th, 1858, and recorded in the office of the Recorder of Santa Barbara County, in Book "B" of Deeds, on pages seven hundred and sixty-seven and seven hundred and sixty-eight, to which record reference is hereby made for a fuller description of boundaries."

The defendant, Francisco Pico, then introduced in evidence a notice served by him on the Sheriff, before the sale, that he claimed the property as a homestead. The Court rendered judgment in favor of the defendants, and the plaintiff appealed from the judgment and from an order denying a new trial.

Charles E. Huse, for Appellant.

The Court erred in holding that it had no other guide for the location of the grant except its contents. The Sheriff's deed alone is sufficient to entitle plaintiff to recover. It nowhere appears that Pico was the head of a family or was entitled to a homestead. Nor does it appear, nor was it pretended, that Pico had ever recorded a homestead claim.

A. Packard and Haymond & Stratton, for Respondent.

The grant of the Ayuntamiento to Candelaria Canizares for a lot of land adjoining the house of Manuel Cota does not show that the lot granted was the one in dispute, and there is no proof that it was the same lot. The deed of the Sheriff to Villa was "rendered a nullity by the notification of defendant Francisco Pico's claim of the premises as a homestead." It is admitted by respondent that Pico occupied the lot. "Occupancy by the family is presumptive evidence of the appropriation of a place as a homestead." (*Taylor v. Hargous*, 4 Cal. 268.)

By the Court, RHODES, C. J.:

A short time previous to the Sheriff's sale of the premises in controversy, under the execution issued upon the judgment in favor of Villa, and against Pico, a notice was served on the Sheriff by Pico, stating that he claimed the premises as his homestead. The Court below regarded that notice as having the effect to render the sale void. The notice alone

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could not have the effect which was attributed to it. Unless the premises were in fact his homestead, the notice or claim that they constituted his homestead was utterly nugatory. There is no evidence in this case, showing that the premises were his homestead, at the time of the Sheriff's sale.

For the guidance of the parties on the new trial, it is proper to say that the plaintiff failed to show title to the premises in controversy, derived from Candelaria Canizares, because he did not show that the grant made in 1849, or the deed of the Mayor and Common Council, executed in 1858, included the premises in controversy.

Judgment and order reversed, and cause remanded for a new trial.

Mr. Justice CROCKETT did not express an opinion.

[No. 1,807.]

EDWIN P. CLARKE v. GEORGE K. FITCH AND J. W. SIMONTON.

EXCESSIVE DAMAGES — NEW TRIAL.—The appellate Court will not review the judgment, as to whether the damages are excessive, unless a motion is made in the Court below for a new trial, and an appeal is taken from an order denying the same.

WORDS NOT LIBELOUS OF THEMSELVES.—The words "Clarke is a carpenter by trade, is interested in the Moore title, and has figured quite prominently in some of the squatter riots which have occurred in the Western Addition," are not libelous of themselves, as usually understood and received in this State.

A COLLOQUIUM IN COMPLAINT FOR LIBEL.—If it is intended to charge in a complaint that such words were used in an offensive sense, such as engaging in a riot to unlawfully invade the possessions of another, and were so understood by those who read them, there must be a colloquium in the complaint to show in what sense the words were libelous.

COLLOQUIUM AND INNUENDO.—A colloquium in a complaint for a libel cannot be supplied by an innuendo. The colloquium states the extrinsic

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facts to show the libelous meaning of the words, and the innuendo applies the words to these facts.

POPULAR SENSE IN WHICH WORDS ARE USED.—Whether a publication is libelous *per se* is to be determined wholly by the sense in which the same is usually understood and received in this State; and when words have a general and notorious signification in this State, Courts will take judicial notice of it.

APPEAL from the District Court of the Fifteenth Judicial District, City and County of San Francisco.

The defendants were the publishers of a daily paper in San Francisco called the *Evening Bulletin*. One Moses Frank was indicted for forgery, and on the trial the plaintiff was a juror. The jury failed to agree, and the said paper published articles concerning the jury, of which the words quoted in the opinion formed a part.

The other facts are stated in the opinion of the Court.

Pixley & Smith, for Appellants.

There are two objections to this charge, but leaving the first to be discussed hereafter, we shall at present show: that the words, "Clarke is a carpenter," etc., will admit of an inoffensive interpretation, are not of themselves libelous, and that the Court erred in charging them so to be. Judge CAMPBELL, of the Superior Court, lays down the rule of libel (*Bennett v. Williamson*, 4 Sand. 66), in the absence of *special* damages claimed and proved, thus: "Then does the publication in question charge the plaintiff with any offense which renders him amenable to punishment? or does it necessarily tend to hold him up to ridicule, hatred, contempt, or infamy? In *Stone v. Cooper*, 2 Denio, 293, Chancellor WALWORTH defines a libel *per se*, to be the charge of an offense "that the Court can legally presume he has been degraded by, in the estimation of his acquaintances or the public." Holt, in his *Law of Libel*, page 223, says: "Everything written

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of another, which holds him up to scorn and ridicule, that might reasonably be considered as provoking him to a breach of the peace, is a libel." And, again: "All such written abuse as may fairly be intended to impair him in the enjoyment of society, or throw a contempt upon him, which might affect his general fortune and comfort, is a positive injury, and, therefore, the subject of an action on the case."

To publish of Clarke that he "is interested in the Moore title," was to give him financial credit. But assuming the "Moore title" to be a fraud, then it is necessary that the publication should have also charged Clarke with a knowledge of that fraud. The words, "that thief A. hath stolen my goods and delivered them to Bacon," held not to give any right of action to Bacon, it not being alleged that he knew the goods were stolen. (*Bacon's Case*, Dal. 41, pl. 21.) "You have passed counterfeit money," non-actionable for the same reason. (*Pike v. Van Wormer*, 6 How. P. R. 171; *Church v. Bridgman*, 6 Miss. 190.) So of the words, "he received goods that were stolen and will be hanged for them." *Ratcliff v. Long*, Palm. 67; *Miller v. Miller*, 8 Johns. 74; *Lampkins v. Justice*, 1 Smith, Ind. 322; *Griggs v. Vickroy*, 12 Ind. 549.)

To publish of E. P. Clarke that he "has figured quite prominently in some of the squatter riots, which have occurred in the Western Addition," is certainly an inoffensive, if not creditable announcement. He may have been a policeman. He may have "figured" in those riots as a conservator of the peace. He may have been a Sheriff's officer. He may have "figured" there in support of judicial mandates and writs; or, as a good citizen, he may have sought to sustain municipal authority. He may have been enlisted as one of the *posse comitatus*. The expression is ambiguous, but not offensive, and the Court must have understood something not expressed in its direct words, upon which to base

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his interpretation of its libelous character. We have a right to claim that where the meaning of the words used is doubtful, they are not necessarily to be subjected to the most objectionable interpretation. "Libelous words are to be construed according to their most obvious meaning." (*Hogg v. Wilson*, 1 N. & M. 216; *Hawkinson v. Bilby*, 18 M. & W. 442; *Dorland v. Patterson*, 23 Wend. 424.) If one man says of another, "he once killed a man," is that *per se* a charge of murder. Lord Ellenborough (in *Rex v. Lambert*, 2 Camp. N. P. Cases, 298) said: "Words are not to be taken in the more lenient, or the more severe sense, but in the sense which fairly belong to them, and which they were intended to convey." But putting the very worst interpretation upon the sentence, of what offense does it accuse Clarke? Of being a squatter and concerned in fights and affrays in the Western Addition, for, or in defense of, the possession of certain lands, perhaps his "interest in the Moore title" (as the phrases are so intimately associated).. "The office of the innuendo is to direct to its object the charge made. It can neither enlarge nor restrain the natural sense and meaning. When the application is explained the innuendo cannot aid them." (*Tappan v. Wilson*, 7 Ham. 193.)

Elisha Cook and William H. Patterson, for Respondent.

The counsel has very ingeniously dissected the language made use of in the publication of those words, and thus attempted to prove that the same was not actionable. It is libelous of itself. One who indulges in such writing is not entitled to exercise of ingenious specifications to see if some sense cannot be discovered which would screen him from legal animadversion; but (2 Denio, 305) for the purpose of determining this question, it is necessary and proper to consider the whole a context, including everything said in the article. We submit, therefore, that such words were construed by the Court, according to their most obvious mean-

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ing. (*Hogg v. Wilson*, 1 N. & M. 216; *Hawkins v. Bilby*, 16 M. & W. 442; *Dorland v. Patterson*, 23 Wend. 424.)

By the Court, CROCKETT, J.:

The action is for libel; and the jury returned a general verdict for the plaintiff for six thousand dollars. There was no motion for a new trial; and the appeal by the defendants is from the judgment.

So much of the evidence as is necessary to explain the exceptions taken to the rulings of the Court, in the progress of the trial, is brought up by a statement on appeal.

In the absence of a motion for a new trial, the question whether the damages are excessive does not arise on this appeal. If the defendants intended to assail the verdict on this ground, they should have moved for a new trial, assigning this as one of the reasons why it should be granted, and should have supported the motion by a proper statement. Having failed to do this, they have waived all objection to the verdict on this ground.

One of the alleged libels contains a sentence in these words, to wit: "Clarke is a carpenter by trade, is interested in the Moore title, and has figured quite prominently in some of the squatter riots, which have occurred in the Western Addition."

The Court charged the jury that this portion of the publication "is libelous in and of itself; and it is a comment by the writer uncalled for by anything which appears in the affidavit published in the same article; and the defendant has given no evidence whatever, even tending to establish its truth, or that they had reason to believe it was true. It must, therefore, be considered by you to have been maliciously published, provided you find that it refers to the plaintiff in this cause, it having been published as a fact within the defendant's own personal knowledge." This charge was

excepted to by the defendants, and is assigned as error. It certainly is not libelous to publish of a person that he is a carpenter by trade; nor is it claimed to be so by the plaintiff. There is nothing in the record to explain what the "Moore title" is, or that these words were used, or understood in any peculiar sense. On their face, and without explanation, the words, "is interested in the Moore title," import nothing derogatory to the plaintiff's character, and are not libelous. But the plaintiff insists, with earnestness, that the remainder of the paragraph, which alleges that he has figured "quite prominently in some of the squatter riots, which have occurred in the Western Addition," is libelous *per se*, and imputes to the plaintiff the offense of having been "wrongfully and wantonly engaged in committing breaches of the peace and riots." This is to be tested wholly by the sense in which the words "squatter riots" are usually understood and received in this State. Whatever the phrase "squatter riot" may elsewhere mean, in its popular sense, it has a well understood meaning in this State, which is so general and notorious that we will take judicial notice of it. Indeed, after the very numerous cases which we have been called upon to adjudicate, arising out of what are termed "squatter riots," we could not well affect to be ignorant of the popular meaning of the phrase. It is one of the most deplorable facts connected with the occupation and settlement of this State by the emigrants who came in 1849, and afterwards, that, owing to the very large tracts in which lands were claimed and held in private ownership, and to the vague and uncertain boundaries by which they were defined, and the doubtful tenures under which they were often claimed, contests for the actual possession of land commenced at an early period, and have ever since continued; but latterly have been, fortunately, of less frequent occurrence, since titles have become better settled, and the boundaries of lands more accurately defined by

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official surveys. These struggles for the possession were often bitter and fierce, and but too frequently resulted in violence and bloodshed. In these fierce contests one side or the other was, of course, in the wrong, as both could not be right. Nevertheless, it frequently happened that both supposed, in good faith, they were in the right. For example, a claimant under a Mexican grant, asserting a title to many square leagues of land, of a very small portion of which he was in the actual possession, would insist that a particular body of land was within the grant; whilst a "settler," in search of a preëmption claim, may have believed, in perfect good faith, either that the grant was fraudulent or that the particular tract which he desired to preëempt was not within it. In this belief he would enter on the land, erect his cabin, and proceed to define his boundaries. On discovering this fact, the claimant under the grant, acting in the full belief that his grant was valid and included the land, would insist that the settler should vacate the premises. Angry words, followed by blows, would quickly succeed, and if each of the parties happened to be attended by several of his friends or sympathizers, this would be termed a "squatter riot." The "Western Addition" to the City of San Francisco is a large body of valuable lands at present included within the corporate limits. In 1852 the city filed a claim before the United States Land Commission for four square leagues of land, to which it claimed to be entitled as the successor of the former Pueblo of San Francisco or Yerba Buena. This claim was fiercely contested, both in and out of the Courts; but after many years of litigation was finally confirmed. In the meantime, however, a very large number of persons had settled upon these lands and defined their boundaries, generally by vague landmarks, often of the most transient and unsubstantial character. Ultimately it was deemed the better policy by the city authorities to donate these lands to the persons

actually in possession of them at a given date. This policy was approved by the Legislature, and the Congress of the United States, by a special Act, finally released the fee to the city in trust for the actual occupants in the manner defined in the Act. As the city grew and extended its streets, these lands rapidly enhanced in value; and the "Western Addition" soon became one of the most important sections of the metropolis. It is apparent from this brief recital that in numerous instances there must have arisen grave contests as to the possession. The title depended upon the fact of possession at a particular period, and the evidence of possession was often as vague as the boundaries. However much to be deplored, it was, perhaps, unavoidable, whilst human nature is constituted as it is, that serious struggles would arise for the possession of these valuable lands; and the records of our Courts attest the frequency and fierceness of these contests. In many instances, doubtless, unscrupulous persons, without a color or shadow of right, have wantonly invaded the possessions of others, trusting to force to maintain a possession acquired by violence or fraud; and if resisted in their unlawful purpose, a scene of violence and perhaps bloodshed would ensue. In other cases a contest would arise between the claimants of adjoining tracts as to the proper location of the division line, and a quarrel would ensue, ending, probably, in blows. It is unnecessary, however, to enter into a further detail of the various circumstances under which these contests have arisen, all of which are classed under the general head of "squatter riots," as that term is usually understood and applied in this State. In some of these cases one of the parties is a wanton aggressor, without excuse or palliation; whilst the other is simply defending his property against an unwarrantable invasion. In other cases the conflict arises from an honest difference of opinion as to their respective rights; and this has led to angry words and, per-

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haps, blows. It is evident, therefore, that there are contests for the possession of land, in some of which one party is the aggressor wholly without excuse, whilst the other is justly defending his possession; and there are other cases in which both parties are acting in good faith, and have become involved in a quarrel and personal conflict arising wholly from an honest difference of opinion. We are not to be understood as in any degree justifying or excusing this latter mode of settling a disputed question of title or boundary. But if it were published of a person that he had "figured prominently" in a "squatter riot" of this description (and many such have occurred in the Western Addition), it would not be actionable. It would not be more libelous than to say of him that he had "figured prominently" in a street fight or any other personal conflict arising from a sudden heat of passion, without stating how the quarrel arose, or which party was in the wrong. The publication in the *Bulletin* does not state in what kind of "squatter riots" the plaintiff had "figured prominently," nor on which side he "figured;" whether as a lawless aggressor, wantonly invading the possession of another, or on the side of law and order in repelling an aggressor. If it was intended to charge that the words were used in the alleged libel in the offensive sense, and as importing a charge that the plaintiff had been engaged in a squatter riot, or in wantonly and unlawfully invading the possessions of others, and that the words were so understood by those who read them, there should have been a colloquium to explain the subject matter, and by proper averments to show in what sense the words were libelous, and that they were used and understood in that sense. (*Wilson v. Fitch*, decided at the present term.) But the want of a colloquium cannot be supplied by an innuendo. The extrinsic facts necessary to be stated in order to show the libelous meaning of the words, must be set forth in the colloquium, and when these facts are stated the office of the

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innuendo is to apply the words to these facts but the innuendo cannot supply the place of the colloquium. (*Nichols v. Packard*, 16 Vt. 83; *Brown v. Brown*, 2 Shepley Me. R. 317; *Harris v. Burley*, 8 N. H. 256; *Linville v. Earlywine*, 4 Blackf. 169; *Tappan v. Wilson*, 7 Ohio R. 190.)

There being no colloquium in this case to explain in what kind of "squatter riots" nor on which side of them it was intended in the libel to charge the plaintiff with having "figured prominently," the Court erred in charging the jury that the words are libelous *per se*. Nor is there anything in the other portions of the alleged libel to show that these words were used in the injurious sense here claimed for them by the plaintiff. The more rational inference is that they were used to identify the plaintiff first, as a carpenter by trade; second, as being one of those interested in the Moore title; and, third, as the same Clark who had figured prominently in some of the squatter riots in the Western Addition.

I think the Court obviously erred in this portion of the charge.

Judgment reversed and cause remanded for a new trial.

Mr. Justice WALLACE did not express an opinion.

[No. 2,544.]

FRANCIS SALMON ET ALs. v. MARJANO G. VALLEJO AND JOHN B. FRISBIE.

COVENANT IN DEED.—A covenant in a deed, that the tract conveyed, or that the grant under which it is held, includes a specific quantity of land, is a personal covenant, and does not run with the land, and a cause of action for the breach of it does not pass to the grantees of the covenant.

COVENANT IN DEED.—STATUTE OF LIMITATIONS.—A covenant in a deed that the tract conveyed contains a specific quantity of land, is a mere

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chose in action, and is broken, if broken at all, as soon as made, and the mere fact that there was no proof till long after it was made, by which the breach of it could be established, might possibly prevent the statute of limitations from running — but this point not decided.

APPEAL from the District Court of the Twelfth Judicial District, City and County of San Francisco.

The plaintiff alleged in his complaint, that in 1845 the Mexican nation granted to Juan Nepomoceno Padilla a tract of land in the Department of Upper California, in what is now the County of Sonoma, called in the grant the Rancho Roblar de la Miseria, and that the grant belonged to the class called inchoate or imperfect grants, in this, that judicial possession was not given, nor was the grant segregated from the national domain until January 18th, 1858, when the same was segregated from the public domain of the United States, and the extent thereof for the first time ascertained, by a survey thereof by the United States, after a confirmation of the grant made in 1856. That, on the 1st day of April, 1850, the defendants, claiming to own the said rancho, sold the same to Daniel Wright and others, whose names are given, and executed a deed, in which they covenanted that the rancho contained four square leagues of land. That Wright and the other grantees had sold and conveyed the land to the plaintiffs, who, by virtue of the conveyances, had succeeded to the covenant, and were entitled to enforce the same. That, when the rancho was segregated from the public domain by the United States, it was for the first time ascertained, and the fact was and is, that it did not contain four square leagues, but only sixteen thousand eight hundred and eighty-seven and forty-five one hundredths acres, thereby falling short of the amount covenanted eight hundred and sixty-four and fifty-seven one hundredths acres, and that the value of the land was fifteen dollars per acre. Judgment was asked for the breach. The suit was commenced September 16th, 1871. The Court below sustained the demurrer to the

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complaint, and the plaintiffs declining to amend, final judgment was rendered for the defendants. The plaintiffs appealed.

The other facts are stated in the opinion.

John W. Dwinelle and James M. Seawell, for Appellants.

The grant was an inchoate and imperfect grant. The lands were not segregated from the public domain. It could not be determined, until they were so segregated, what the quantity of land was. Statutes of limitations do not begin to run until a party is in a condition to sue. But until a final survey had been made, the plaintiffs were in no condition to sue, because it was the final, confirmed survey which not only established but created the fact that the covenanted amount of land fell short. Until the final, confirmed survey, not only could the plaintiff not establish the fact that a deficiency existed, but no deficiency did in fact exist, for the deficiency was the creature of the survey. The plaintiffs must therefore have failed in their action if they had brought it before the final, confirmed survey was made.

Every contract must be interpreted in reference to the condition of the subject matter. The subject matter here was the quantity of land. This was to be determined by the final location under a confirmed survey. The controlling event was therefore a finally confirmed survey. Until this final survey existed, no right of action accrued, and the statute of limitations did not begin to run. (*Angel on Limitations*, Sec. 115 [Day's edition, 1869]; *Johns v. Gilfillan*, 8 Minn. 395.)

Wm. H. Patterson, for Respondents.

The covenant for quantity is strictly analogous to a covenant of seizin, and of good right to convey, and was broken, if at all, the moment it was delivered. The quantity was contained in the grant made by the Mexican nation, or it

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was not. If that quantity was lawfully granted under the treaty of Guadalupe Hidalgo, the United States was bound to confirm, protect, and segregate it to the successors in interest (plaintiffs), unless they failed to present their claim to the Land Commission. (11 East. 641; Rawle, 52, 82; 13 Missouri, 527; Platt on Cov. 135, 305.) The covenant, after it was broken, did not run with the land, and was not transferred by a deed of the land. (Rawle on Cov. 349; *Mitchell v. Warner*, 5 Conn. 597; 1 Pike. 322.)

By the Court, CROCKETT, J.:

One of the grounds of demurrer to the complaint was that it does not state facts sufficient to constitute a cause of action, and in support of this ground it is urged that the covenant sued upon was a personal covenant, and does not run with the land. This point is well taken. A covenant of seisin, or that the grantor has lawful right to convey, or that the land is free from incumbrances, is a personal covenant, and when broken is broken as soon as made. The right of action upon it is a mere chose in action, and does not run with the land. (*Lawrence v. Montgomery*, 37 Cal. 188.) A covenant that the tract conveyed, or that the grant under which it is held includes a specified quantity, stands on the same footing, and is broken as soon as made. It either did or did not contain the stipulated quantity, and the fact could not be changed by anything which subsequently transpired. The difficulty of ascertaining the fact does not touch the question of the nature of the covenant. If the deficiency could not be ascertained except by a final official survey under the decree of confirmation, that fact might possibly prevent the statute of limitations from running until the survey was made, though on this point I express no opinion. But the nature of the covenant remains the same and is not affected by the fact that there was no proof by which the breach of it could

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be established until the final survey was made. The breach existed as soon as the covenant was made; but the proof to establish it may not have been attainable until the final survey. The same difficulty might arise under a covenant of seizin, or against incumbrances, which, it is well settled, are personal covenants not running with the land. (*Lawrence v. Montgomery*, supra, and cases there cited.) For precisely the same reasons, the covenant in this case was a personal covenant, and the cause of action for a breach of it did not pass to the plaintiffs under the deeds to them from the original grantees.

Judgment affirmed.

WALLACE, J., concurring specially:

I concur in the judgment.

[No. 2,270.]**BERNARDINO SANCHEZ v. MICHAEL NEARY****ET ALA.**

DEED FROM SUTTER TO SUTTER, JR.—The deed of the 14th day of October, 1848, from John A. Sutter to his son John A. Sutter, Jr., and recorded in Book "C" of deeds, in the office of the County Recorder of the County of Sacramento, includes the site of the City of Sacramento.

MOTION FOR NONSUET.—If the defendant in ejectment moves for a nonsuit, and intends to rely on the point, that a deed offered in evidence by the plaintiff, and which was admitted without objection, does not include the demanded premises, he should distinctly so state in his motion.

PRESUMPTION THAT A DEED CONTAINS DEMANDED PREMISES.—In ejectment to recover lot number five, in the square bounded by L and M and Fourth and Fifth streets, in the City of Sacramento, if the plaintiff offers in evidence a deed, conveying the south half of sixteen blocks, between Fourth and Eighth and M and I streets, in the City of Sacramento, excepting lots six and eight, between Fourth and Fifth streets and J and K streets, and lots five and eight, between Fourth and Fifth and K and L streets, and lot eight, between Fourth and Fifth and L and M streets, and lots seven and eight, between Fourth and Fifth and I and J streets—the lots conveyed being fifty-eight in number—there is enough on the face of the deed to raise the presumption that it includes the lot sued for, without other evidence.

Argument for Respondents.

APPEAL from the District Court of the Sixth Judicial District, Sacramento County.

This was an action of ejectment. The Court below granted a nonsuit, and the defendant appealed.

The other facts are stated in the opinion.

A. P. Catlin, for Appellant.

The grounds of the motion for nonsuit were, that the plaintiff had failed to show that the demanded premises were included in any of his deeds, or in the grant, or patent. The objection is, in substance, that neither the grant, the patent, nor the deed of 1848 embraced the City of Sacramento. The objection is too general to raise a point against any particular defect in the descriptive portion of any particular one of the mesne conveyances. "The party must lay his finger upon the point of his objection." (*Kiler v. Kimball*, 10 Cal. 267; *McGarrity v. Byington*, 12 Cal. 429.)

"A party moving for a nonsuit should state in his motion precisely the grounds upon which he relies, so that the attention of the Court and the opposite counsel may be particularly directed to the supposed defects in the plaintiff's case." (*People v. Banvard*, 27 Cal. 470.)

But, assuming that the objection is specific enough, we hold that the deed is not affected by it, for the reason that other parts of the description upon the face of the deed show, not only that lot number five is in the south half of the block, but also that the block bounded by Fourth and Fifth and L and M streets is within the exterior bounds of the description, namely: within Fourth and Eighth and M and I streets.

Henry Starr, for Respondents.

The appellant goes upon the presumption, without evidence, that there are eight lots in a block, and the deed

purports to convey the south half of each block; yet in the blocks between Fourth and Eighth streets and I and M streets, it purports to except seven lots, and to sell fifty-eight. If there are but eight lots in a block this could not be, for there would be but fifty-seven left after excepting seven lots. Therefore, if fifty-eight were sold, there must be more than eight lots in a block, there being only the south half of the blocks sold. There is no extrinsic evidence in the case to show that lot five sued for lies in the south half of the block between L and M and Fourth and Fifth streets, which block lies in above described property, but whether in the south half or north half, or the east or west half, or whether there are eight or ten, or twelve or twenty lots in a block, does not appear, or whether the lot is in the deed or not. .

By the Court, CROCKETT, J.:

The Court below erred in granting a nonsuit in this case. The action is to recover a lot in Sacramento City, and the plaintiff deraigns his title through mesne conveyances from John A. Sutter, to whom the premises were granted by the Mexican Government, and to whom they have been confirmed and patented by the Government of the United States. That the deed of the 14th October, 1848, from Sutter to his son, includes the site of the City of Sacramento, was decided by this Court in *Mayo v. Mazeaux*, 38 Cal. 442, and we see no reason to question the correctness of that decision. If the defendants intended to rely, in their motion for a nonsuit, on the ground that the deed from Sutter, Jr., to Brannan does not include the *locus in quo*, they should have distinctly so stated at the time. The grounds of the motion, as shown by the transcript, were: First, that the plaintiff had failed to show the title to the demanded premises to be in himself; second, that he had failed to show that said premises are included in any of the deeds offered in evidence, or in the

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grant or patent to Sutter. The deed from Sutter, Jr., to Brannan, was admitted in evidence without having been objected to on the ground that it did not include the premises in controversy; and there is nothing in the record to show that the attention of the Court or counsel was called to the point now relied upon, to wit: that this particular deed does not include this particular lot. On the contrary, it is quite apparent, I think, that the point really made and decided was that the grant to Sutter, and his deed of the 14th October, 1848, to his son, did not include the site of Sacramento City, and, therefore, did not include the demanded premises. But, there is enough on the face of the deed itself to raise a presumption that it includes these premises which are described in the complaint as lot number five, in the square bounded by L and M and Fourth and Fifth streets, in the City of Sacramento. The deed from Sutter, Jr., to Brannan, conveys the south half of each of sixteen blocks between Fourth and Eighth and M and I streets, in the City of Sacramento, excepting lots six and eight, between Fourth and Fifth streets and J and K streets, and lots five and eight, between Fourth and Fifth and K and L streets, and lot eight, between Fourth and Fifth and L and M streets, and lots seven and eight, between Fourth and Fifth and I and J streets—the lots conveyed being fifty-eight in number. From these recitals, the presumption is that the south half of each of the blocks contained lots numbered five, six, seven, and eight, inasmuch as lots thus numbered are excepted from the conveyance, which purports to include only the south half of the blocks. The deed certainly furnishes some evidence that the lot in contest is situate in the south half of the block bounded by Fourth and Fifth and L and M streets, and is, therefore, included in the conveyance.

Judgment reversed, and cause remanded for a new trial.

Statement of Facts.

[No. 2,082.]

**THE WESTERN PACIFIC RAILROAD COMPANY v.
LLOYD TEVIS AND GEORGE H. KERR.**

RIGHT OF WAY OF CENTRAL PACIFIC RAILROAD.—PRE-EMPTIONERS.—The right of way granted to the Central Pacific Railroad Company of California, over the public lands of the United States, for its road, became perfect upon the filing of the plat of the location of the railroad in the proper land office, as against preemptioners who had not perfected their preemption right by payment of the price of the land.

POWER OF CONGRESS OVER PRE-EMPTIONERS.—Congress has the power to grant a right of way for a railroad over public lands which are occupied by persons who have the right to preempt, but have not yet perfected that right by proving up and making payment for the land.

A PRE-EMPTIONER NOT A CLAIMANT OF PUBLIC LAND.—A claimant of public land, within the meaning of the third section of the Act of Congress granting a right of way over the public lands to the Union and Central Pacific Railroad Companies, is one who has an interest in the land recognised by the laws of the United States. One who is a pre-emptioner, but has not paid for the land, is not such claimant.

APPEAL from the District Court of the Sixth Judicial District, Sacramento County.

On the 1st day of July, 1862, Congress passed an Act granting to the Union Pacific Railroad Company and the Central Pacific Railroad Company of California the right of way over the public lands of the United States for their respective roads. On the 1st day of October, 1864, the said Central Pacific Company assigned this right, from Sacramento to San Francisco, to the Western Pacific Railroad Company. On the 3d day of March, 1865, Congress ratified this assignment. The respondent Kerr was living on the northwest quarter of section six, township number six north, of range number six east, Mount Diablo base and meridian. When the Western Pacific Company was about to build its road over this land, it commenced an action to condemn a portion of it for its track, and Commissioners were appointed,

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who assessed the value of the land to be taken, and the money was paid into Court. Afterward, the Western Pacific Railroad Company and George H. Kerr each filed a petition for leave to withdraw the money. The Court below ordered the money (four hundred and ninety-nine dollars and eighty-five cents) to be paid to Kerr, and the Western Pacific Railroad Company appealed from the order.

The other facts are stated in the opinion of the Court.

Robert Robinson and Lewis Ramage, for Appellant.

Nothing passes the title to public land, but a patent or grant by Act of Congress. (*Wilcoxson v. Jackson*, 13 Peters, 498.) An imperfect title cannot be set up against a grant from the Government. (*United States v. King*, 3 Howard, 773.) Title from the United States is superior to an entry with the Register and Receiver. (*Hooper v. Scheinmer*, 23 How. U. S. 225; *Griffith v. Duffitt*, 17 Missouri, 31; *Dickerson v. Brown*, 9 S. & M. 130; *Wiggins v. Lusk*, 12 Illinois, 132; *Landers v. Brant*, 10 How. U. S. 348.) The grant of the right of way over Government land is, without reserving any benefit, right, or privilege to settlers or preëmptors; but the grant of the alternate odd sections, reserves or excepts from the operation of lands granted, valid preëmption claims, etc. (Third and fourth sections of the Act as amended July 2d, 1864.) We refer to these sections to show that the right of way was granted over all Government lands, whether the same had been settled upon, or preëmpted, or not; but the rights of preëmption claimants are reserved from operation of the grant of the alternate odd sections of the land.

Henry Starr, for Respondent.

The third and fourth sections of the Act of Congress, passed July 1st, 1862, provide for and exempt lands to which a preëmption claim or homestead claim may have attached.

If the title to the land did not pass to Kerr by virtue of

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the payment of the purchase money and the proving up of his preëmption claim, which I claim it did, I think he had an equitable inchoate vested right which Congress could not divest him of by the grant to the railroad. In *The United States v. Fitzgerald*, 15 Pet. 407, it was decided that no reservation or appropriation of public land can be made after the citizen has acquired the right of preëmption. The doctrine is thus broadly laid down in the opinion of the Court in that case. If Congress may override and disregard the rights acquired by actual settlers, and the expenditure of labor and money in erecting improvements upon the land, and subduing it by cultivation, it must possess an equal right to refuse its patent to the preëmptioner after the payment of the purchase money.

In *Lytle v. The State of Arkansas*, 9 How. 333, the Court say: "The claim of preëmption is not that shadowy right which by some it is considered to be. Until sanctioned by law it has no existence as a substantive right; but when covered by the law it becomes a legal right, subject to be defeated only by a failure to perform the conditions annexed to it."

In *Delassus v. The United States*, 9 Pet. 133, Mr. Chief Justice MARSHALL says, that "no principle is better settled in this country than that an inchoate title to lands is property." And again he says: "The inquiry then is, whether this concession was legally made by the proper authorities, and might have been perfected into a complete title" — was property.

In *The Northern Railway Co. v. Gould*, 21 Cal. 260, Mr. Justice NORTON says: "It was doubtless the purpose of the Act of Congress merely to give a right to enter upon the public lands, assuming them to be vacant, and its effect is to relinquish to the plaintiffs any claim for compensation that might belong to the United States as proprietor under any proceeding under the State law to appropriate the land for

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public use. But does this confer upon the plaintiff the right to enter upon premises in the actual occupancy of a settler without compensating him for the damage done to his possession?

“The United States, upon ejecting such an occupant, might not be under any obligation to pay for his improvements, but they may give to him a preëmption privilege; and this is in consonance with the policy heretofore pursued by the General Government toward settlers upon the public lands. There is scarce a doubt but this defendant will ultimately become the owner of one hundred and sixty acres of the land he occupies, with all the improvements, upon paying the Government price of the unimproved land.”

By the Court, RHODES, C. J.:

The respondent, Kerr, settled on the land in controversy in 1854, with the intention of preëempting it, and has ever since lived upon and improved it. In 1856 he filed his declaratory statement, but that was of no avail to him, as the township in which the land is situated was then unsurveyed. The township was afterward surveyed, and the township plat was filed in the Land Office at Sacramento, on the 20th of February, 1868. Kerr filed a declaratory statement in that Land Office on the 13th of May, 1868, and in due time proved up his preëmption claim, paid the purchase money, and received his certificate of purchase. The plat and location of the railroad was filed in the Land Office on the 30th of January, 1865. The question is whether the respondent, Kerr, or the petitioner, the railroad company, is entitled to the money which, in the proceedings to acquire the right of way for the railroad, was paid into Court on account of the right of way over this land.

The right of way over the public lands of the United States, became perfect upon the filing of the plat of the loca-

tion of the railroad in the proper Land Office. This right did not extend to a parcel of land in or to which a private person had acquired a title or interest, which he could maintain as against the United States. At the time the plat of the location of the road was filed, Kerr had not filed his declaratory statement. It was held by this Court, in *Hutton v. Frisbie*, 37 Cal. 475, that Congress has the power, at any time after a settler has settled upon and taken steps to acquire a preëmption right to a tract of public land, but has not perfected his right by the payment of the price of the lands, to withdraw the lands from the operation of the preëmption laws, and confer a right of entry upon another. The same doctrine was laid down by the Supreme Court of the United States in *Whitney v. Frisbie*, 9 Wall. 187. It follows that Congress has the power, under similar circumstances, to grant to another the right of way over the lands, or any other right which is of less magnitude than the entire title, or the right to acquire the title by purchase.

But it is contended by Kerr, that under the provisions of the third and fourth sections of the Act of Congress of July 2d, 1864 (13 U. S. Stats. 356), he is entitled to damages for the right of way for the railroad. The fourth section throws no light on the question. The lands therein mentioned are the alternate sections, which, with certain exceptions and reservations, were granted to the respective railroad companies. The third section provides that "in case the owner or claimant of such lands or premises and such company cannot agree as to the damages [for the right of way over such lands], the amount shall be determined by the appraisal of three disinterested Commissioners," etc. This section applies, in terms, to lands within the Territories; but conceding that the provision is applicable to lands within the States, so far as the matter of compensation is concerned, the question arises whether the respondent comes within the provision. He was not the owner of the land at the time

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when the grant of the right of way took effect, nor was he the claimant, within the meaning of the Act. A claimant is one having some interest in the land, which is recognized by the laws of the United States. One who has entered upon and improved a parcel of public land, without having taken a step toward the acquisition of the title, cannot be regarded as the claimant of the land. His position in this respect is not strengthened by the fact that, after the filing of the plat of the location of the railroad, he became the purchaser of the land, because if he was not at that time the claimant of the land, the grant of the right of way over that land then took effect, and his purchase was subject to the right of way for the railroad.

Judgment reversed, and cause remanded.

Mr. Justice SPRAGUE did not express an opinion.

[No. 2,384.]

R. B. ARMSTRONG, J. P. SHELDON, AND W. H. DAVIS (TRADING AND DOING BUSINESS AS ARMSTRONG, SHELDON & Co.) v. CHARLES W. DAVIS.

SURPRISE AS GROUND FOR NEW TRIAL.—Where, in an action for goods sold and delivered, the defendant in his answer set up a promissory note as a counterclaim, which purported on its face to have been made for value received, and the plaintiffs, in an answer to defendant's cross-complaint, alleged that the note was given without consideration: *held*, that testimony on the trial by the defendant, in support of the averments of his answer as to the making of the note and the consideration therefor, did not constitute such a surprise to the plaintiffs as to entitle them to a new trial.

NEWLY DISCOVERED EVIDENCE.—Sufficient to support a motion for new trial considered.

APPEAL from the District Court of the Fifteenth Judicial District, City and County of San Francisco.

Statement of Facts.

This was an action brought for goods sold and delivered, amounting to three thousand and forty-two dollars. The defendant interposed several defenses in his answer to the complaint by way of counterclaim, one of which was the following:

"And the defendant, further answering the plaintiff's complaint, and for a further and other counterclaim against said plaintiffs, avers and shows to this Court that the above named plaintiffs, on the 23d day of December, 1867, by their promissory note in writing, for value received, promised to pay to this defendant or order the sum of two thousand dollars in gold coin of the United States, sixty days from the date thereof, with interest thereon at one and one quarter per cent. per month; and that plaintiffs have not paid the same nor any part thereof, but are justly indebted to the defendant therefor in the said sum of two thousand dollars and interest at said rate from December 23d, 1867. And defendant says that the following is a copy of the said promissory note made, executed, and delivered to defendant by plaintiffs (duly stamped) at said city and county, at the date thereof, viz:

"\$2,000 00.

"SAN FRANCISCO, December 23d, 1867.

"Sixty days after date, without grace, we promise to pay to Chas. W. Davis or order the sum of two thousand dollars, payable only in gold coin of the Government of the United States, for value received, with interest thereon at the rate of 1½ per cent per month from date until paid.

"ARMSTRONG, SHELTON & Co.

"No. ——. Due.

"And defendant says that he is now the owner and holder of said note, and that the same is past due and no part thereof has been paid."

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The plaintiffs filed an answer to the defendant's cross-complaint, in which they reply to the matter in regard to the promissory note, as follows:

"And for answer to the second count or cause of action set forth in said answer or cross-complaint, plaintiffs admit the execution by them of the promissory note therein set forth, but deny that they executed the same for value received, and deny that the same was executed by them for a valuable or for any consideration; and allege the fact to be, that said note was executed and delivered by them to said defendant without any consideration whatsoever paid or given by said defendant therefor to them, or to any person for their use; and plaintiffs deny that they are now, or were at the time this action was commenced, or at the time said answer and cross-complaint was filed, indebted to said defendant in the sum of two thousand dollars, or any other sum of money whatsoever, upon said promissory note or in any amount of interest thereon; and plaintiffs allege the fact to be, that, at the request of said defendant and for his accommodation, and for no other purpose whatsoever, and without any consideration whatsoever by them received therefor, and for the purpose of enabling said defendant to borrow the sum of two thousand dollars, by discounting said note, they did, on the day of the date of said note, execute and deliver the same to said defendant, to be by him discounted for his accommodation, and that at the time of said execution and delivery said defendant promised to protect and pay the said note at its maturity; and that, at the same time with the execution of said note, and as a part of the same transaction, said defendant executed and delivered to these plaintiffs his promissory note of the same tenor and effect as that set forth in said answer, whereby he promised to pay to plaintiffs two thousand dollars in United States gold coin, sixty days after date thereof, with interest thereon

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from date thereof until paid, at the rate of one and one quarter per cent per month, in like gold coin; that said note is long past due and payable, and that defendant has not paid the same or any part thereof. and that the whole of the principal sum and interest specified in said promissory note to be paid by defendant is now due, unpaid, and payable to plaintiffs from defendant."

The case was tried by the Court with a jury. At the trial the defendant testified that the promissory note set out in the answer was executed and delivered on the day of its date, early in the morning, at the residence of the defendant, in consideration of two thousand dollars in gold coin, on that day loaned by him to the plaintiffs.

The plaintiff, Sheldon, testified that the defendant did not give him any money at that time or place: that he (Sheldon) was at that time at his own residence, two miles away; that he was not at the defendant's house on that day: that the note in question was given as an accommodation note, and was executed in the afternoon of that day at the plaintiffs' place of business. The defendant subsequently testified that he was not at the plaintiffs' place of business on that day, but remained in the vicinity of his own house throughout the entire day. Other evidence was introduced. The verdict and judgment were for the defendant. The plaintiffs moved for a new trial, on the ground of surprise and newly discovered evidence, and in support of the motion the plaintiff Sheldon filed an affidavit stating that he was surprised by the testimony of the defendant, and that he had no intimation, from the pleadings or otherwise, that such testimony would be given. He also filed affidavits by Charles Randall and William H. Davis, that they saw and talked with the defendant about the middle of the 23d of December, 1867, at the office of the plaintiffs. The motion was denied, and the plaintiffs appealed.

Argument for Respondent.

Jarboe & Harrison, for Appellants, argued that the testimony of the defendant operated as a surprise upon the plaintiffs; that it was a surprise against which ordinary prudence could not have guarded, and for which a new trial should have been granted; citing *Daniel v. Rose*, 1 Nott. McCord, 34; *Dow v. Watson*, 28 Miss. 383; *McFarland v. Clark*, 9 Dana, 134; *Seely v. Chittenden*, 4 How. Pr. 265; *Sargent v. Dennison*, 5 Cowen, 106; *Parshall v. Klinck*, 43 Barb. 203; *Adams v. Bush*, 2 Abb. (N. S.) 104; *Millar v. Field*, 3 A. K. Marsh. 110; *Fabrilius v. Cook*, 3 Burr. 1771; *Lister v. Mandel*, 1 Bos. & P. 429; *Wehrkamp v. Willet*, 1 Daly, 4. As to the newly discovered evidence, they cited *Atken v. Bemis*, 3 Wood & M. 358; *Parshall v. Klinck*, and *Adams v. Bush*, supra; *Waller v. Graves*, 20 Conn. 303; *Simons v. Hay*, 1 E. D. Smith, 107; *Oakley v. Sears*, 1 Abb. (N. S.) 368.

Henry J. Howe, for Respondent, cited *Schellhouse v. Ball*, 29 Cal. 609; 3 G. & W. on N. T. 395; *Live Yankee v. Oregon Co.*, 7 Cal. 40; *Taylor v. California Stage Co.*, 6 Cal. 228; *Turner v. Morrison*, 11 Cal. 21; *Klockenbaum v. Pierson*, 22 Cal. 160; G. & W. on N. T. vol. 3, p. 1,023; *Smith v. Richmond*, 15 Cal. 502; *Nooney v. Mahoney*, 30 Cal. 226; *Peters v. Foss*, 16 Cal. 357; *Drake v. Palmer*, 2 Cal. 181; *Watson v. McClay*, 4 Cal. 288; *Hastings v. Steamer Uncle Sam*, 10 Cal. 341; *Burnett v. Whitesides*, 15 Cal. 35; *Quinn v. Kenyon*, 22 Cal. 82; *Patterson v. Ely*, 19 Cal. 35; *Brooks v. Douglas*, 32 Cal. 211, as to surprise; and as to newly discovered evidence, he cited *Bartlett v. Hodgdon*, 3 Cal. 55; *Brooks v. Lyon*, id. 113; *Barret v. Gibson*, id. 396; *Live Yankee Co. v. Oregon Co.*, 7 Cal. 42; *Berry v. Metzler*, id. 418; *Taylor v. California Stage Company*, 6 Cal. 228; *Gaven v. Dopman*, 5 Cal. 342; *Baker v. Joseph*, 16 Cal. 173; *Klockenbaum v. Pierson*, 22 Cal. 160; *Spencer v. Doane*, 23 Cal. 418; *Aldrich v. Palmer*, 24 Cal. 513; *O'Brien v. Brady*, 23 Cal. 243; *Weddle v. Stark*, 10 Cal. 301; *Peck v. Hiler*, 3 Barb. 655.

By the Court, CROCKETT, J.:

The plaintiffs moved for a new trial on the ground of surprise and newly discovered evidence, and, the motion having been denied, they have brought this appeal. The alleged surprise is founded on the fact that at the trial the defendant testified that a promissory note of the plaintiffs for two thousand dollars, held by him, was executed and delivered on the day of its date, at the residence of the defendant, in consideration of that sum in gold coin, on that day loaned by him to the plaintiffs; whereas the plaintiffs allege that no sum whatever was loaned to them by the defendant; that the note was an accommodation note made by them, without having received any valuable consideration therefor, and for the sole accommodation of the defendant, to enable him to raise money thereon for his own use, and on his promise to pay the note at maturity, in case he should procure the same to be discounted. The note on its face purports to have been made for value received; and the defendant, in his answer, sets out a copy of the note and relies upon it as a valid counterclaim. With this answer before them, it is difficult to understand how the plaintiffs could have been surprised when the defendant testified that the note was given for a valuable consideration, and was not made for his accommodation. After setting up in his answer as a counterclaim, and after the plaintiffs had distinctly taken issue upon the averment that the note was made for a valuable consideration, they could not well have been surprised that the defendant attempted to make good by proof a fact distinctly put in issue in the pleadings. The note itself was prima facie evidence that it was made for a valuable consideration, and the onus was on the plaintiffs to rebut this presumption. Under all the facts, the plaintiffs have shown no such surprise as entitled them to a new trial on that ground.

In respect to the newly discovered evidence, if it be con-

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ceded that the plaintiffs were guilty of no laches in failing to produce it at the trial, and that it is material and pertinent, it is, nevertheless, liable to the objection that it is only cumulative. But if it were not, we do not think it is so conclusive in its character as to raise a reasonable presumption that the result of a second trial would be different from the first.

Order denying new trial affirmed.

[No. 2,096.]

HIMMELMAN v. BYRNE.

ORDER FOR STREET WORK.—An order of the Board of Supervisors of the City and County of San Francisco authorizing the Clerk of the Board to advertise for proposals to do street work is sufficient, although it do not mention sealed proposals nor specify the time or place of giving notice.

PETITION for rehearing.

The appeal in this case having been decided at the January term, 1871, upon the authority of *Chambers v. Satterlee*, 40 Cal. 497, the defendant, Byrne, by his attorneys, S. H. Brodie, Byrne & Freelon, moved for a rehearing, upon the ground that the decision of the Court had not included the point that the Board did not cause notice to be published for five days nor cause the notice to be conspicuously posted in the Superintendent's office inviting sealed proposals for the work. His counsel argued that the order of the Board failed to comply with the requirements of the statute, and cited *Meuser v. Risdon*, 36 Cal. 239; *Heyman v. Babcock*, 30 Cal. 367; *Himmelman v. Reay*, 38 Cal. 163; *Hewes v. Reis*, 40 Cal. 255; and *Blanchard v. Beideman*, 18 Cal. 262.

By the Court, WALLACE, J.:

The words of the order of the Board here were: "the Clerk is hereby authorized to advertise for proposals to do

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the work." In *Meuser v. Risdon*, 36 Cal. 239, relied upon by respondents, the words of the order were these: "and the Clerk of the Board is hereby directed to advertise for proposals for doing said work." The two orders are thus seen to be substantially — almost literally — identical. Neither of them mentions sealed proposals, nor gives time or place of giving notice. Yet it was not doubted in *Meuser v. Risdon* that the order was sufficient. It was, indeed, impliedly held good, for the point decided there was, that the order to give the notice should have been repeated by the Board before the Clerk could give notice of a reletting of the contract.

Petition for rehearing denied.

[No. 2,548.]

**THE SOUTH BEACH LAND ASSOCIATION v. R.
CHRISTY, C. BERGLE, AND J. BEISEL.**

PARTY NOT AMENABLE TO WRIT OF RESTITUTION.—A party in the actual possession of land at the commencement of an action of ejectment, and holding adversely to the plaintiff, is not amenable to a writ of restitution issued in the action to which he was not a party.

COLORABLE POSSESSION OF LAND.—Where a defendant in ejectment has taken possession of land in collusion with the plaintiff, for no other purpose than to afford such plaintiff a pretext to take possession under a writ of restitution, such pretended possession will be disregarded.

WRIT OF RESTITUTION.—If a sheriff has wrongfully turned a person out of possession of land under a writ of restitution, he will be restored by the Court to the possession, on motion made for that purpose.

RECEPTION OF IRRELEVANT TESTIMONY.—An order will not be reversed by the appellate Court on account of the reception of irrelevant testimony if its reception does the appellant no harm.

APPEAL from the District Court of the Twelfth Judicial District, City and County of San Francisco.

Argument for Appellants.

In 1870 the plaintiff obtained a judgment by default against Robert Christy, C. Bergle, and J. Beisel, in an action for the recovery of the possession of a tract of land on the Potrero Nuevo, in San Francisco, known as the Robinson tract. A writ of restitution was issued on the judgment, and the Sheriff, by virtue of the same, removed Rowland Chatham from the land. He moved the Court, on affidavits, to be restored to the possession. The affidavits showed his possession adversely to the plaintiff when the suit was commenced, and that the defendants colluded with the plaintiff to have the suit brought, and consented to the judgment, and that Christy pretended for a short time to be in possession of the land, in order to give the plaintiff a pretense to serve the writ of restitution on him and also to turn out Chatham.

The respondent, for the purpose of showing collusion, was allowed to put in evidence the pleadings in an action of ejectment for the same land by *John Bensley and Frederick Mason v. Robert Christy and J. W. Farrington et al.*, brought in the Twelfth District Court, transferred to the Seventh District Court, and still pending. The Court below granted the motion, and the plaintiffs appealed.

Whiting & Naphtaly, for Appellants.

The order setting aside the execution of the writ of possession in this cause, as to Rowland Chatham, should be reversed, because the defendant in the writ was in possession at the time of the execution of the writ. The writ was executed regularly and in good faith. If Chatham has any rights, his remedy is by action.

The Court erred in admitting to be read, upon this motion, the papers in *Bensley v. Christy et al.*, and in overruling the objections thereto, because appellant was not a party to that action—could be neither bound nor affected by the statements therein contained.

Argument for Respondent.

Wilson & Crittenden, for Respondent.

The Court finds that the respondent was in possession of the premises at the commencement of the action, and that he was wrongfully dispossessed; and this finding is in strict accordance with the facts. The respondent was not a party to the action, and was not holding under or in privity with any of the parties thereto. The proceedings by which the respondent was dispossessed, including the action and judgment, were concocted, carried on, and consummated by the plaintiff and defendants as a fraudulent and collusive scheme to get possession of the premises; and the papers in the case of *Bensley & Mason v. Christy, Farrington*, and others, tend to establish these facts, and were properly given in evidence. It appears from them that the attorneys for the plaintiff in this action are the attorneys for Christy and Farrington in that case; and that there they are making a strong and persistent defense. Here, however, the plaintiff has been allowed to take judgment by default; the action being commenced and the judgment rendered during the pendency of the other case. The inference of collusion is irresistible; but there is additional evidence of the fact. In order that the service of the writ should be easy and unobstructed, it was necessary that some preliminary arrangements should be made, and Christy appears as the man to make them. He found a person who was willing to serve him in the character of tenant, and this person, being surreptitiously introduced upon the premises, was found there when the Sheriff went to serve the writ; and on answering that he was the tenant of Christy, the Sheriff turned him out, together with several head of cattle belonging to the respondent. Comment is unnecessary. The whole matter was a fraudulent and collusive contrivance, of which the respondent was the unfortunate victim.

If the Court should hold that the papers in *Bensley v.*

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Christy were inadmissible, we claim that the error could not have prejudiced the plaintiff, the case being fully made out by other evidence. The only question is, whether the respondent was properly dispossessed, and the facts show clearly that he was not. The law applicable to these facts has been laid down by the Court in numerous cases. (*Watson v. Dowling*, 26 Cal. 125; *Tevis v. Ellis*, 25 Cal. 515; *Rogers v. Parish*, 35 Cal. 128.)

By the Court, CROCKETT, J.:

This appeal is from an order, restoring the respondent to the possession of a piece of land, from which he was removed under a writ of restitution issued in an action to which he was not a party. The proof shows satisfactorily that he was in the actual possession at the commencement of the action, holding adversely to the plaintiff, and of course was not bound by the judgment or amenable to the writ of restitution issued thereon. It is equally plain on the proofs that the pretended and colorable possession of Christy was collusive, and that his nominal and temporary occupation, such as it was, had no other purpose than to afford a pretext to the plaintiff, on which the possession might be taken under the writ. If the Court improperly admitted in evidence the record in the case of *Bensley v. Christy et als.*, it was an error which did the appellant no injury, inasmuch as there was ample evidence without this to justify the order restoring the respondent to the possession.

Order affirmed.

JULY TERM, 1871.

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
JULY TERM, 1871.

[No. 2,786.]

THE PEOPLE OF THE STATE OF CALIFORNIA ON
RELATION OF TIMOTHY J. JENKINS v. GEORGE
DUNCAN AND WILLIAM BLACKMORE.

TURNPIKE FRANCHISE NOT ASSIGNABLE EXCEPT WITH CONSENT OF GRANTOR.—A franchise to construct a turnpike road and collect tolls thereon is a personal trust reposed in the grantee, and is not assignable either at forced sale or by voluntary conveyance, except with the consent of the granting power.

A FRANCHISE DOES NOT PASS TO ASSIGNEE IN BANKRUPTCY.—A franchise to construct a turnpike road and collect tolls thereon, being a personal trust, not assignable without the consent of the granting power, does not pass, by virtue of an assignment under the United States bankrupt law, to the assignee in bankruptcy.

TRANSACTIONS CONSTITUTING VALID TRANSFER OF FRANCHISE.—Where the owner of a turnpike road franchise became a bankrupt and the assignee in bankruptcy sold the franchise to a third person, and the bankrupt acquiesced in the transfer, relinquished all his title, and delivered possession of the road and its appurtenances to the purchaser, and afterwards the Board of Supervisors—the grantors of the franchise—assented to the transfer and authorized the purchaser to collect

Statement of Facts.

the tolls; *held*, that, though the franchise, being a personal trust, did not pass by virtue of the assignment in bankruptcy, the whole transactions constituted a valid transfer of it by the owner, with the consent of the granting power.

APPEAL from the District Court of the Thirteenth Judicial District, Mariposa County.

This was an action in the nature of quo warranto, brought in the name of the People by the Attorney General against the defendants, to oust them from the use and enjoyment of a certain turnpike road franchise from Ross' Ranch to Bear Valley, in Mariposa County. It appears that the franchise was granted by the Board of Supervisors of that county to the relator, Jenkins, on March 3d, 1862, for a period of ten years. In May, 1868, Jenkins filed a petition in bankruptcy in the United States District Court, and after proper proceedings had, all his estate was conveyed to Henry C. Hyde, as the assignee in bankruptcy. In March, 1869, Hyde, as such assignee, sold the franchise to the defendant, George Duncan, the chief creditor of the bankrupt; and afterwards, upon Duncan's demand, Jenkins surrendered to him full and complete possession of the road, the franchise, and all papers relating to them, and signed a paper to that effect; and also conveyed the land through which the road ran. Subsequently, but after this action was commenced, Duncan applied to the Board of Supervisors, setting forth the facts of his purchase and possession; and the Board, by an order entered on its minutes, assented to the sale, authorized him to collect the tolls for the balance of the term originally granted, and granted him a franchise to that extent, at the same time vacating the order granting such right to Jenkins.

In addition to the foregoing facts, the Court below found that the grant by the Supervisors to Duncan was with a reservation to vacate the same if it should eventually be established that Duncan was possessed of no rights in the road and improvements; that Jenkins had demanded pos-

Argument for Appellants.

session of the road before suit and was refused; and that the deed from Hyde, as assignee, was never authorized by the United States District Court, nor made with its consent, nor was the sale ever ratified by it. As conclusions of law, the Court found that no rights passed to Duncan or Blackmore, his agent and employé, by virtue of the deed from Hyde; that they had usurped the right to collect tolls; and that Jenkins was entitled to the use and enjoyment of the franchise. Judgment for plaintiff was entered in accordance with the findings, and defendants appealed.

Alex. Deering, for Appellants.

It is not contended on the part of the appellants that a franchise is the subject of a forced sale; but we do insist that it, with the appurtenances — such as the road and improvements — is a species of property that passes into the hands of an assignee in bankruptcy, and would be capable of being devised. (3 Greenleaf's Cruise, Chap. III, Secs. 20-22; *Stewart v. Hargrove*, 23 Ala. 429.) But were the sale by the assignee valueless for any reason, that does not make the case better for Jenkins, for by his application in bankruptcy he became divested of every particle of property not exempt from execution. He surrendered all. He obeyed the assignee's order, and delivered up the road, and conveyed to Duncan the land claim "through which the road run." This was surely in itself an abandonment — a complete surrender of the charter or franchise — and was recognized by the Supervisors as such when they assented to the sale. A franchise may be conveyed with the consent of the granting power. This is a well settled principle of law, and is recognized in the case of *Wood v. The Truckee Turnpike Co.*, 24 Cal. 487.

James C. Cary and P. D. Wigginton, for Respondent.

The present Bankrupt Act excepts from the operation of

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the assignment all property exempt from levy and sale upon execution. The road and franchise here were exempt from such a sale, and consequently did not pass to the assignee. (*Monroe v. Thomas*, 5 Cal. 471; *Thomas v. Armstrong*, 7 Cal. 287; *Woods v. Truckee Company*, 24 Cal. 479.)

But even if the franchise passed to the assignee, the sale by him to Duncan was a nullity, being made without notice, at private sale, and without an order of Court. (Bank. Act, Sec. 20; *In re Lewis F. Solomons*, 1 Bank. Reg. 42; *In re Taylor R. Stewart*, 2 Bank. Reg. 19.)

The franchise, however, did not pass to the assignee, and he had no authority either to demand or receive it, much less to clothe Duncan with authority to demand or receive it. The surrender of the franchise could only be made to and accepted by the Board of Supervisors, and it does not appear that the relator at any time ever surrendered to the Board. It was not within his power to make a valid transfer of it, and it could not be made the subject matter of a voluntary assignment or sale.

The order of the Board of Supervisors assuming to vacate the franchise was void, because it was made without notice; because neither the pretended sale or surrender authorized the Board to make it; and because Jenkins held a vested right for the term, which could only be divested after due proceedings had according to law and for cause shown.

By the Court, CROCKETT, J.:

In *Wood v. Truckee Turnpike Company*, 24 Cal. 474, it was decided that a franchise to construct a turnpike road and collect tolls thereon is a personal trust reposed in the grantee, and is not assignable either at forced sale or by voluntary conveyance, except with the consent of the granting party. In *Monroe v. Thomas*, 5 Cal. 470, the same proposition was maintained in respect to a ferry franchise, and the principle

was reaffirmed in *Thomas v. Armstrong*, 7 Cal. 289. Accepting this as a correct exposition of the law, the title of Jenkins to the franchise was not only exempt from execution, but was incapable of being made the subject of a voluntary conveyance by him, except with the consent of the granting power. Waiving any opinion on the point whether a franchise is property exempt from execution, in the sense of section fourteen of the bankrupt law of the United States, and which, for that reason, would not pass to the assignee, it is obvious that if it is a personal trust, not assignable without the consent of the granting power, the assignee in bankruptcy does not acquire it by virtue of the assignment. He can take nothing which the bankrupt could not voluntarily assign, unless it be property previously conveyed by him, in fraud of creditors or of the law. I am, therefore, of opinion that the title of Jenkins did not pass to his assignee in bankruptcy. If this were the whole case the defendant would be without title. But it appears from the findings, that after the conveyance from the assignee to the defendant (Duncan), Jenkins acquiesced in the transfer, and not only relinquished all his title, but delivered the possession of the road and its appurtenances to Duncan. Subsequently the Board of Supervisors (from which the franchise was originally obtained), not only assented to the transfer, but expressly authorized Duncan to collect the tolls. Under the authorities already cited, this must be deemed a valid transfer of the franchise by Jenkins, with the consent of the granting power from whom it was originally derived.

Judgment reversed, with an order to the Court below to enter judgment for the defendant on the findings.

Mr. Justice TEMPLE did not participate in the foregoing decision.

Argument for Respondent.

[No. 2,478.]

JOHN MATHEWS v. GEORGE B. KINSELL.

DAMAGES DONE TO LAND BY OVERFLOW OF WATER.—A party is not liable for damages done to another's land, by an overflow of water from his own land, if the overflow is caused by a heavy fall of rain, increased by the additional momentum given to the water before it reaches the defendant's land by ditches dug by a third person.

FINDINGS BY THE COURT.—Findings by the Court should be mere statements of the ultimate facts in controversy, and the legal consequences from the facts. They should not include probative facts, or the reasons given by the Judge for his decision.

REVERSAL OF JUDGMENT ON FINDINGS.—The mere fact that express findings do not support the judgment does not authorize a reversal of the judgment. The findings must be inconsistent with the judgment, or it will be allowed to stand.

APPEAL from the District Court of the Third Judicial District, Alameda County.

The defendant recovered judgment in the Court below, and the plaintiff appealed.

The other facts are stated in the opinion of the Court.

N. Hamilton, for Appellant.

The defendant had no right to relieve his own lands at the expense of the plaintiff's, either by the diversion of a running stream from its natural channel or bed, or to divert the watershed from the foothills from their accustomed flowage in finding an outlet to the bay. (*Townsend v. McDonald*, 2 Kernan, 391; *Miller v. Laubach*, 47 Penn. R. 154; *Casebur v. Mowry*, 55 Penn. R. 419, 423; *Pixley v. Clark*, 35 N. Y. R. 520; *Tillotson v. Smith*, 32 N. H. R. 90; Angell on Water Courses, Sec. 108 d.)

Stephen G. Nye and A. M. Crane, for Respondent.

The findings do not show that the defendant relieved his own land at the expense of the plaintiff. Even admitting that he did, we contend that a land owner has the right to

relieve his own land of surface water, although it might thereby flood his neighbor. (Angell on Water Courses, 6 ed. 122.) The facts found do not show in plaintiff an affirmative right to recover. They are not inconsistent with the judgment. (*James v. Williams*, 31 Cal. 211; *Lucas v. San Francisco*, 28 Cal. 591; *Tewksbury v. Magraff*, 33 Cal. 237.)

By the Court, TEMPLE, J.:

There having been no motion for a new trial, the only question involved in this appeal is whether the judgment can be sustained upon the findings, express or implied.

The action is to recover damages for an alleged diversion of water by the defendant, by which the lands of plaintiff were flooded, and one hundred acres washed to such an extent as to be rendered valueless.

The findings show that the parties occupy contiguous tracts of land in Alameda County; that the waters which fall upon the neighboring hills ordinarily collect upon the defendant's land, and were usually contained there in a natural basin, but, after heavy rains, have been accustomed to overflow and disperse themselves over the plaintiff's lands. The usual flow of the waters, when the natural basin was full, was over the plaintiff's land, along a channel or depression extending to the marsh or bay.

Prior to the injury complained of, a person occupying a farm higher than the defendant's land, and from which the water flowed upon the land of defendant, had dug several ditches, which had the effect of increasing the momentum of the water in the channels in times of heavy floods to such an extent as to flow down into the basin already mentioned in twelve hours as much water as formerly flowed in a week. A ditch had been constructed by the defendant, which di-

verted the water flowing from the natural basin through another channel to the bay.

After a heavy rain in the Spring of 1869, the water overflowed from this basin and over the banks of the ditch dug by the defendant upon the lands of the plaintiff, doing the damage to recover which this suit is brought. The waters of a certain creek called Yoakum Creek also overflowed the lands of plaintiff at the same time, contributing to the injury.

There is no finding to the effect that the overflow was caused by the ditch dug by the defendant, or any fact which tends to prove that the acts of the defendant contributed thereto. On the contrary, they clearly show that the Judge who tried the case was of the opinion that the overflow was the necessary result of a heavy fall of rain, increased by the additional momentum given to the waters by ditches dug by a person who is not a party to this suit.

The findings are not such as were intended by the Practice Act. They should be mere statements of the ultimate facts in controversy, and the legal consequences from the facts admitted and proven. In this case they are but a statement of the case, including probative as well as ultimate facts, with the reasons given by the Judge for his decision. They sufficiently show, however, that in the opinion of the Judge the injury was not caused by the act of the defendant. The mere fact, however, that the express findings do not support the judgment has been frequently held not to be sufficient to authorize a reversal. They must be inconsistent with the judgment, or it will be allowed to stand.

Judgment affirmed.

Mr. Justice CROCKETT did not express an opinion.

Statement of Facts.

[No. 2,581.]

THOMAS CAMPBELL v. WILLIS JONES.

EXTENSION OF TIME TO FILE STATEMENT.—JUDGE'S PROMISE OF ORDER NOT ENOUGH.—Where a Judge, on being asked to extend the time for filing a statement on motion for new trial, said that he would have an order to that effect entered of record at the meeting of the Court, but failed, by oversight, to have it done; *held*, that the time was not extended.

ORDER EXTENDING TIME TO FILE STATEMENT.—An order extending the time for filing statement, on motion for new trial, should in all cases be in writing, and either entered on the minutes of the Court, in open session, or signed by the Judge, and filed within the time prescribed by section one hundred and ninety-five of the Practice Act.

WAIVER OF MOTION FOR NEW TRIAL BY FAILURE TO FILE STATEMENT.—A failure to file a statement, on motion for new trial, within time, amounts to a waiver of the motion.

OBJECTIONS TO FORM OF VERDICT AND EXCESSIVE DAMAGES.—Objections to the form of a verdict, or that excessive damages were thereby awarded, can only be made available on motion for a new trial, or on appeal from an order denying a new trial.

APPEAL from the District Court of the Fourteenth Judicial District, Placer County.

This action was for the return of certain iron pipe, and apparatus for hydraulic mining, alleged to be detained by defendant, and in default thereof, for its value, laid at the sum of two thousand nine hundred and ninety-three dollars and ninety cents, together with damages for wrongful detention. The defendant, on the other hand, set up that the property was worth only nine hundred and fifty dollars; that he had received it from the plaintiff by way of pledge to secure the repayment of money loaned and advanced; and that, as the loans and advances were not repaid, the right of property had become absolute in him.

The cause was tried before a jury, in May, 1870, and a verdict rendered as follows: "We, the jurors, find for the plaintiff; value of property, fourteen hundred dollars; damages for retaining said property, two hundred and sixty dollars." Upon the verdict a judgment was entered for a return

Argument for Respondent.

of the property, or in default thereof, its value, assessed at one thousand four hundred dollars; and for two hundred and sixty dollars damages, and costs taxed at four hundred and six dollars and ten cents. The proceedings, on defendant's motion for new trial, are stated in the opinion of the Court. Defendant appealed.

Jo Hamilton, for Appellant.

Should respondent's motion to strike out the statement prevail, the judgment should be reversed on the judgment roll—because the judgment for detention of personal property should be the value of the property and legal interest. (*Dorsey v. Manlove*, 14 Cal. 563; *Phelps v. Owens*, 11 Cal. 22; *Howe v. Hathaway*, 33 Cal. 117; *Nickerson v. Chatterton*, 7 Cal. 568.) The action is detinue. (3 Black. 151; 1 Chitty Pl. 122.) And in detinue the verdict and judgment must fix the value of each parcel of property sued for. (1 Chitty Pl. 122; *Higginbotham v. Rucker*, 5 Call. Va. 813; *Haynes v. Crutchfield*, 7 Ala. 198; *Bell v. Pharr*, 7 Ala. 812; *Baker v. Beasley*, 4 Yerger, 570; *Goodman v. Floyd*, 2 Humph. 60; *Buchner v. Haggin*, 3 T. B. Monroe, 60; *Thomas v. Tanner*, 6 T. B. Monroe, 61.)

O. A. Tuttle, for Respondent.

The judgment was entered on May 18th, 1870, and on the same day defendant served his notice of motion for new trial. The statement was not filed until May twenty-eighth, ten days after the service of notice. This, in the absence of any stipulation or agreement, was too late, and the statement should be stricken out. When the motion for new trial came on to be heard before the District Judge, defendant objected to the statement on this ground, and moved to strike it out. There has, therefore, been no waiver of defendant's rights in this respect. The statement does not say or show that the Judge made any order out

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of Court. A Judge cannot make an order out of Court, unless it is in writing. His telling an attorney that he will have an order entered when the Court meets, is not making an order out of Court.

By the Court, SPRAGUE, J.:

The verdict of the jury was rendered on the 17th day of May, 1870. On the 18th day of May, 1870, defendant duly served and filed his notice of motion for new trial, and on the same day requested the District Judge, out of Court, to grant an order for five days additional time to file statement on motion for new trial. The District Judge, on said request, said that at the meeting of Court he would have said order entered of record in said cause, but failed to have the order made of record by oversight. Thereupon defendant's attorney left Auburn, the county seat, before the opening of Court, and filed said statement within the ten days, to wit: on the 28th day of May, 1870. It does not appear that respondent proposed or offered any amendments to the statement thus filed, and the same was settled and certified as correct by the Judge on the 21st day of June, 1870. On the same day the motion for a new trial came on to be heard before the Judge; the respondent appeared by his counsel and "objected to the statement on file, upon the ground that the same had not been filed in time, and moved to strike it out," which motion was by the Court overruled, to which ruling respondent's counsel duly excepted. Thereupon the motion for a new trial was argued and submitted, and by the Court overruled, from which order overruling defendant's motion for a new trial, as also from the judgment, defendant brings this appeal. And now, on appeal, respondent moves to strike out defendant's statement on motion for a new trial, on the ground that the same was not filed in proper time. Appellant, in response to this motion,

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insists that the mere oversight of the Judge, in not causing to be entered in the minutes of his Court in accordance with his promise and intention, an order extending the time for appellant to file his statement five days, should not be held a waiver of his right to file and have the benefit of his statement.

An order extending the minimum time fixed by statute for filing statement, on motion for a new trial, should in all cases be in writing, and either entered in the minutes of the Court, in open session, or signed by the Judge, and filed, with the papers in the case, within the time prescribed by the one hundred and ninety-fifth section of the Practice Act. To hold that a verbal promise of the Judge to cause an order to be entered, or that a verbal request for an order, verbally granted by the Judge, was sufficient to extend the time for filing the statement, would lead to great confusion and needless controversies. The statement in the present case was not filed by appellant within five days after the filing of the notice of his intention to move, and there was no order of the Court or Judge extending the time beyond the five days. The right of appellant to move for a new trial was, therefore, waived before his statement was filed, and the order of the Court denying his motion cannot be reviewed on this appeal. (Practice Act, Sec. 195; *Caney v. Silverthorn*, 9 Cal. 67; *Munch v. Williamson*, 24 Cal. 167; *Easterby v. Larco*, 24 Cal. 179; *The Bear River and Auburn W. & Mg. Co. v. Boles*, 24 Cal. 354; *Jenkins v. Frink*, 27 Cal. 337; *Hegeler v. Henckell*, 27 Cal. 491; *Le Roy v. Rassette*, 32 Cal. 171.)

The appeal is then left to rest upon the judgment roll, upon the face of which no error appears.

The points urged by appellant upon the judgment roll cannot be considered. The judgment conforms with the requirements of section two hundred of the Practice Act, and objections to the form of the verdict, or that excessive

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damages were thereby awarded, can only be made available on motion for new trial. Such objections cannot be raised for the first time in this Court. (*Douglas v. Kraft*, 9 Cal. 562; *Duff v. Fisher*, 15 Cal. 380; *Van Pelt v. Littler*, 14 Cal. 194.)

Judgment affirmed.

[No. 2,751.]

EDWIN F. CHILD AND CYRUS W. JONES v. HENRY HUGG.

CONFLICT OF EVIDENCE.—If the testimony is conflicting, the judgment will not be disturbed on the ground that it is not warranted by the evidence.

RATIFICATION OF A SALE MADE BY A PLEDGEE.—If a sale of mining stock, pledged as security for money, is made without notifying the pledgor to make his margin good, and without sufficient notice of time and place, still, if the pledgor knew of the time and place of sale, and made no objection, and after the sale approved of it, and promised to pay a balance claimed by the pledgee, he by these acts ratifies the sale.

SALE BY PLEDGEE AT AUCTION.—The question whether a sale of mining stock made in the Board of Brokers is not a sale at public auction, such as a pledgee is authorized to make upon default being made by the pledgor, not decided.

APPEAL from the District Court of the Twelfth Judicial District, City and County of San Francisco.

This action was brought to recover three thousand five hundred and fifty-one dollars and thirty-nine cents for stock purchased for defendant, and commissions and advances, and cash loaned to him by plaintiffs, as brokers. The defendant set up in his answer, by way of counter claim, that for the payment of the indebtedness he pledged as security one hundred shares of the stock of the Bullion Mining Company, and that the plaintiffs sold the same without his authority or permission, and that after the sale the shares were worth thirteen thousand dollars. The testimony showed

that the plaintiffs had the stock in pledge, and sold the same in the Board of Brokers for one thousand one hundred and fifty-two dollars and fifty cents, on the 14th or 15th of September, 1866. The testimony further tended to show that before the suit was brought the Bullion mining stock sold as high as one hundred and sixty dollars per share. The Court below gave judgment for the plaintiffs for the sum claimed, and the defendant appealed.

The other facts are stated in the opinion.

Henry E. Highton, for Appellant.

The sale was invalid, because the appellant was not notified to make his margin good, nor of time or place of sale. (*Markham v. Jaudon*, 41 N. Y. [2 Hand.] 239.)

J. W. Winans, for Respondents.

The question of notice does not arise. The defendant ratified the sale after it was made.

By the Court, TEMPLE, J.:

This appeal presents only a case of conflicting evidence. The testimony of the plaintiffs is sufficiently positive that the account presented to defendant was acceded to by him, and the finding of the Court supports that view. It may be admitted that defendant was entitled to notice to make his margin good before the stock which was pledged could be sold; also, that the notice of the time and place of sale was insufficient. Still, if the evidence of plaintiffs is to be taken as true, defendant did know in advance of the contemplated sale, and of the time and place, and made no objection, and that after the sale he was presented an account, in which he was credited the amount received at the sale; that, knowing all the facts, he admitted the correctness of the account, and even approved of the sale, and

Points decided.

repeatedly afterward promised to pay the balance claimed to be due; that he never, on any occasion prior to the bringing of the suit, objected to the correctness of the account, or to the sale, on account of want of notice, or for any other reason. If this testimony be true, it is sufficient to sustain the finding that the sale had been ratified by the defendant, and we do not feel at liberty to disturb the finding of the Court on that point.

For the same reason, it is not necessary to consider the point made that a sale in the Board of Brokers, where the general public are not at liberty to bid, is not a sale at public auction, such as a pledgee of stock is authorized to make upon default being made by the pledgor.

Judgment and order affirmed.

[No. 2,538.]

PECK & TURNER v. W. E. LOVETT & CO., AND
THOMAS FLINT.

TESTIMONY OF ABSENT WITNESS.—INSUFFICIENT ADMISSION ON MOTION FOR CONTINUANCE.—Lovett and Adams were partners, under the firm name of W. E. Lovett & Co.; Adams sold his interest to Flint, who received in part payment a promissory note signed by the firm name, and afterwards transferred it to other parties who, at maturity, sued for payment. On the trial the parties defendant moved for a continuance, to procure the attendance of Flint as a witness, and in support of the motion, an affidavit was filed stating, that if present, Flint would testify that he had nothing to do either with the execution or delivery of the note, or with the direction of the business of the firm. The plaintiffs admitted that, if present, Flint would testify that he did not sign the note nor authorize any one to sign it for him. On this the Court denied the motion for a continuance, and proceeding with the trial found, that as the note had been signed by Lovett in the firm name, in the presence of Flint, the latter held himself out to the world, by the transaction, as a partner. *Held:* first, that the testimony of Flint, as stated in the affidavit, was competent and material upon the question involved in the finding; second, that the admission of the plaintiffs was not broad enough to cover all the material facts to which defendants expected Flint would testify.

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Argument for Appellant.

APPEAL from the District Court of the Twelfth Judicial District, City and County of San Francisco.

The defendant Lovett and N. C. Adams were partners in a stage line from San José to Los Angeles, under the firm name of W. E. Lovett & Co. In 1867, Adams sold his interest in the business, with the consent of his partner, to defendant Flint, and received in part payment a promissory note from Lovett & Co., payable twelve months from date. Before the maturity of the note Adams indorsed it to the plaintiffs. When presented at maturity it was not paid, but was protested, and in October, 1869, this action was brought to enforce payment of it. The motion for continuance, to procure the attendance of an absent witness, supported by the affidavit noticed in the opinion of this Court, being overruled, the case was tried by the Court and a judgment rendered against defendants Flint and Lovett. Defendant Flint moved for a new trial, and the motion being denied, he appealed.

The other facts are stated in the opinion.

D. S. Gregory, for Appellant.

The plaintiffs at the trial admitted that the appellant Thomas Flint, if placed on the stand, would state that "he did not sign the note" in question, or authorize it to be signed by any one for him; but this admission did not embrace the matter to which the appellant was expected to testify. The affidavit of Bixby states that just upon the eve of the trial it was discovered that Adams could give testimony, not that Flint signed the note or authorized it to be signed, but that he negotiated the said note and delivered the same to the payee, and that Thomas Flint was the only person who could contradict this statement, and which the affiant stated was false. The affiant further declared that it was believed by affiant that Flint would testify, if an oppor-

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tunity to examine him could be had, "that he had naught to do with" nor "was he concerned" in the execution "or delivery of the note."

Accordingly, the Court found, on the testimony of Adams, that Flint delivered the note to the plaintiff, and "by this testimony," held himself out to the world as Lovett's partner—showing how material to the issue the Court below regarded the testimony which Flint was not permitted to deny.

Bodley & Rankin, for Respondents.

There was no error in the Court by the refusal to continue the cause, especially so when plaintiffs admitted that the witness Flint (also one of the defendants), "would testify that he did not sign the note, in the complaint mentioned, or authorize the same to be signed by any one for him." It was a matter for the sound discretion of the Court—which will not be reviewed by this Court, except in cases of gross abuse, to the injury of the party. (*Smith v. Billett*, 15 Cal. 23.)

It is true that issue was only joined on the 4th and the trial had on the 6th day of October, 1869—but it is equally true that the amended complaint was filed November 2d, 1868; that personal service was had on Benjamin Flint, the admitted partner of appellant, on the 31st of December, 1868; that service on appellant was had by publication—which was commenced on April 24th, 1869—and defendant had from that time until the sixth of October to have been personally present at the trial, or to have had his deposition taken.

By the Court, RHODES, C. J.:

It is not now contended that Thomas Flint was, in truth, a member of the firm of W. E. Lovett & Co., but it was

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found by the Court that the promissory note was signed by Lovett in the firm name, in the presence of Flint, and that he and Lovett delivered it to Adams, the payee, in part payment for his interest in the partnership property, which was then sold by him to Flint; and it was also found that Flint held "himself out to the world as a partner of the defendant Lovett, by the transaction aforesaid." In the affidavit which was filed in support of the motion for a continuance of the cause, it is stated that Thomas Flint, if present, would testify, "that he had naught to do with and was wholly unconnected with either the execution or delivery of the promissory note, or with the direction of the business of the said firm of W. E. Lovett & Co." On the hearing of the motion, the plaintiffs admitted that Flint, if present as a witness, would testify "that he did not sign the note, in the complaint mentioned, or authorize the same to be signed by any one for him;" and thereupon the Court denied the motion for a continuance. The testimony of Flint, as stated in the affidavit above alluded to, was competent and material upon the question involved in the finding last above mentioned, as that finding was based upon the alleged participation of Flint in the transaction, in which the note was made and delivered. The admission of the plaintiffs did not extend to all the matters which the defendants expected to prove by Flint. They did not admit that he would testify that he was unconnected with the delivery of the note or with the direction of the business of the firm. The admission was not broad enough to cover all the facts, to which the defendants expected that Flint, if present at the trial, would testify, and the continuance should have been granted.

Judgment and order reversed and cause remanded for a new trial.

Statement of Facts.

[No. 2,876.]

RICHARD H. SINTON, D. J. OULLAHAN, RICHARD J. BUSH, CHARLES CORKERY, J. M. BYRNE, EDWARD BOSQUI, GLUYAS & DUTTON, AND WILLIAM HARNEY v. MUNROE ASHBURY.

POWER OF LEGISLATURE OVER AFFAIRS AND PROPERTY OF MUNICIPAL CORPORATIONS.—The Legislature has the constitutional power to direct and control the affairs and property of a municipal corporation for municipal purposes, and may, for such purposes, so control its affairs by appropriate legislation as ultimately to compel it, out of the funds in its treasury, or by taxation, to pay a demand which in good conscience it ought to pay, though there be no legal liability to pay it.

OPENING OF STREETS A LEGISLATIVE MUNICIPAL PURPOSE.—The opening of streets in a city is clearly a municipal purpose; and whether the cost of such enterprises should be borne by the contiguous property, or by all the property of the city, or a certain proportion by each, is a matter for legislative discretion.

CONSTITUTIONALITY OF ACT TO PAY SAN FRANCISCO MONTGOMERY STREET EXTENSION COMMISSIONERS.—The Act of March 4th, 1870, requiring the City and County of San Francisco to advance out of its treasury a sufficient sum to pay for the services of the Commissioners and certain others employed on the proposed extension of Montgomery and Connecticut streets (Stats. 1869-70, p. 146): *held*, to be clearly constitutional.

ORIGINAL application in the Supreme Court for mandamus.

The grounds upon which the defendant attacked the Act of March 4th, 1870, and rested his defense to this application for mandamus, are thus stated in the affidavit of Mayor Selby, referred to in the opinion:

“That he is advised and believes, and hereby charges and states, that the validity of the proceedings for the extension of Montgomery street and Connecticut street is questioned and attacked, and that it is questionable and doubtful whether or not the proceedings for the extension of said streets will be sustained; that in the event the said proceedings heretofore had should be declared null and void and of no effect, the said streets will not be extended, and no

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assessment will be made for any damage, costs expenses, or charges, and none will or can be collected; and that the City and County of San Francisco would thereupon be entirely without any remedy to collect what the County Judge might compel it to pay to the applicants applying to him to fix their compensation and amount of expenses."

The amount allowed by the County Judge against the city was thirty-two thousand seven hundred and thirty dollars and ninety-six cents; but as anticipated by the Mayor, the streets were never extended; and no assessments were ever collected to reimburse the city and county treasury.

W. H. Patterson, for Relators.

When a person is clothed with power and has assumed the duties of a public officer, he has taken upon himself the obligation to perform those duties; and if he neglects or refuses to do so, any person, whose rights are thereby injuriously affected, is entitled to demand relief, and mandamus is the proper remedy. (Moses on Mandamus, 14.)

There is no constitutional question involved. The matter of the compensation of the relators, directed to be ascertained and paid by the Act of the Legislature, was peculiarly within its province and jurisdiction in the exercise of the sovereign power of taxation. (*People v. Allen*, 42 N. Y. 378; *Litchfield v. Vernon*, 41 N. Y. 123; *People v. Mayor of Brooklyn*, 4 Comstock, 419; *Guildford v. Supervisors of Chenango Co.*, 3 Kernan, 133; *Brewster v. City of Syracuse*, 19 N. Y. 116; *The Providence Bank v. Billings*, 4 Peters, 514; *Beale v. Amador Co.*, 35 Cal. 624; *Blanding v. Burr*, 13 Cal. 350; *Howell v. The City of Buffalo*, 37 N. Y. 267; *Thomas v. Leland*, 24 Wend. 65; *Sharp v. Contra Costa Co.*, 34 Cal. 284; *People v. McCreery*, 34 Cal. 432; *People v. Alameda Co.*, 26 Cal. 641.)

W. C. Burnett, for Respondent.

The Auditor must exercise his *judgment and discretion* in passing upon claims presented to him. Mandamus would not lie against him, but should have been brought, if at all, against the Supervisors. (*Moses on Mandamus*, 15; *Tremond v. Crippen*, 10 Cal. 211; *Ludlum v. Judge Fourth District*, 9 Cal. 7; *People ex rel. S. F. Gas Co. v. Supervisors of San Francisco*, 11 Cal. 42.)

There was no legal or moral obligation, on the part of the City and County of San Francisco, to compensate the relators, nor is the purpose of their payment a municipal one. The demand for payment does not arise from any act of the city and county as a municipal corporation, or as agent of the State Government, nor out of contract. The passing over of the money would be an advance for a time, without consideration, to relators, with a chance of receiving the same amount of money from another source than from relators. No municipal purpose moving to the payment, it cannot be compelled. (*Atkins v. Town of Randolph*, 31 Vt. 226; *Bowdoinham v. Richmond*, 6 Greenleaf, 112; *Brunswick v. Litchfield*, 2 Greenleaf, 28; *Hampshire v. Franklin*, 16 Mass. 88; *Hasbronck v. Milwaukie*; 13 Wis. 37; *Tyson v. School Directors*, 51 Penn. St. 9; *Grogan v. San Francisco*, 8 Cal. 590; *Low v. Marysville*, 5 Cal. 214; *Hammet v. Philadelphia*, 65 Penn. St. 146.)

By the Court, CROCKETT, J.:

This is an application for a mandamus, to compel the Auditor of the City and County of San Francisco to issue his warrant on the General Fund of said city and county for the several amounts found to be due to the relators respectively, by the County Judge, in accordance with the provisions of the Act of March 4th, 1870. (Stats. 1869-70, p. 146.) The

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application is resisted chiefly on the ground that the Act is unconstitutional, and, therefore, void. It appears from the record that proceedings were commenced by the Board of Supervisors under the Act of April 4th, 1864 (Stats. 1863-4, p. 352), for the extension of Montgomery and Connecticut streets, in said city; and the relators were appointed Commissioners to assess the damages and benefits to the property to be affected by the proposed improvement. By the provisions of the last mentioned Act, all the expenses of the undertaking, including the compensation of the Commissioners, were to be borne by and assessed upon the property to be benefited by the improvement; and it was made the duty of the Board of Supervisors to ascertain and declare what property would be thus benefited, and would, therefore, be liable to assessment. This duty was performed, and the Commissioners proceeded to make the assessments as required by law. By the Act of March 4th, 1870, the County Judge was authorized to hear and determine, on the application of the Commissioners, the amount due to them for their services, and for counsel fees, clerk hire, office rent, and other necessary incidental expenses; and on ascertaining the amount due it is made the duty of the County Judge to file his decision or determination with the Auditor of the city and county, who shall, thereupon, draw his warrant on the General Fund in the treasury of the city and county for the amount so ascertained to be due, and the Treasurer is directed to pay the warrant. The amount so paid out of the treasury is to be refunded by assessments on the property benefited by the improvement. The Act further requires that notice of these proceedings be given to the Attorney for the city and county; and the County Judge is authorized to hear testimony and to examine the Commissioners under oath. It appears in the case that the County Judge heard the application of the Commissioners, after due notice to the City and County Attorney, and made his decision in writing, determining the

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amount due, and filed the same with the Auditor, who refuses to issue his warrant because he entertains a doubt whether the Act of March 4th, 1870, is a constitutional and valid enactment.

The argument, by which it is sought to impeach the validity of the Act is, that when the Commissioners were appointed, and rendered the services for which they now seek compensation, the city and county were not, and are not, under any legal or moral obligation to pay for such service, inasmuch as the Act of April 4th, 1864, under which the proceedings for extending the streets were commenced, expressly provides that the entire expense of the work shall be defrayed by assessments on the property benefited by the improvement. It is insisted that the Commissioners accepted their employment, and performed the service, with full knowledge that their services were to be paid for in this method, and not otherwise, and hence that the city and county were under neither legal nor moral obligation to pay for them; and it is denied that the Legislature has the power, under the Constitution, to appropriate the funds of a municipal corporation towards the liquidation of a demand, which the corporation was not under even a moral obligation to pay. It is stated that the funds in the treasury of the corporation were raised by taxation, for municipal purposes only, and can be applied to no other; and that to apply them in satisfaction of a demand, which the corporation was not bound, in good conscience, to pay, would be to appropriate them to a purely private purpose, having no connection whatever with municipal affairs; and the power of the Legislature to do this is denied.

But few branches of jurisprudence have been more fully discussed by American Courts than the extent to which municipal corporations and their property are subject to leg-


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islative control and disposition. But whilst it is conceded in nearly all the cases that a municipal corporation is a subordinate part of the State Government, organized for the more convenient administration of the local affairs of a particular district, and deriving its powers wholly from the Legislature, to whose general control and supervision it is subject, I am not aware that any case has gone so far as to hold that the Legislature may devote the funds of a municipal corporation to purposes confessedly private and having no relation to municipal affairs. But I deem it unnecessary for the purposes of this decision to review the authorities on this point, or to attempt to define with precision the limits of the legislative authority over the property and funds of a municipal corporation. It is established by an overwhelming weight of authority, and, I believe, is conceded on all sides, that the Legislature has the constitutional power to direct and control the affairs and property of a municipal corporation for *municipal purposes*, provided it does not impair the obligation of a contract, and by appropriate legislation may so control its affairs as ultimately to compel it, out of the funds in its treasury, or by taxation to be imposed for that purpose, to pay a demand when properly established, which in good conscience it ought to pay, even though there be no legal liability to pay it. (*Beals v. Amador County*, 35 Cal. 624; *Blanding v. Burr*, 13 Cal. 343; *People v. Board of Supervisors of San Francisco*, 11 Cal. 206; *Sharp v. Contra Costa County*, 34 Cal. 284; *People v. McCreery*, 34 Cal. 432; *People v. Alameda County*, 26 Cal. 641.)

It remains only to inquire whether the appropriation in this case was for a municipal or for a purely private purpose. The work in respect to which the services of the Commissioners were rendered was clearly one of great public importance. It related to the extension of the principal street of the city; and the enterprise was set on foot and ordered to be carried forward by the Board of Supervisors. The

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law, as it then stood, it is true, directed the compensation to the Commissioners to be paid by means of assessments on the property benefited; and it may be assumed that when they accepted this employment, and performed the service, it was with the distinct understanding that they were to look to this source only for their compensation. But it appears from the affidavit of Mayor Selby that grave doubts were entertained whether the whole enterprise for extending the streets might not ultimately fail, and no assessments be collected out of which to defray the expenses; and it was possibly in view of this contingency that the Legislature deemed it but just and equitable that the city and county should advance the money to the Commissioners, and take the chance of being reimbursed out of the assessments. The Board of Supervisors having set on foot a plan for extending the principal street of the city through many blocks, and caused private citizens to expend their time and labor in furtherance of the enterprise, it may well be that when doubts arose as to the success of the undertaking the Legislature deemed it equitable that the hazard of the contingency should be borne by the city and county, and not by the Commissioners. But the compensation to the Commissioners is only an inconsiderable portion of the expense which was expected to result from the extension of the streets; all of which is to be assessed on the contiguous property, which it is supposed will be chiefly benefited by the improvement. But if the Legislature should decide, even after the whole enterprise is completed, that it would not be just to assess upon the contiguous property the entire cost of opening a great artery for trade and travel through the heart of a populous city, and should require a portion of the cost to be defrayed out of the city treasury, or by taxation on all the inhabitants, I am not prepared to say it would exceed its constitutional power. The opening of streets is clearly a municipal purpose, and whether the cost of such



Points decided.

enterprises shall be borne by the contiguous property, or by all the property of the city, or a certain proportion by each, is a matter for legislative discretion. It cannot, with propriety, be asserted that it is inequitable to compel all the property of a city to contribute toward opening and maintaining its principal highways. These views appear to be supported by the following authorities: *Thomas v. Leland*, 24 Wend. 65; *Brewster v. Syracuse*, 19 N. Y. 117; *People v. McSpedon*, 21 How. Pr. R. 178; *People v. Pickney*, 32 N. Y. 393; *People v. Morris*, 13 Wend. 395; *People v. Batchelor*, 22 N. Y. 128; *Police Commissioners v. County Court*, 34 Mo. 546; *Layton v. New Orleans*, 12 La. An. R. 515.

In this case all that the Legislature has attempted to do is to compel the city and county to advance, out of its treasury, a small portion of the cost of opening one of its chief thoroughfares until the amount shall be reimbursed by means of assessments on the property to be principally benefited, and I think the Act is clearly constitutional.

It is therefore ordered that the writ issue as prayed for.

RHODES, C. J., and TEMPLE, J., concurring:

We concur in the judgment.

[No. 2,189.]

WALTER BOHALL v. D. N. DILLER.

CONSTRUCTION OF WRITTEN CONTRACT.—In a contract for the payment of money at different periods of time, with an extension of time, if needed, for the payment of an installment the extension is a privilege of which, if the party entitled to it desires to avail himself, he must notify the other party, on or before the day upon which the installment becomes due, that he needs the extension.

COMPLAINT IN ACTION FOR DAMAGES.—In an action for damages the plaintiff must allege, in his complaint, that he has sustained damages, in order to sustain a judgment for damages.

Argument for Appellant.

CONCURRENT COVENANTS.—A party who agrees to convey land upon payment of the purchase money, cannot recover the purchase money due upon the contract until he tenders a deed, if all the installments became due before the action was brought.

ALLEGATION OF TENDER.—In such a case the complaint must allege a tender of a conveyance.

RESCISSION OF CONTRACT.—**VENDOR AND VENDEE.**—When a vendee has so failed to perform the contract that the vendor may elect to treat the contract as rescinded, it is incumbent upon the vendor, in order to work that result, to restore to the vendee whatever he has paid on the contract.

IDEM.—**MUST BE ENTIRE.**—The rescission of a contract, to be effectual, must be a rescission *in toto*.

IDEM.—**ALLEGATION IN COMPLAINT IN EJECTMENT.**—In order to recover possession of premises on the ground of rescission of contract, the plaintiff must allege a repayment or tender of the amount paid by the defendant at the execution of the contract.

APPEAL from the District Court of the Eighth Judicial District, County of Klamath.

The facts are stated in the opinion of the Court.

George Cadwalader, for Appellant.

Bohall does not aver that he demanded payment, or that he tendered Diller a conveyance. On the last branch he says "he was prepared to do it on the 1st of April, 1866." This is not sufficient. (*Hill v. Grigsby*, 35 Cal. 656.) This suit was commenced twenty-six days before the needed extension of time for the April payment expired. The option of the extension was entirely with Diller. It was not necessary for him to ask Bohall for it; for the latter could not refuse it. This could not be damaging to Bohall; for with the extension to Diller went the interest or use of one per cent per month to Bohall. Look at the complaint in any aspect, and it declares no cause of action. The judgment of the Court seems to have an element in it entirely unwarranted by the complaint. We refer to the three hundred and fifty dollars damages. (*Pittsburg Coal Co. v. Greenhood*, 39 Cal. 71.)

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Walter Van Dyke, for Respondent.

The plaintiff, in his complaint, alleges, in addition to what appellant's counsel quotes in his brief: "That at all times he has complied with the several obligations and agreements imposed upon him in any way by said instrument and said agreement; and he further alleges that said defendant has complied with none of the obligations, promises, and undertakings imposed upon him by said agreement." This is sufficiently pleading the performance of conditions precedent in a contract. (Pr. Act, Sec. 60; *Cal. St. Nav. Co. v. Wright*, 6 Cal. 268; *People v. Jackson*, 24 Cal. 632.)

By the Court, RHODES, C. J.:

The complaint states that the plaintiff was the owner and in possession of the premises in controversy; and that he and the defendant entered into a contract in writing for the sale of the land by the plaintiff to the defendant. By the contract it appears that the price to be paid was six hundred dollars — fifty dollars paid in hand, one hundred dollars to be paid on the 1st of August, 1865, and four hundred and fifty dollars on the 1st of April, 1866, "with a continuance of time of payment, if needed, on the last mentioned amount, six months;" and that the plaintiff, upon the payment of the purchase money, was to convey the premises to the defendant. It is further stated that the plaintiff put the defendant into the possession of the premises, and that the defendant is now in possession; that the defendant has not paid any part of either of the last two mentioned sums; that the defendant has not made any application for an extension of time for the payment of the last mentioned sum; and that on the 1st of April, 1866, the plaintiff "was prepared to convey" the premises to the defendant. The prayer is that the defendant be decreed to surrender to the plaintiff

the possession of the premises, and that the plaintiff have judgment for five hundred and fifty dollars, with interest, as damages for the breach of the contract, and for the use of the premises, and also for general relief. The plaintiff had judgment for the recovery of the possession of the premises, and for three hundred and fifty dollars damages. The appeal is from the judgment.

The "continuance of time of payment" for six months, mentioned in the contract, was a privilege granted to the defendant; and if he desired to avail himself of it, it was incumbent on him to notify the plaintiff, on or before the day mentioned for the payment of the last installment, that he "needed" such extension of time. It not appearing that such notice had been given, the last installment had become due before the commencement of the action.

The complaint is not sufficient to sustain the judgment. It is not alleged in the complaint that the plaintiff has sustained damages, and, therefore, he is not entitled to a judgment for damages.

He cannot recover the purchase money; for the agreement was that the conveyance should be executed upon the payment of the purchase money; and, as the last installment had become due before the action was commenced, it was necessary for him to tender a deed before suing for the purchase money. The covenants in such case are concurrent. The plaintiff has not alleged a tender of a conveyance of the premises.

The plaintiff having stated the contract of sale, and alleged that under it he placed the defendant in possession of the premises, it became necessary for him, if he desired to recover the possession, to show, that the contract was rescinded. When a vendee has so failed to perform the contract, that the vendor may elect to treat the contract as rescinded, it is incumbent on the vendor, in order to work that result, to restore to the vendee whatever he has paid on the contract.

Points decided.

A rescission of a contract, in order to be effectual, must be a rescission *in toto*. The plaintiff has failed to allege a repayment, or tender of the amount paid by the defendant, at the execution of the contract. He, therefore, cannot proceed to recover the possession of the premises on the ground of a rescission of the contract.

Judgment reversed, and cause remanded, with leave to the plaintiff to amend his complaint.

[No. 2,403.]

THE MAYOR AND COMMON COUNCIL OF THE
CITY OF SAN JOSE ET AL. v. JOHN TRIMBLE.

MEXICAN GRANT, INCLUDING PRIVATE CLAIM.—A Mexican grant was confirmed by the United States, excepting certain tracts included within its exterior boundaries, granted to private claimants. Land claimed as part of a tract thus excepted was excluded by an official survey of the tract; *held*, that the land thus excluded is a portion of the land confirmed in the larger grant.

CONSTRUCTION OF STATUTE.—LIMITATION TO RECOVERY UNDER MEXICAN GRANT.—An actual adverse possession of five years subsequent to the passage of the Act of 1863, relative to Spanish and Mexican grants, will, in certain cases, bar a recovery under a title derived from Spain or Mexico, even though the title was not confirmed until after the expiration of the five years.

ADVERSE POSSESSION AS BAR TO RECOVERY.—Adverse possession, in order to bar a recovery by the true owner, must have continued, without interruption, during the statutory period. If interrupted, even by force of fraud, and the possession be recovered by a peaceable or forcible entry, or by process of law, the continuity is broken, and the statute begins to run only from the time of the reentry.

APPEAL from the District Court of the Third Judicial District, County of Santa Clara.

Plaintiffs had judgment, and defendant appealed.
The other facts are stated in the opinion of the Court.

Argument for Appellant.

Moore, Laine & Silent, for Appellant.

The proofs show that the defendant Trimble entered into the possession of the premises under a paper title, 1857; that he in all things subjected it to his dominion and control; claimed it as his own against all the world; had it inclosed, and cultivated it, and continuously and uninterruptedly held it until at least as late as January, 1863. The complaint was not filed until the 14th of October, 1868. This gave the defendant title under the statutes of this State. The sixth section of our statute of limitations governs in ejectment. (24 Cal. 289.) The possession of the defendant was adverse, under sections ten, eleven, twelve, and thirteen of Acts of Limitations. (2 Hittell, 4352-4356.) The Court placed its instructions on the ground that, as the plaintiffs claimed title under a Spanish or Mexican grant, the statute did not run until final confirmation. Until the amendment of April 18th, 1863 (2 Hittell, 4348, and foot note), a party claiming under such grant had the special privilege of maintaining an action of this kind, if commenced within five years after final confirmation. (See 24 Cal. 114; 26 Cal. 23; 27 Cal. 57; 33 Cal. 448.) This was a special privilege, not really necessary to the protection of such titles, as ejectment could be maintained on such titles, without confirmation. (18 Cal. 198; 21 Cal. 552; 10 Cal. 589; 33 Cal. 102.) By Act of 18th April, 1863 (Stats. 1863, pp. 325, 327), this privilege was limited. All grants then not finally confirmed had to be sued on within five years, or be barred of their remedy where there was one adverse holding. This suit was not so brought; and the defendant's five years holding made him a perfect title. The Spanish grant claimants did not take advantage of the proviso, since they ask this special privilege. It was a mere proviso, and not an exception. The statute was against a Spanish title, as well as

Argument for Respondent.

any other, unless the holders took advantage while it existed. Statutes conferring such privileges are strictly construed. (Cooley's Constitutional Limitations, 393, 394, and authorities there cited.) The plaintiffs allowed their time to pass, and their title is governed by the general statute; and under the statute the defendant's long continued possession, before the pretended ouster of the Ogans, gave him a title that could not be divested, except by conveyance or a possession adverse to his own continuance for five years. (See *Arrington v. Liscom*, 34 Cal. 363; *Stockmon v. Cannon*, 36 Cal. 535.) The Court misdirected the jury as to this matter throughout the instructions.

J. Alexander Yoell, for Respondent.

The construction of section six of the Act of 1863, contended for by appellant, is that the plaintiff's remedy was barred before her right accrued. This is not a case of a grant of a specific quantity within large exterior boundaries, but it is a grant of all contained within the exterior boundaries, excepting a certain grant within said exterior boundaries, the quantity and boundaries of which said interior grant remained to be determined, and located, and segregated; and until that question was finally determined, the lands in dispute could not be affected by the statute of limitations. (*Mayor, etc., v. Urridias*, 37 Cal. 339.) Such a construction as is given by appellant, would only give a few months, or weeks, or days, within which to commence an action to a certain class of titles, to wit: such as were only confirmed a few months, or weeks, or days before five years after the passage of the Act, and all those confirmed after that date, would be barred before the right accrued. Can the Legislature, in defiance of the Constitution and the Treaty of Guadalupe Hidalgo, say: If your title is finally confirmed to you by the Courts of the United States within five years from this date (the passage of the Act), you may

have your land, but if it is not, then you can't get it, although you could not sue for it before? I submit that it cannot, and that such an Act is clearly unconstitutional. (*Brooks v. Hyde*, 37 Cal. 366; *Lathrop v. Mills*, 19 Cal. 513.) In this case the defendant did not show, nor did he have a five years' continuous adverse possession at the commencement of this action, and therefore could not claim the bar of the statute he contends for. (Hittell, Art. 4,351; *San Francisco v. Fulde*, 37 Cal. 349; *Brooks v. Hyde*, supra; *Stevenson v. Bennett*, 35 Cal. 424; *Leese and Vallejo v. Clark*, 3 Cal.; *Maguire v. Tyler*, 8 Wallace, 650; *Jordon et al. v. Barrett et al.*, 4 How. 169; *Lee v. Norris*, Cro. Eliz. 331; *Arrington v. Liscom*, 34 Cal. 365.)

By the Court, CROCKETT, J.:

The action is ejectment, and the plaintiffs are clearly entitled to recover, unless the defendant has established a valid defense under the statute of limitations. The plaintiffs claim under a final decree of the Supreme Court of the United States, rendered in June, 1866, confirming to them a large tract, which includes the premises in controversy; but on the face of this decree there is excepted from its operation certain tracts granted by the Spanish or Mexican Governments to private claimants; and of these excepted tracts the "Rancho Milpitas" was one. This tract was granted by the Mexican Government to one Alviso, whose title was confirmed by a final decree of the proper tribunal of the United States prior to the year 1863; and an official survey thereof was made by one Thompson, a Deputy United States Surveyor, which survey included the premises in controversy as a part of said rancho. But in September, 1863, this survey was set aside by competent authority and a new survey ordered, which was accordingly made and became final in December, 1868. This survey excluded the premises in con-

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troversy from the Milpitas Rancho; and it results, as a necessary conclusion from these facts, that said premises are a portion of the lands finally confirmed to the plaintiffs by the decree of June, 1866.

But it appears in the case that as early as 1851, Alviso, claiming to be the owner of said premises as a portion of the Rancho Milpitas, sold and conveyed them; and the defendant derails title under this conveyance. It further appears that the defendant and his predecessors entered under this title, and had the actual and undisturbed possession from 1851 to 1863, in which last named year the defendant was forcibly evicted from the whole tract, or the greater portion thereof, by one Ogan, who had the actual possession until the early part of the year 1866, when the defendant regained the possession by process of law, and has ever since remained and is yet in possession. The present action was commenced in October, 1868, and the defense chiefly relied upon is the statute of limitations.

The title of the plaintiffs is derived from the Spanish and Mexican Governments, and under the amendment of 1855 to the statute of limitations, it is quite plain that if that amendment had remained in force the statute would not have commenced to run against the plaintiffs until after their claim was finally confirmed and had been located by a final, approved survey. But in 1863 the statute was again amended and materially modified, in respect to actions or defenses founded on titles derived from Spain or Mexico. The sixth section of the amendatory Act, after providing that time which had already run under the existing law, should be taken and computed as a part of the time limited in said amendatory Act, for the commencement of an action or making a defense thereto, proceeds as follows:

“Provided, further, that any person claiming real property, or the possession thereof, or any right or interest

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therein under title derived from the Spanish or Mexican Government, or the authorities thereof, which shall not have been finally confirmed by the Government of the United States or its legally constituted authorities, more than five years before the passage of this Act, may have five years after the passage of this Act in which to commence his action for the recovery of such real property or the possession thereof, or any right or interest therein, or for the rents and profits out of the same, or to make his defense to an action founded upon the title thereto; and provided, further, that nothing in this Act contained shall be so construed as to extend or enlarge the time for commencing actions for the recovery of real estate or the possession thereof, under title derived from the Spanish or Mexican Government, in a case where final confirmation has already been had, other than is now allowed under the Act to which this Act is amendatory."

This provision is by no means free from ambiguity; but as I interpret it, the substance of the enactment is that if a title derived from Spain or Mexico had been finally confirmed prior to the passage of said amendatory Act, an actual adverse possession for five years or more after the final confirmation will bar a recovery. But if the title had not been finally confirmed at the time of the passage of the amendatory Act, five years from *the date of its passage* is allowed within which to commence the action against one in the actual adverse possession, without reference to the date of the subsequent confirmation. In other words, an actual adverse possession of five years subsequent to the passage of the Act of 1863, or the time when it took effect, will bar a recovery under a title derived from Spain or Mexico, even though the title was not confirmed until after the expiration of five years.

Prior to the passage of this Act, an adverse possession,

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however long continued, would not defeat a recovery under this class of titles, unless it continued for five years after final confirmation, and before action brought. But in the Act of 1863, the Legislature saw fit to declare that no more than five years from *that date* should be allowed to holders of these titles, which were not then confirmed, within which to commence their actions against persons in the actual adverse possession. Nor is there anything unreasonable or unjust to the holders of these titles in this provision. A long period had already been allowed them within which to perfect their titles and to commence proceedings for the expulsion of intruders, and yet a further period of five years was allowed, by the Act of 1863, for that purpose. They were under no necessity to await a final confirmation before proceeding against intruders, inasmuch as it has been repeatedly decided by this Court that the holder of a Mexican or Spanish grant is entitled to the possession of the whole tract included within the exterior limits of his grant, pending the proceedings for the confirmation of his title, and may maintain ejectment therefor prior to the final confirmation. The holders of these titles, therefore, have no just cause to complain that the Legislature has not been sufficiently indulgent, or has not afforded them the most ample opportunity to protect their rights; and a just regard for the repose of titles demanded that this species of litigation should be speedily ended.

Applying these principles to the case in hand, the conclusion is inevitable that, if the defendant was in the actual adverse possession of the premises in controversy for five years after the Act of 1863 took effect, and prior to the commencement of the action, the plaintiffs were not entitled to recover. But it appears from the evidence that, from the latter part of 1863 to the early part of 1865, the defendant's possession was interrupted by the forcible intrusion of Ogan, who had the actual possession during that period. It is well

settled that an adverse possession, in order to bar a recovery by the true owner, must have continued without interruption during the statutory period. It must have been continuous, and not at intervals only. (*San Francisco v. Fulde*, 37 Cal. 349, and cases there cited.) If interrupted, even by force or fraud and the possession be recovered by a peaceable or forcible entry, or by process of law, nevertheless the continuity of the possession was broken, and in such case the statute will begin to run only from the time of the reëntry. After the intrusion of Ogan, the defendant recovered the possession in 1865, and five years did not thereafter elapse before the commencement of the action. The defense under the statute was, therefore, not made out. The evidence was conflicting as to the value of the rents and profits, and in respect to the fact whether the possession of Ogan included the whole or only a portion of the premises in controversy, and we cannot disturb the verdict on the ground that it is not supported by the evidence.

Judgment affirmed.

[The foregoing opinion was rendered at the December term, 1870. A rehearing was granted, and the following opinion was delivered at the July term, 1871.—REPORTER.]

By the Court, RHODES, C. J.:

We have carefully considered the question in this case, arising upon the construction of the sixth section of the Act of 1863, amendatory of the statute of limitations of 1850, and in our investigations we have had the aid of very elaborate arguments of several counsel who are interested in the question. The reëxamination of the question has strengthened our conviction, that the conclusion announced in our former opinion is correct. We deem it unnecessary to discuss the question at any length at this time. It is proper,

however, to say that in our opinion, it is clear that the Act of 1855 was repealed by the Act of 1863. The principal purpose of the Act of 1863 was to place all title, all rights of entry, and all rights of action, on the same footing, so far as respects the statute of limitations; to require every person, whatever may be the source or nature of his title, to whom a cause of action accrues for the recovery of the possession of lands against a person in the adverse possession thereof, to commence his action within the period mentioned in the Act, or be forever barred of his remedy.

To avoid certain misapprehensions which, from the arguments of some of the counsel, seem to exist, it should be stated that we do not hold that where, for any cause, a party has no right of entry, or cannot maintain an action, the statute will run against him. Nor do we hold that if a party acquires a second right of entry, or right of action, that he may not maintain his action within the time limited by the Act, although his remedy under his former right of entry may have become barred. It is unnecessary to express any opinion as to whether a person, while holding one right of entry, can acquire a second, nor whether such second right of entry accrues in the case of a confirmation survey or patent of a "sobrante grant" or a Spanish or Mexican grant of any character.

Judgment affirmed.

[No. 2,719.]

JOHN WILSON v. M. CAPURO AND G. CAPURO.

BANKRUPTCY.—ACTION BY CREDITOR AFTER PROVING DEBT.—Under the provisions of section twenty-one of the United States Bankrupt Act of 1867, a creditor who has proved his debt is deemed to have waived his right of action against the bankrupt, and cannot maintain such action.

CONTROL OF BANKRUPT'S ASSETS EXCLUSIVE IN FEDERAL TRIBUNALS.—It is the intent of that Act that the Federal tribunals shall have the exclusive control of the assets of the bankrupt, and shall distribute the proceeds among his creditors.

APPEAL from the District Court of the Fifth Judicial District, County of San Joaquin.

The plaintiff demurred to defendants' answer, the demurrer was overruled, and the defendants obtained judgment, from which the appeal was taken.

The other facts are stated in the opinion.

Byers & Elliott, for Appellant.

Section twenty-one of the Bankrupt Act of 1867 was not intended to mean that if the bankrupt shall have been guilty of palpable frauds of so gross a character that he dare not make an attempt to get a discharge, that the creditor shall be compelled to remain content with having proved up his claim, whether he shall have received a dividend or not, and not be permitted to enforce his claim in action subsequently brought upon the unpaid claim. Such a construction is a bid for fraud. It is true the creditor might decline to prove up his claim and depend upon preventing the bankrupt's discharge, and collect his debt out of the future acquisitions of the bankrupt; this remedy would be no less unfavorable for the creditor than proving up his claim in the hope of obtaining a dividend. The parties proving up would have

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no object in opposing the discharge, if they had waived all right of future action by proving their claim; and this notwithstanding the bankrupt had committed a thousand fraudulent acts which would prevent his discharge, if suggested in opposition thereto. (Compare section five of the Bankrupt Act of 1841, found in Hilliard on Bankrupt., p. 442, and section twenty-one of the Act of 1867; *Hamlin v. Hamlin*, 3 Jones' Eq. N. C. 191; *Haxtun v. Corse*, 2 Barb. Chan. 506.) No plea but a discharge will suffice to abate the suit. The creditor has a right to prosecute his suit notwithstanding the proceedings in the Court of bankruptcy, no discharge being pleaded, unless he be enjoined from further proceedings by an order from the Court in which the insolvency proceedings are pending. (*In re Bellows & Peck*, 3 Story, 428.)

It appears from this case that the United States District Court might restrain the creditor from proceeding further in the State Court until the termination of proceedings in bankruptcy. Should no injunction be thus placed on the creditor, he is at liberty to pursue his action to judgment. The State Court is under no obligation to suspend any proceedings properly before it on account of any proceedings pending in the United States Court. Neither should it — for the debtor, if desiring it, may procure an order restraining the creditor, but this order cannot effect the jurisdiction of the State Court, but will simply render the creditor amenable for contempt of Court in thus pursuing his action, should he refuse to discontinue it.

The State Court cannot recognize a plea of insolvency proceedings pending, as any defense to an action, as it is not made a defense by any statute. Neither should it, upon this plea, discontinue the suit. (*Hobart v. Haskell*, 14 N. H. 127; *In re Roseberg*, 2 B. R. 81; *In re Metcalf et al.*, 6 I. R. R. 223; *In re Reed*, 6 I. R. R. 21; *In re Jacoby*, 6 I. R. R. 149; *In re Myers*, 1 B. R. 162; James' Bankruptcy, 139; *Atkin-*

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son v. Fontenberry, 7 S. & M. 302; *Ingass v. Savage*, 4 Barr, 224.)

In the case at bar the Court has, upon the defendant's plea of proceedings pending, ordered a dismissal of the case and judgment for defendant for his costs.

It will appear from the answer of defendant that his petition in bankruptcy was filed in April, 1868. No steps have ever been taken to obtain a discharge. The Court by its judgment finds that the plea of proceedings pending is a complete bar to the action as fully as the plea of discharge would have been. But as we have seen, the stay, where granted, is only to obtain time to get a discharge and plead it in defense. Why should any stay be ordered if the plea of proceedings pending is a complete defense, entitling the defendant to a judgment for his costs? The tenor of every decision is that where proceedings in insolvency are pending, the proper Court (United States District Court) may restrain the creditor from further proceedings until the debtor has had an opportunity of applying for his discharge; for it was held *In re Rosenberg*, 3 B. R. 81, that if the discharge be refused the stay ceases, and the creditor is entitled to prosecute his action to judgment.

J. H. Todd, for Respondents.

Section twenty-one of the Bankrupt Act of 1867 has reference to two classes of creditors of the bankrupt: first, creditors who prove their debts in the bankruptcy proceedings; second, creditors who do not prove their debts, but whose debts are provable under the provisions of said Act. The first class are, under the provisions of the section, not allowed to maintain any suit at law, etc., for the debts proven. The second class are not allowed, by the provisions of the second clause of section twenty-one, to prosecute to judgment any suit on the debts which are provable without permission of the Bankrupt Court, until the question as to the

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bankrupt's final discharge be determined. The pendency of the proceedings in bankruptcy, and the proof made therein by the creditor, if not a matter in bar, must, at the very least, be a matter in abatement of any action which the creditor may bring for the debt which he has proven. It was not the intention of Congress that a creditor should be allowed to pursue two remedies at the same time and in different tribunals for the same indebtedness. The State Courts must take notice of the laws of Congress and be governed thereby, so far as they may affect the rights of the parties litigant in the State Courts. The Constitution and the laws of the United States which shall be made in pursuance thereof, are the supreme law of the land, and the Judges of every State are bound thereby. (Art. VI, Const. of the U. S.)

The first clause of the twenty-first section of the Bankrupt Act is not ambiguous; it requires no judicial interpretation to explain its meaning. The question is not what should have been, but what are the provisions of the Act in reference to the effect of proving a debt by a creditor in the proceeding in bankruptcy. In *Haxtun v. Corse*, 2 Barb. Chan. Rep. 532, Chancellor WALWORTH held that by the mere act of proving the debt, for the recovery of which proceedings were pending in the State Courts, such proceedings were absolutely surrendered, relinquished, and discontinued; and the Chancellor quotes with approbation the opinion of Judge Ware, in the case of *Everett v. Derby*, 5 Law Rep. 225. The language of the Bankrupt Act is: "That no creditor, proving his debt or claim, shall be allowed to maintain a suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action and suit against the bankrupt, and all proceedings already commenced shall be deemed to be discharged."

If, then, "the proving of the debts operates as a surrender *ipso jure* of the action, and is a bar to any further proceed-

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ings in that suit," by parity of reason, such proof must be a bar to an action in the State Courts to recover the debt so proven.

The Chancellor, in *Haxtun v. Corse*, 2 Barb. Chan. R. 529, gave, as his opinion, with considerable hesitation, that the proof of a debt in proceedings in bankruptcy would not bar the creditor who proved the debt of all right to the future acquisitions of the bankrupt; but that was not the real point at issue in that case. The real point at issue was, whether the proof of the debt operated *ipso jure* as a surrender of a judgment for the same demand rendered before the debt was proven; and the Chancellor, without hesitation, held that it did so operate.

There is a difference between the English statutes in respect to the effect of the proof of a debt against a bankrupt's estate and the bankrupt law of the United States on the same subject.

The fourteenth section of the statute, 49 Geo. III, Chap. 121, declared that the proving of a debt under a commission against the bankrupt should be deemed an election by the creditor to take the benefit of such commission in respect to the debt so proven. By the United States Bankrupt Act, the creditor proving his debt shall be deemed to have waived all right of action and suit against the bankrupt.

The provisions of the Bankrupt Act against the right of a creditor who has proven his debt to maintain an action therefor, is much more pointed and stringent than the English statute on the same subject.

If the proof of a debt be a defense in any Court, why not in a State Court? It was held to be a defense in *Haxtun v. Corse*, hereinbefore cited. The cases cited by the counsel for appellant were those arising under the second clause of the twenty-first section of cases arising under the clause of

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the thirty-third section above referred to. United States District Courts have jurisdiction in their respective districts only. (Bankrupt Act, Sec. 1.)

In case the creditor of a bankrupt should be without the jurisdiction of the United States District Court having cognizance of the bankruptcy proceedings, the bankrupt might be without remedy against the claim of such creditor, although he may have proven his debt and thereby become entitled to a dividend from the bankrupt's estate. If the United States District Court have no jurisdiction of the person of the creditor, it could make no effective order restraining him from pursuing his action in the State Court.

The proof of a debt by a bankrupt creditor is *ipso jure* a surrender of a judgment for the same debt, and available in a State Court. (See *Haxtun v. Corse*, above cited.) And, as respondent claims, it is also an absolute waiver of all right of action for the same debt, and is available as a defense in a State Court in an action for the same debt.

A creditor whose debt is provable—not proven—does not waive his right of action against the bankrupt; but any action such creditor may commence to enforce the collection of the debt, may be restrained upon the application of the bankrupt to await the determination of the Court in bankruptcy on the question of the discharge.

This restraining order should, of course, be made by the Court in bankruptcy, which has jurisdiction of the matter, and not by the State Court.

The proving by a creditor of the debt not created by fraud is a defense available in any Court. The fact that the debt is provable, though not proven, is a matter entitling the bankrupt to a temporary restraining order from the Court in bankruptcy against the creditor until the question of the bankrupt's discharge be determined therein.

By the Court, RHODES, C. J.:

This action was brought on a promissory note. The defendants, among other defenses, alleged that they, as partners, commenced proceedings in bankruptcy; that they were duly adjudged bankrupts; that the proceedings are still pending; and that the plaintiff appeared in those proceedings and proved the indebtedness of the defendants to him on the note in suit. The demurrer which was interposed to this defense, raises the only question in the case.

It is provided by section twenty-one of the Act of 1867, to establish a uniform system of bankruptcy throughout the United States (14 U. S. Stats. 526), "that no creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action and suit against the bankrupt," etc. It is clear, from this provision, that a creditor who has proved his debt in the bankruptcy proceedings, cannot maintain an action on the same demand against the bankrupt. His right of action in the State Court, as well as in the Federal Courts, is waived. The purposes of the Act would, in a great measure, be defeated were the creditor permitted to recover a judgment on his debt, after having proved it in the bankruptcy proceedings. It is the intent of the Act that the Federal tribunals shall have the exclusive control of the assets of the bankrupt, and shall distribute the proceeds among his creditors. A judgment in a State Court, on a debt which has been proved in the proceedings in bankruptcy, would be useless unless it gave the creditor some lien or priority that he otherwise would not possess, or enabled him to enforce the payment of the judgment without regard to the proceedings in bankruptcy. A discharge in bankruptcy would be no relief to the debtor, if the creditor, after participating in those proceedings, were entitled to maintain an action on his debt.

Points decided.

No question arises in the case, as to whether a creditor can maintain an action, when the debtor has unduly delayed in procuring his discharge, or when the discharge has been denied, or when he has been guilty of fraud in the proceedings in bankruptcy; for no facts of that character are alleged or proved.

Judgment affirmed.

[No. 2,821.]

E. S. EMERSON v. ELIAS SANSOME

SHERIFF'S DEED DOES NOT CONVEY AFTER-ACQUIRED INTEREST.—A Sheriff's deed transfers to the purchaser all the interest the execution debtor had in the land sold at the date of the levy, but no subsequently acquired right or interest of such debtor.

EXECUTION DEBTOR NOT ESTOPPED FROM SETTING UP AFTER-ACQUIRED TITLE.—An execution sale and Sheriff's deed does not estop the execution debtor from asserting a subsequently acquired interest or right of possession to the land sold, as against the right of possession and interest sold and transferred by the Sheriff's deed.

POSSESSORY RIGHTS UNDER THE UNITED STATES HOMESTEAD LAW.—Where the possessory claim of a settler on public land was sold out on execution, and afterwards he entered the same land as a homestead, under the Act of Congress of May 20th, 1862; *held*, that he had by his homestead entry acquired from the paramount proprietor a right and interest in the land which he did not possess at the time of levy and sale, and that this newly-acquired right and interest vested an independent right of possession, which would constitute a complete and valid defense to an action of ejectment based on the Sheriff's deed.

RENTS AND PROFITS OF POSSESSORY CLAIM SOLD BY SHERIFF.—Where the possessory claim of a settler on public land was sold out on execution and he afterwards entered the same land as a homestead, under the Act of Congress of May 20th, 1862; *held*, that, though the purchaser under the Sheriff's deed might not be entitled to the possession of the land, which had so been entered as homestead, he was entitled to the rents and profits for so long as the settler occupied the land intermediate the Sheriff's deed and homestead entry.

APPEAL from the District Court of the First Judicial District, San Luis Obispo County.

Argument for Appellant.

This was an action of ejectment for a piece of land in San Luis Obispo County, commenced in March, 1869. It appears that in July, 1868, two judgments were recovered by the plaintiff in a Justice's Court against the defendant, who had settled upon and was in possession of the land in question; that in August following the Sheriff, on executions duly issued on such judgments, levied upon and sold out all the right, title, interest, and claim of the defendant in and to the same; that the plaintiff became the purchaser and received the Sheriff's deed in February, 1869; that the defendant had continued in possession; and that in February, 1870, and after the commencement of the suit, defendant filed his declaration of intention to hold the same as a homestead right, in the United States Land Office, pursuant to the Acts of Congress to secure homesteads to actual settlers on the public domain, of May 20th, 1862, and March 21st, 1864.

There having been findings and judgment in the Court below in favor of the plaintiff for possession of the land and two hundred dollars damages, for withholding the same, the defendant appealed.

L. D. Latimer, for Appellant.

It is well settled that a Sheriff's deed on execution conveys only the right, title, or interest that the judgment debtor had at the time of the levy of the execution. No title or interest that defendant acquired after the sale passed by the Sheriff's deed. (*Montgomery v. Whiting*, Oct. Term, 1870; *Freeman v. Caldwell*, 10 Watts. 9; *England v. Clark*, 4 Scam. 486.)

Nor was the defendant estopped from showing an after-acquired title or right as against the plaintiff. The deed of the Sheriff was not the deed of the defendant. The Sheriff

Argument for Respondent.

could not have bound the defendant by covenant; but there was no covenant, and hence no estoppel. (*Clark v. Baker*, 14 Cal. 628.)

Whatever the character of defendant's possession may have been prior to his entry of the land as a homestead, it is plain that from the time of such entry his possession was rightful. By the entry he connected himself with the original source of title—the United States—and acquired an interest in the land, and the right to its possession. By such entry he added to his naked possession the absolute right of possession; and there being no estoppel, he was entitled in this action to assert such subsequently acquired right.

William J. Graves, for Respondent.

The purchaser under an execution, in an ejectment against the defendant in the execution or one claiming under him, need not show any other title than a judgment, execution, and Sheriff's deed; and defendant will not be permitted to controvert such title by showing it to be defective or by setting up a better outstanding title in a third person. (*Lessee of Cooper v. Galbraith*, 3 Wash. C. C. 550; 3 Caines, 188; 10 John. 223; 2 Yeates, 443; 5 Binney, 270; 4 John. 22; 2 Binney, 463.)

The homestead entry conferred no title on Sansome. By his application he merely placed himself in the predicament of a person who could acquire a homestead right. He could acquire no title until he should have resided upon the land continuously, or cultivated it for the period of five years. By filing his affidavit, and paying fees and commissions, he had taken merely the preliminary steps; and at the very time he did these things his position on the land, the dwelling where he resided, the improvements, and everything belonging to him on it, and which would enable him to assert a homestead claim, belonged to Emerson by virtue of the execution sale. True, no after-acquired title would pass

by the Sheriff's deed, but every right and all title that Sansome then had did pass, and as unmistakably he had the possession which is presumed to be rightful, this passed to Emerson. Before, he was a preëmtor, and had placed himself in as near connection with the legal title as he did by turning his preëmption claim into a homestead claim. In either case his right was only inceptive. (*Hutton v. Frisbie*, 37 Cal. 475.)

By the Court, SPRAGUE, J.:

The Sheriff's deed of February 13th, 1869, transferred to the plaintiff all the interest the defendant had in the land in controversy at the date of the levy of the executions thereon, under which the sale thereof was subsequently made to plaintiff by the Sheriff, and no subsequently-acquired right or interest in such lands by the defendant could inure to the plaintiff as purchaser at such execution sale. Nor would such sale, followed by a Sheriff's deed to the purchaser, estop the defendant from asserting a subsequently-acquired interest or right of possession in such lands, as against the right of possession of an interest therein sold under execution and transferred by the Sheriff's deed.

It is apparent from the record that at the date of the levy of the executions by the Sheriff, and at the date of the sale of the lands thereunder—also at the date of the Sheriff's deed to the purchaser at such sale—the demanded premises were public lands of the United States; that defendant was in possession thereof, claiming right of possession merely, without title or any vested interest therein, as against the United States. This possessory claim of defendant, and nothing more, passed to the plaintiff by virtue of his purchase on execution sale and subsequent deed of the Sheriff. By the subsequent entry of the same lands as a homestead by the defendant, on the 1st of February, 1870, under the Act of

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Congress of May 20th, 1862, he acquired, as I understand this Act of Congress, an interest in the lands and the absolute right of possession from the paramount proprietor, which possession, if actually continued for the period of five consecutive years from the date of the entry, will, under the Act above cited, entitle him to a patent therefor, on proof being made that he has resided on or cultivated the same for such terms of five years, without further payment of money. The defendant then, by his homestead entry, acquired from the paramount proprietor a right and interest in the lands which he did not possess at the date of the levy and sale on execution, and this newly-acquired right and interest is in no way connected with or dependent upon his prior possession or interest which was sold on execution against him, but is an independent, substantive interest, vesting an independent, absolute right of possession acquired directly from the paramount proprietor. This interest and right of possession presented by defendant's supplemental answer is a complete and valid defense to the plaintiff's suit for possession, based upon his acquisition of the defendant's former simple possessory claim. I am of opinion, therefore, that, upon the facts as presented by the findings of the Court below, judgment should have been rendered for defendant upon the issue as to the right of possession tendered by his supplemental or amended answer.

This, however, could not relieve the defendant from his responsibility to plaintiff for the rents and profits of the premises from the date of the Sheriff's deed to plaintiff up to the date of defendant's homestead entry of the premises or for so much of such period as defendant occupied the same.

Judgment reversed, and cause remanded for further proceedings.

Argument for Petitioner.

[No. 2,746.]

CORNELIUS CARPENTER v. H. S. SARGENT.

PURCHASE OF SWAMP AND OVERFLOWED LAND — TIME OF FIRST PAYMENT.— Under section one of the Act of April 27th, 1863, for the sale of certain lands of the State (Stats. 1863, p. 591), the first payment must be made within thirty days after the record in the County Surveyor's office of the approval of the Surveyor General; and a failure by the applicant to pay within the thirty days will not be excused on account of a neglect of the County Surveyor to forward to him the approved copy of the survey.

NO EXTENSION OF TIME FOR FIRST PAYMENT ON SWAMP AND OVERFLOWED LANDS.— The thirty days' time after the record of the Surveyor General's approval of survey, prescribed for the first payment of money by section one of the Act for the sale of swamp and overflowed lands (Stats. 1863, p. 591), cannot be postponed or extended on account of accident, mistake, neglect or inadvertence.

COUNTY TREASURER'S DUTIES — FAILURE TO PAY WITHIN TIME ON SWAMP AND OVERFLOWED LAND — ABANDONMENT.— A County Treasurer is not bound to accept money tendered after the time prescribed by law (Stats. 1863, p. 591, Sec. 1) for the first payment on a proposed purchase of swamp and overflowed lands, but may properly treat the proposed purchase as abandoned.

ORIGINAL application to the Supreme Court for a writ of mandamus.

The facts are stated in the opinion.

J. H. Budd, for Petitioner.

It was the imperative duty of the County Treasurer, on presentation of the approved survey, to "receive the amount, whether in full or in part, so provided by law, and the fee for the certificate of purchase, indorsing his receipt thereof upon the back of said certificate of location," etc. (Statute of April 27th, 1863, Sec. 14.) The applicant forfeited no rights by failure to present the approved copy within thirty days after the record of the approval, especially when, as in this case, he presented the same as soon as received by him. The refusal of the Treasurer to receive the money tendered does not affect any right of the applicant to purchase the

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land mentioned in the approved survey. It is a well-established principle that where an individual, in the prosecution of a right, does everything which the law requires him to do, and he fails to attain his right by the misconduct or neglect of a public officer, the law will protect him. (*Lytle v. The State of Arkansas*, 9 How. 833.) The Treasurer is not invested with judicial authority. The statutes make it his duty, on presentation of the approved survey, to receive the amount therein shown to be due the State. In such matter he acts in a ministerial capacity. Questions as to conflicting claims, which may arise by reason of his receiving the purchase money for the land, are to be determined in another manner, and by a tribunal especially constituted for that purpose.

Hall & Montgomery, for Respondent.

The design of the legislative direction to the County Surveyor to forward the approved copy of the survey may have been to put the applicant upon early notice; but it cannot be construed to mean that the date of the receipt of such copy shall be the point of time from which the limitation of thirty days shall begin to run. If such had been the legislative intention, it would have been so declared in plain terms. The forwarding of the copy was a means used by the State, *ex gratia*, to facilitate compliance with the thirty days' condition; but it was not meant to substitute the date of the receipt of the copy for the date of the record of the approval, as the initial point of the thirty days. It was for the applicant to be on his guard, and on his own motion to be advised of the event on which his obligation would arise, and not have awaited the Surveyor's action. An interpretation of the statute contrary to this would enable the County Surveyor to have fixed terms of sale according to his will, in opposition to the will of the Legislature. The records of the County Surveyor's office were, and are, at all times

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"open to public inspection," and it is not asserted that the relator ever resorted to them for information between the date of the forwarding of his application to the Surveyor General and December 4th, 1865, when the time for payment had elapsed. The relator's offer was accepted by the State on the condition that he made the offer good by payment within the given period. No contract was effected until payment, and without it the State's acceptance of the offer was determined by its own terms. (*People v. Supervisors of Lake County*, 33 Cal. 487.)

By the Court, CROCKETT, J.:

This is an application for a mandamus to compel the respondent, as County Treasurer of San Joaquin County, to accept from the petitioner the first payment for a quarter section of swamp and overflowed land, and to execute a proper receipt therefor. The petitioner made his application to the County Surveyor on the 18th of August, 1865, in the form prescribed by the Act of April 27th, 1863, (Stats. 1863, p. 591), to purchase the land from the State. The County Surveyor noted the application and proceeded to make the survey, which was completed on the 11th of September, 1865, on which day the survey and other necessary papers were forwarded to the Surveyor General for his approval, and were received by him and filed in his office on the twenty-second of the same month. On the 30th of October, 1865, the Surveyor General approved the application and survey, and forwarded an approved copy of the survey to the County Surveyor, which was received and recorded by the latter officer November 4th, 1865. On the 2d of January, 1866, the County Surveyor delivered to the applicant the approved copy of the survey, and on the same day the applicant presented said approved copy to the then County Treasurer, and tendered to him the first installment

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of the purchase money and interest on the remainder, as required by law; but the County Treasurer refused to accept the money or to receipt therefor, on the ground that the statute required the payment to be made within thirty days after "the record of approval of survey or location by the Surveyor General in the County Surveyor's office," as provided by the first section of the Act of April 27th, 1863. The first question to be determined is, whether the refusal of the then County Treasurer to accept the money was justifiable; for it is obvious that if he properly refused to receive it, nothing has since occurred which renders it incumbent on his successor, the present respondent, to accept it. Section first of the Act expressly requires the first payment to be made within thirty days after the record in the County Surveyor's office of the approval of the Surveyor General. It provides for no excuses and makes no exception founded on mistake, inadvertence, or inevitable accident. Section seven makes it the duty of the County Surveyor "immediately upon the receipt from the Surveyor General of any approved copy of survey of swamp or tide lands, to forward the same to the applicant." In this case the applicant did not tender the money to the County Treasurer until after the lapse of fifty-nine days from the time when the approval of the Surveyor General was recorded in the County Surveyor's office; and the only excuse given for the delay is the neglect of the County Surveyor to forward to him the approved copy of the survey within the thirty days. But this neglect of the County Surveyor does not excuse the delay. The books of his office were at all times open to inspection, and exhibited the date of the record of the Surveyor General's approval; and though the statute make it his duty immediately to forward to the applicant the approved copy of the survey, there is no provision from which it can be reasonably implied that a neglect of this duty will defer the time of payment beyond the thirty days. On the

contrary, there is no provision whatever for any contingency whereby the payment may be postponed. The Legislature has prescribed the terms and conditions on which these lands can be purchased, and persons seeking to purchase must comply substantially with them. If the first installment of the purchase money be not paid within the time required by law, the officers and agents of the State may well treat the proposed purchase as abandoned. If the rule were otherwise, there would be no fixed period at which it could be ascertained whether the applicant had abandoned the contemplated purchase or had only delayed making the payment on account of some accident, mistake, or neglect. This would lead to the greatest perplexity and confusion in the disposition of the lands, and would tend greatly to increase litigation. It is said, however, that the County Treasurer is not a judicial officer with authority to decide between contesting claimants, and that his duty being purely ministerial he has no right to refuse to accept payment for these lands, because not made strictly within the time limited by the statute. But though he has no authority to decide upon conflicting claims, he is, nevertheless, to be governed by the statute in the discharge of his duties. He is clearly not bound to accept payment after the time expressly limited by the statute within which it may be made. If it was incumbent on him to accept it thirty days after the proper time had elapsed, it would be equally his duty to accept it five or ten years later. There is no reasonable interpretation of the statute which would sanction such a practice.

The application for the writ is denied and the petition dismissed.

Argument for Appellants.

[No. 2,244.]

**LEWISTON TURNPIKE COMPANY v. SHASTA AND
WEAVERVILLE WAGON ROAD COMPANY AND
WILLIAM S. LEWDEN.**

ALLEGATION IN COMPLAINT.—In an action by the owner of a toll road against another for damages caused by obstructing the public highway leading to his road, the plaintiff must allege that his right to collect tolls has been disturbed, or it will be presumed that he has received no injury by reason of the obstruction.

OBSTRUCTION OF A HIGHWAY A NUISANCE.—The obstruction of a public highway is a common nuisance.

IDEM — ACTION BY PRIVATE PERSON.—A private person has no cause of action by reason of such obstruction, unless he has suffered some special damage. In order to maintain an action for such damage, it must be such as might legitimately flow from the nuisance.

COMPLAINT IN SUIT FOR DAMAGES FROM NUISANCE.—Special damages to private persons, from nuisance in obstructing a public highway, must be particularly stated in the complaint. The means by which the damages were caused must be alleged in the complaint.

APPEAL from the District Court of the Ninth Judicial District, County of Shasta.

The plaintiff demurred to the complaint on the ground that it does not state a cause of action, and the demurrer was overruled. Upon the trial judgment was rendered for the plaintiff, and the defendants appealed.

The other facts are stated in the opinion.

W. S. Long and A. P. Dudley, for Appellants. Beatty & Denson, of Counsel.

The Court below erred in not sustaining the demurrer to plaintiff's complaint, because the complaint shows only an alleged public nuisance, and shows no cause of special complaint on the part of plaintiff. (*Blanc v. Klumpke*, 29 Cal. 156.) The complaint makes an allegation of injury; but that injury is not based on allegations of facts which would naturally tend to produce injury. The obstruction of

Argument for Respondent.

a highway does not necessarily injure any turnpike or toll road in the vicinity. On the contrary, it might greatly benefit such toll road; and this would seem to be the case here, for after the erection of the obstruction the toll road took all the travel between the points of its termini, and its business was on the increase, as appears upon the face of the complaint.

A pleading must not state merely the conclusion that plaintiff is injured, but the facts which would show to the mind of the Court that, being true, injury would result.

J. S. Follensbee, J. Chadbourne, and E. & C. A. Garter,
for Respondent.

The Court below did not err in not sustaining the demurrer to plaintiff's complaint, for the reason that the complaint shows both a public and a private nuisance. The complaint shows that the plaintiff's road constitutes a connected part of a thoroughfare for public travel between Shasta and Weaverville, named therein; that the public travel passes over plaintiff's road, when not interrupted; that the plaintiff's use and enjoyment of property in said road consists in the revenue from the collection of tolls thereon; that the defendants stopped up the road, by placing obstructions across the same, and that by means of these obstructions the plaintiff cannot have the use and enjoyment of their said property; that defendants also interrupted the public travel on plaintiff's road, by demanding and collecting toll on the public highway connecting with plaintiff's toll road, thereby showing a nuisance as against the plaintiff. The case made by the complaint is governed by the law and decision in the case of *Blanc v. Klumpke*, 29 Cal. 156; see, also, Pr. Act, Sec. 249.

By the Court, RHODES, C. J.:

The only questions in the case arise upon the demurrer to the complaint. The plaintiff is the owner of a turnpike road leading from Lewiston, in Trinity County, to a certain point where it intersects a public highway in Shasta County, and possesses the right to collect tolls on that turnpike. The defendants have wrongfully placed a toll gate on the public highway, about a half mile from the point of intersection of the public highway with the plaintiff's turnpike, and have demanded and collected tolls of persons who pass along the highway with their teams, vehicles, etc., and threaten to maintain the gate and collect tolls, etc. The plaintiff alleges that by means of the gate the highway is greatly obstructed, and that by reason thereof, the plaintiff cannot "have or enjoy its said toll road or turnpike as it ought to be [have] done, and otherwise might and would have done; and has been and is by means of the premises deprived of the use, benefit and advantage thereof," and that the maintenance of the toll gate by the defendant will cause great and irreparable damage to the plaintiff. It is also alleged in the complaint "that under and by virtue of said incorporation (the incorporation of the plaintiff) the plaintiff obtained the franchise or right to collect tolls on said road or turnpike, and has, since its completion, enjoyed said right, privilege, and franchise without any interruption, disturbance, or interference whatever."

The complaint, tested by the familiar rule that a pleading is to be construed most strongly against the pleader, shows no cause of action; for if the plaintiff's franchise—its right to collect tolls—has not been interrupted or disturbed, no injury has been occasioned by reason of the acts complained of.

The obstruction of a public highway is a common nuisance. A private person has no cause of action by reason of such

obstruction, unless he has suffered some special damage. The special damage must be such as might legitimately flow from the nuisance. It is a further rule of pleading, that such special damages must be particularly stated. (1 Chit. Plead. 347; *Butler v. Kent*, 19 Johns. 228; *Squier v. Gould*, 14 Wend. 159; *Bogart v. Burkhalter*, 2 Barb. 525; *Cole v. Swanston*, 1 Cal. 51; *Gay v. Winter*, 34 Cal. 153.) It was held in *Stevenson v. Smith*, 28 Cal. 102, that when the damages are special—that is, such as do not necessarily arise, or are not implied by law, from the act complained of—the facts out of which the damages arise must be averred in the complaint. The maintenance of a toll gate upon the public highway, mentioned in the complaint, did not necessarily lessen its use as a highway; and if such were the case, it does not necessarily follow that thereby the travel on the plaintiff's road was diminished and the tolls lessened. The plaintiff should have stated the facts out of which the damages arose—the means by which the damages were caused. The plaintiff has not alleged that any one was prevented, by means of the defendants' toll gate, or in consequence of their having demanded or collected tolls, from traveling upon the plaintiff's turnpike, on paying the proper tolls therefor. The complaint, in that respect, is defective. (*Lansing v. Smith*, 8 Cow. 146.)

Judgment reversed and cause remanded, with directions to sustain the demurrer to the complaint.

Statement of Facts.

[No. 2,598.]

J. T. LAWRENCE, E. W. MERRITT, B. W. ADAMS,
SAMUEL STRONG, AND T. E. CAREY v. J. H.
NEFF.

INSOLVENT'S CONVEYANCE TO CERTAIN CREDITORS, FOR THEMSELVES AND OTHERS, NOT "ASSIGNMENT FOR BENEFIT OF CREDITORS."—Where Stanford, being in insolvent circumstances and largely indebted, conveyed, by an instrument in writing, certain valuable personal property to five persons, as a committee appointed by and representing themselves, and about ninety-five of his other creditors, reserving in himself a right to redeem in six days; and, at the same time, he delivered possession of the property, and the said creditors gave him receipts in full; *held*, that the instrument and transaction was not an "assignment for the benefit of creditors," within the meaning and prohibition of section thirty-nine of the insolvent law (Stats. 1852, p. 69).

PREFERENCES OF CREDITORS BY INSOLVENTS.—There is nothing in section thirty-nine of the insolvent law (Stats. 1852, p. 69) prohibiting an insolvent debtor from conveying his property absolutely, or by way of security, directly to one or more of his creditors, to the exclusion of the remainder.

INSOLVENT ACT, SECTION THIRTY-NINE—"ASSIGNMENT FOR BENEFIT OF CREDITORS."—Section thirty-nine of the insolvent law (Stats. 1852, p. 69) was aimed wholly at "assignments for the benefit of creditors;" but a conveyance to the creditor himself is not an "assignment," in the sense of the statute.

APPEAL from the District Court of the Fourteenth Judicial District, Placer County.

C. P. Stanford, at the time he executed the instrument referred to in the opinion (August, 1869), was carrying on the Coldstream Sawmill, in Placer County. The plaintiffs to whom, and the other persons for whose benefit also, he made the conveyance, were his employés. Among his other creditors was "The Contract and Finance Company," which, about the time of the transfer above referred to, commenced a suit against him, in the Sixth District Court for Sacramento County, for thirty-one thousand five hundred and ninety-two dollars and eighty-seven cents. An attachment was issued and transmitted to the defendant, the

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Sheriff of Placer County, who levied upon and took into his possession and out of the possession of the plaintiffs, the property so conveyed to them, consisting of lumber, cattle, wagons, saws, and other personal property, estimated at six thousand eight hundred and sixty-four dollars and ninety-seven cents.

Plaintiffs then commenced this action against the Sheriff for a return of said property or its value, and damages. On the trial, after they had presented their proofs, defendant moved for a nonsuit, upon the ground that the transfer was void under section thirty-nine of the Insolvent Act, as an assignment for the benefit of creditors. The motion being sustained and judgment entered for defendant, and motion for a new trial overruled, plaintiffs appealed.

Fellows & Norton, for Appellants.

A debtor has an undoubted right to convey all his property to any one of his creditors, in satisfaction of his debt; and there is nothing in the insolvent law to prohibit such a preference. (*Dana v. Stanford*, 10 Cal. 275; *Morganthau v. Harris*, 12 Cal. 247; *Wellington v. Sedgwick*, 12 Cal. 474; *Gladwin v. Gladwin*, 13 Cal. 332; *Forbes v. Scannell*, 13 Cal. 242; *Le Cacheaux v. Cutter*, 6 Cal. 519.)

But, we submit, that the instrument in writing offered by the plaintiffs was not, tested by the spirit, intent, and true meaning of the law, an "assignment." (*Treadwell v. Davis*, 34 Cal. 601.) It was a chattel mortgage. (*Wright v. Ross*, 36 Cal. 414.)

S. W. Sanderson, for Respondent.

Stanford being insolvent, the assignment in question was void under section thirty-nine of the insolvent law, as against the Contract and Finance Company, which was a creditor of Stanford at the date of the assignment, and therefore in a position to attack it. (*Chever v. Hays*, 3 Cal. 471; *Adams v.*

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Wood, 8 Cal. 152; *Morganthaw v. Harris*, 12 Cal. 245.) The instrument was not a mortgage, as contended upon the other side, but an assignment within the meaning of the insolvent law, because it created a trust in favor of third persons. (*Dana v. Stanford*, 10 Cal. 269; *Wellington v. Sedgwick*, 12 Cal. 469.)

By the Court, CROCKETT, J.:

The only question in this case is whether the instrument from C. P. Stanford to the plaintiffs is void under section thirty-nine of the Act of May 4th, 1852, for the relief of insolvent debtors and protection of creditors. (Stats. 1852, p. 69.)

It appears that Stanford, being in insolvent circumstances and largely indebted to about one hundred laborers, including the plaintiffs, proposed to turn over to them certain personal property in satisfaction of, or as security for, their several demands; that, thereupon, the laborers held a meeting, acceded to the proposition, and appointed the plaintiffs as a committee to accept the transfer in behalf of the whole; that, in pursuance of this arrangement, the instrument in question was executed and delivered by Stanford, accompanied by an immediate transfer of the possession of the property to the plaintiffs; that, upon the execution and delivery of the instrument, all the laborers gave to Stanford receipts in full for their respective demands.

This instrument purports, on its face, to have been made in consideration of "ten thousand dollars, more or less money due to the men whose names are hereunto annexed as creditors, for labor performed;" and then proceeds to convey the property absolutely to plaintiffs, "a committee appointed by the creditors, whose names are appended hereto, to hold said property in trust for them, * * * reserving to myself the right to redeem said property

within six days from this date, by paying to the parties whose names are hereto annexed the sum of money set opposite each man's name." It further appears that no redemption was made within the six days; and the defendant, as Sheriff of Placer County, seized the property under attachments issued at the suit of other of Stanford's creditors, who claim that the transfer to the plaintiffs was an assignment in trust for creditors, within the meaning of section thirty-nine of the Act above cited, and was, therefore, void.

It is quite clear that if the instrument had been made directly to all the creditors, whose names are appended to it, it would have come fully and precisely within the principles decided in *Dana v. Stanford*, 10 Cal. 269, and would have been upheld as a valid conveyance. There is nothing in section thirty-nine of the insolvent law prohibiting an insolvent debtor from conveying his property absolutely, or by way of security, directly to one or more of his creditors, to the exclusion of the remainder, as was decided in *Dana v. Stanford*, and several subsequent cases. That section was not intended to abridge the right of an insolvent debtor to convey his property to one or more of his creditors, in satisfaction of, or as a security for, their demands, but was aimed wholly at "assignments" for the benefit of creditors; and a conveyance to the creditor himself is not an "assignment" in the sense of the statute. The policy which dictated this section, and the character of assignments which it was intended to forbid, are discussed, with learning and ability, by Justice Field, in *Dana v. Stanford*; and I fully assent to the conclusions at which he arrived. In my opinion, the instrument in question here is not an "assignment" in the sense of this section, as expounded in *Dana v. Stanford*, nor within the evils which it was intended to prevent. This

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conveyance is made directly to a portion of the creditors; and so far as *their* rights are concerned, the case is fully and clearly within the decision in *Dana v. Stanford*. If any part of it is void, because in contravention of the statute, it is only that portion which relates to the other creditors, whose names are appended to it, but who are not parties to it; and if void as to them, it is, nevertheless, valid as to the plaintiffs, whose rights are readily severable from those of the other creditors. As to them, it is a conveyance to them directly, in payment of, or as a security for, their several demands, which can be easily separated from the claims of the other creditors. The nonsuit was, therefore, improperly granted, even though it be conceded that the instrument was void, so far as it was intended to protect the rights of other creditors.

But, in my opinion, no portion of it is void. It is not an "assignment" in the sense of the statute, but is either an absolute sale and conveyance, in satisfaction of the enumerated debts, with a right to the vendor to repurchase within the stipulated time, or it is a mortgage made to the plaintiffs, partly to secure their own debts, and partly in trust to secure the demands of the other enumerated creditors. In either event, the transaction is wholly different, both in form and in its legal effect, from an assignment. If it be an absolute sale, with a right to repurchase, the title vested absolutely in the plaintiffs, and the debts due to the enumerated creditors, were wholly and finally extinguished. On the other hand, if it be a chattel mortgage, the title of the mortgagee became absolute at law, on condition broken, with a right of the mortgagor to redeem, under appropriate proceedings in equity. These are not elements in an assignment for the benefit of creditors. In whatever light, there-

Statement of Facts.

fore, this conveyance may be viewed, it is not obnoxious to the objections urged against it.

Judgment reversed, and cause remanded for a new trial.

Mr. Chief Justice RHODES did not participate in the foregoing decision.

[No. 2,822.]

ALEXANDER R. WALSH v. GEORGE A. HILL, JENNINGS T. SHELBY, L. M. BURSON, AND A. E. FRASER.

FINDING AGAINST EVIDENCE—TESTIMONY CONTRARY TO STIPULATION.—

Where a finding of fact was supported by the testimony of only one witness, and his testimony, besides being open to suspicion on other grounds, was directly contradicted by the stipulation of the parties attached to the statement: *Held*, that such finding was against evidence.

POSSESSION OF SPECIFIC LAND WITHIN LARGE INCLOSURE.—A general inclosure of a large tract of land is not sufficient to constitute an actual, exclusive possession of a specific parcel within it, when it appears that much of the land within the inclosure is not claimed, and much of it is in the actual occupancy of parties claiming and holding adversely.

APPEAL from the District Court of the Third Judicial District, Alameda County.

This was an action of ejectment for a tract of about twenty acres of land, on what is known as the "Potrero Nuevo," in the City and County of San Francisco. It was originally commenced in the Twelfth District Court, but was afterward, on account of the disqualification of the San Francisco Judges to try Potrero cases, transferred to the Third District Court of Alameda County. There having been findings and judgment for plaintiff, and motion for new trial overruled, defendants Shelby, Burson, and Fraser appealed.

The other facts are stated in the opinion.

Walter Van Dyke, for Appellants.

Shafter, Southard & Seawell, for Respondent.

By the Court, SPRAGUE, J.:

On the former appeal of this case (38 Cal. 481), two points were settled: First — That the deed from Crowell to Mason, Bensley, and Himrod, of 15th December, 1853, embraced the land in controversy. Second — That neither plaintiff nor those through whom he derives title, prior to the commencement of this suit, as shown by the evidence on the former trial, ever had constructive possession of any portion of the demanded premises. The question of actual possession in plaintiff or his grantors, beyond the half acre leased by Mason to Garagnon in 1861, was not passed upon by this Court, as the Court below had not found such actual possession, but constructive possession, of the residue of the entire tract described in the deed, by virtue of this half-acre lease and the entry of the tenant into the actual possession of the leased premises.

On the retrial, it was "stipulated and agreed that the testimony and proceedings in the former trial should be considered as taken and had in this trial, as the same appears in the printed transcript on said appeal, and on file herein, the same as in the former trial, * * * with permission to either party to introduce additional testimony."

The cause was tried before the Court without a jury. Additional testimony was introduced by each party, and the Court made special findings of facts, and rendered judgment against defendants Benson, Shelby, and Fraser, and in favor of plaintiff, for all that portion of the tract of land described in the complaint south of Mariposa street, from which judgment, and also from a subsequent order of the Court denying said defendant's motion for a new trial, comes this appeal.

The points upon which appellants rely on this appeal are: First — That "the testimony was insufficient to support the

findings; that in August, 1854, or at any other time, Mason, Bensley, and others leased to Snow and others, or to any one, the land claimed by them within the inclosure, so far as relates to the Shelby tract, or the land in controversy, or that the parties mentioned in said lease ever went into the possession of the Shelby tract, or land in controversy, or were on said tract in any manner or form;" and that "the evidence, on the contrary, shows that the said pretended lease does not cover or include any portion of the Shelby tract or land in controversy." Second—That "the evidence fails to show that plaintiff and his cotenants, Bensley and Mason, were ever in the actual possession of the Shelby tract or land in controversy, or that they claimed the same in good faith."

The findings of the Court to which the above exceptions are directed were the seventh and tenth, which are as follows:

"Seventh—On the 18th of August, 1854, said Mason, Bensley, and Himrod executed and delivered to one H. A. Snow, A. L. Brewster, Meredith Brier, and W. S. Mann a lease of the land claimed by them within the said inclosure. These parties entered upon the land under the lease, and occupied a house upon it known as the Farrington, or Ludlum, house. This house was not upon the land in controversy, but was located to the west of it, and within the general inclosure of land claimed by Mason, Bensley, and Himrod. The parties did not cultivate, improve, or use the land for any purposes. They were generally armed, and occupied the house for the purpose of keeping possession of the leased premises for their lessors, and to keep squatters off of them, and to keep up the fences. In this way they occupied the house for about a year."

The ninth finding, which I have inserted for the purpose of illustrating the tenth, is as follows:

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"Ninth — In August, 1861, Mason leased part of the land in controversy to one Garagnon, for the term of one year, with the privilege of four years. The tenant immediately entered into actual possession of the leased premises which lie north of the described road, and inclosed the same with a substantial fence, and erected on them a tannery; and he and his grantees under him have since continued to occupy the same, and are still in the occupation of them as tenants of Mason, Bensley, and the plaintiff. In addition to which, Mason and Bensley, and their tenants for them, have kept the eastern line of fence in repair until 1862."

This is the lease and actual possession under it of a part of the premises described in the Crowell deed, and in the complaint from which the Court, on the former trial, found that Mason, Bensley, and plaintiff were in the constructive possession of all the land described in the deed which includes the Shelby tract (the land in controversy) lying south of the "described road." This finding, on the former appeal, was by this Court decided erroneous.

The tenth finding on the retrial, is as follows:

"Tenth — The remainder of said tract, south of the described road to its cross-ditch, was not used for any purpose by the plaintiff or his cotenants Mason and Bensley, but they claimed it in good faith under the deed to them from Crowell, and under this claim of right they continued in actual possession of the premises in controversy by the inclosure, and acts which I have described, from January, 1854; and the plaintiff, as grantee of said Himrod, also continued in such actual possession until August, 1862; which the defendants Benson, Shelby, and Fraser entered without right or title into and upon said tract of land described in the complaint, lying south of the road running near or on the line of Mariposa street, and ousted the said plaintiff and his cotenants, Bensley and Mason, therefrom."

The facts, as I understand them from the findings and evidence not controverted, are briefly as follows: In June, 1852, Farrington and Ludlum, having purchased a brickyard from one Wire, located on what is known as the Potrero Nuevo, in the City and County of San Francisco, undertook to locate a possessory or preëmption claim of one hundred and sixty acres, including the brickyard, by making a description of the land so claimed, and recording the same in the Recorder's office, with a plat thereof. This one hundred and sixty acres so located by Farrington, it is agreed by the parties to this suit, "was bounded on the west by a line on or near and parallel to Potrero avenue, and on the south by a line on or near and parallel with Solono street, and on the east by the westerly line of the tract in controversy. Its northern boundary was Mission Creek."

Some time prior to September, 1853, one Crowell had taken possession of the eastern portion of the Farrington and Ludlum claim, claiming the same adversely to Farrington and Ludlum, under, as he claimed, a deed to him from Roberts and Lange, dated June 3d, 1851. This deed from Roberts and Lange to Crowell, embraced a tract of land off the eastern portion of the Farrington and Ludlum claim, sixty-six and two thirds rods wide, and extended from Mission Creek on the north eight and one third rods south of the south line of the Farrington and Ludlum claim. It does not definitely appear from the evidence when Crowell entered upon this land, whether before or after the record of the Farrington and Ludlum claim, or whether he entered under his deed from Roberts and Lange; but it definitely and conclusively appears that on and for some time prior to the 15th December, 1853, and as early as September 1st, 1853, Crowell and several other parties claiming under him were in the actual occupation of portions of the land covered by the Roberts and Lange deed, holding and claiming the same adversely to Farrington and Ludlum.

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In September, 1853, there was a piece of vacant unoccupied land, of about twenty acres, between the eastern boundary line of the land covered by the deed of Roberts and Lange to Crowell, and the western boundary line of land in the occupation of one Piercy, no part of which was covered by the Farrington and Ludlum claim. During this month Crowell made claim to this piece of land and, as evidence of his claim, marked the boundaries thereof by running a plow furrow or small ditch along Piercy's west line from the bay southerly about one hundred and forty rods; thence easterly about ten rods to a skeleton fence, which before that time had been constructed by some party not disclosed by the evidence, which at that time ran from the point where the ditch intersected it; thence northerly along or near the easterly line of the Farrington and Ludlum claim to the bay or Mission Creek. At this time one Ellis and some others, claiming under Crowell within the boundaries of the Farrington and Ludlum claim, had inclosed the parcels claimed by them.

On the 15th December, 1853, Crowell conveyed by deed the lands described in the complaint to Bensley, Mason, and Himrod. The land described in this deed included the land so taken up by Crowell in September, 1853, and a small parcel of the northeast portion of the land described in the deed from Roberts and Lange to him of June 3d, 1851. At this time no portion of the land so taken up by Crowell had ever been occupied, cultivated, or improved by him, nor had any acts been performed by him to evidence a possession thereof, other than the construction of the small ditch on its eastern and southern boundaries, hereinbefore referred to. Some five days after this purchase from Crowell by Bensley, Mason, and Himrod, some of the grantees (it does not distinctly appear whether all three joined) purchased an undivided interest in the Farrington and Ludlum claim, and immediately thereafter Bensley, Mason, and Himrod

commenced the construction of a substantial post and board fence from the bay southerly along the east line of their purchase from Crowell, which was along the west line of Piercy's claim, near and along the small ditch theretofore constructed by Crowell; and in January, 1854, had extended the same south the whole extent of this easterly line to the ditch on the south line, and continued it in the same direction a short distance further south, until it connected with a line of fence which had been previously built (but when or by whom built does not appear) running from the point of intersection west and north to Mission Creek. And these last lines of fences and Mission Creek and the Bay of San Francisco, with the eastern line of fence so built by Bensley, Mason, and Himrod, formed a general and substantial inclosure for the tract of land described in the complaint—the Farrington and Ludlum claim; the tract described in the deed from Roberts and Lange to Crowell, and also a tract of from twenty to thirty acres immediately south of the Farrington and Ludlum tract. Mason, Bensley, and Himrod kept the eastern line of this general inclosure in repair up to 1862, the time at which appellants entered upon the south half of the land described in the deed from Crowell to Mason, Bensley, and Himrod; but other portions of the fence forming this general inclosure were broken and dilapidated, and not kept up or in repair so as to form an inclosure after January, 1856. The tract of land in controversy, occupied by appellants, embraces that portion of the land described in the complaint and in the deed from Crowell to Mason, Bensley, and Himrod, which lies south of a public road which has crossed the tract, running east and west, since 1853, nearly on the line of Mariposa street. The plaintiff in this case is the successor in interest of Him-

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rod, the cotenant of Bensley and Mason in the land purchased from Crowell, as hereinbefore stated.

On the former trial, the plaintiff gave in evidence a lease from Mason, one of his cotenants, to one Garagnon, made in August, 1861, of a small parcel of the tract purchased from Crowell, embracing one half acre, located on the bay, north of the above described public road, and proved that Garagnon took immediate, actual possession of the leased premises, built a tannery thereon, and that Garagnon and his assignees had continued to occupy the leased premises ever since. The effect of this lease and occupancy of the lessee under the same were disposed of on the former appeal. On the retrial, plaintiff introduced and read in evidence, against objections of defendants, a lease made by Bensley, Mason, Himrod, Dumarthray, Farrington, and Webster, as lessors, to Snow, Brewster, Brier, and Mann, as lessees, dated August 18th, 1854, of lands described as follows: "All that certain tract or parcel of land lying and being in the City of San Francisco, being part of the tract known as the 'Potrero Nuevo;' that is to say, the tract of land known as the Farrington claim, formerly the Farrington and Ludlum claim, as the same is shown upon a map of said tract on record in the office of the County Recorder of the County of San Francisco. Also, all that tract of about twenty acres lying southerly of and adjoining the said last mentioned tract, the said tracts of land being now closed by a substantial fence."

Plaintiff then introduced evidence tending to show that the lessees immediately entered under the lease, and occupied a house situated about the center of the Farrington and Ludlum claim, called the Ludlum house, and occupied the same about one year, keeping the fences forming the general inclosure heretofore described in repair. As to what these lessees did under said lease, the Court below finds as follows: "The parties did not cultivate, improve, or use the lands for

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any purposes. They were generally armed, and occupied the house for the purpose of keeping possession of the leased premises for their lessors, and to keep squatters off of them, and to keep up the fences. In this way they occupied the house for about a year."

For the purpose of showing that the lands described in this lease covered and embraced the land in controversy plaintiff called as a witness Frederick Mason, one of the lessors named in the lease, who testified that "at the time this lease was made, this (meaning the land conveyed to himself, Bensley, and Himrod, by Crowell, in December, 1853) was the only land answering the description of the twenty acres lying southerly of and adjoining the Farrington claim;" and on further examination, the same witness testified as follows: "There was no other land, except this in controversy, answering the description of the twenty acres.

* * * At the time of the execution of this lease, I considered this tract in controversy as lying south of the Farrington claim. The lessees did not live on this land; they lived in the Farrington house; they did not put any improvements on the tract in controversy. The west line of the tract in controversy, which is the east line of the Farrington claim, runs nearly north and south."

This is the only evidence contained in the records tending to show that this lease of August 18th, 1854, embraces the lands in controversy. In the statement on motion for a new trial, which was agreed to and signed by the attorneys of the respective parties as correct, occurs the following:

"It was shown by diagrams, and admitted, that the tract known as the Farrington and Ludlum claim, as the same is shown upon a map of said tract on record in the Recorder's Office of the County of San Francisco, was bounded on the west by line on or near and parallel to Potrero avenue, and on the south by a line on or near to and parallel with Solano

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street, and on the east by the westerly line of the tract in controversy; that Crowell, John Brewster, and others, holding under Crowell, occupied a strip of the eastern part of said Farrington claim, and bordering the tract in controversy on the west; that south of the old Farrington claim, as above, there was a tract inside of the general inclosure of twenty to thirty acres, and that no part of the tract in controversy lies south or southerly of the said Farrington claim; that it lies directly east of it, and separate from the part occupied by the Ludlum house by the said strip in possession of the Crowell party."

Thus, it appears that plaintiff has admitted the incorrectness of the evidence of his witness, Mason, in two vital particulars: First—Mason testified that the land in controversy "was the only land answering the description of the twenty acres lying southerly of and adjoining the Farrington claim." Plaintiff's admission is "that south of the old Farrington claim * * * there was a tract inside of the general inclosure of twenty or thirty acres." Second—Mason testifies that "the tract in controversy lies to the southeast of the Farrington claim;" but plaintiff admits "that no part of the tract in controversy lies south or southerly of said Farrington claim; that it lies directly east of it."

The first paragraph of the seventh finding of the Court is not supported by, but is manifestly against, the evidence. The evidence clearly shows that the lease of the 18th August, 1854, instead of being made by Mason, Bensley, and Himrod to Snow and others, of "the land claimed by them within the said inclosure," was made by Mason, Bensley, Himrod, Dumarthray, Farrington, and Webster, to Snow and others, of the old Farrington and Ludlum claim, and about twenty acres lying southerly of and adjoining the old Farrington and Ludlum claim. This lease did not cover the land in controversy, or any portion thereof. There could, therefore,

have been no possession, actual or constructive, on the part of plaintiff or his grantor, or their cotenants, of any portion of the premises in controversy, by virtue of this lease, and the entry and occupancy of the lessees thereunder, as disclosed by the evidence.

It appears from the evidence that the witness, Frederick Mason, claims to be a cotenant with plaintiff in the demanded premises, and had possession of this lease at the former trial. He is interested with plaintiff in the recovery of the demanded premises from appellants; and the fact that this lease was not introduced on the former trial, and no evidence offered in relation thereto, is very suggestive of a knowledge on the part of plaintiff and Mason that the premises described therein did not embrace the land described in the complaint, or any part thereof. On the former trial, plaintiff relied upon his cotenant Mason's lease to Garagnon of the half acre in the northern part of the premises described in the complaint, and the actual possession taken by the lessee of the leased premises in 1861, as sufficient to establish in plaintiff a constructive possession of the entire premises described in the Crowell deed to Mason, Bensley, and Himrod. But this having failed on appeal to this Court, this lease of August, 1854, is on the retrial, sought to perform a like service for plaintiff, not before considered within the range of its powers.

The second point now urged by appellants, that "the evidence fails to show that plaintiff and his cotenants Bensley and Mason, were ever in the actual possession of the Shelby tract or land in controversy," as found by the Court in its tenth finding, I think is well taken. There is no evidence tending to establish that plaintiff or his cotenants, or their grantors, ever occupied, cultivated, or improved one foot of the Shelby tract, the land in controversy. It cannot rationally be claimed that the plow furrow or small ditch made by Crowell in September, 1853, on the east and south lines of

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the tract, constituted an actual possession of the tract by him, nor can it be reasonably claimed that the construction of a substantial fence only along the east line of the land in controversy by Mason, Bensley, and Himrod, in January, 1854, and keeping the same in repair till 1862, constituted an actual possession, or the subjection of the tract of land, or any portion thereof except that upon which the fence stood, to their will and dominion, to the exclusion of others. And as to the general inclosure, which included the land in controversy, and nearly two hundred acres of other lands not claimed exclusively by plaintiff, his grantor or their cotenants, and much of which, all the time this inclosure was maintained, was in the actual occupancy of various parties claiming and holding adversely to the Farrington and Bensley parties, it would be the extreme of assumption to maintain that this sufficed to subject the premises in controversy to the will and dominion of the then claimants of a portion thereof, to the exclusion of others, or to constitute an actual, exclusive possession of any claimant of a specific parcel within this general inclosure. (*Wolfe v. Baldwin*, 19 Cal. 367, 368; *Borel v. Rollins*, 30 Cal. 408.)

I am clearly of opinion that the evidence entirely fails to establish either an actual or constructive possession in plaintiff or his grantors of that portion of the premises described in the complaint lying south of the road running east and west on or near the line of Mariposa street, and that the judgment and order denying appellant's motion for a new trial should be reversed and the cause remanded.

So ordered.

Mr. Justice CHOCKETT being disqualified, and Mr. Justice WALLACE did not participate in the foregoing decision.

Statement of Facts.

[No. 2,708.]

F. F. FUQUAY v. J. B. STICKNEY, JOHN WRIGHT,
A. S. LEAVITT, P. IDE, MECHANICS' MILL AND
MANUFACTURING COMPANY, D. J. STAPLES,
ALPHEUS BULL, AND THE FIREMAN'S FUND
INSURANCE COMPANY.

MECHANICS' LIENS, AS AGAINST HOLDER OF PRIOR TRUST DEED.—Where an insurance company loaned the owner of a lot and uncompleted building money for the purpose of finishing the building, and took from him a deed of trust conveying the fee, defeasible on the payment of a debt, and afterwards knowingly permitted the building to go on without giving notice that it would not be responsible therefor: *held*, that under section four of the Mechanics' Lien Law (Stats. 1868, p. 589), the interest in the property held by the insurance company was subject to mechanics' liens for work done and materials furnished after the making of the trust deed.

MECHANICS' LIEN LAW, SECTION FOUR.—LEGISLATIVE POWER.—If the owner of land, or any one claiming an interest in it, knowingly permits buildings and improvements to be erected on it without giving notice that it is done without his consent, it is just that he should be held to have acquiesced therein, as provided in section four of the Mechanics' Lien Law (Stats. 1868, p. 589); and the power of the Legislature to enact that provision is clear.

INTEREST IN LAND CONVEYED BY TRUST DEED FOR MONEY LOANED.—A trust deed of real estate, taken by a person who loans money to the owner, defeasible on payment of the debt, is something more than a mortgage. It conveys the legal title and an interest in the land.

APPEAL from the District Court of the Fourth Judicial District, City and County of San Francisco.

The deed of trust executed by the defendant Stickney to secure the loan made to him by the Fireman's Fund Insurance Company, as stated in the opinion, was made to the defendants Staples and Bull, as trustees of that company. The plaintiff and the defendants Wright, Leavitt, Ide, and Mechanics' Mill and Manufacturing Company, were the holders of mechanics' liens for work done and materials furnished after the execution of the trust deed. The defendant Stickney having made default, a decree, finding the amounts of the different liens, and for a foreclosure and sale of the prop-

Argument for Appellant.

erty, was entered by stipulation of the other parties. A sale took place, and the net proceeds — four thousand four hundred and seventy-four dollars and seventy-three cents — an amount insufficient to satisfy all the claims, being brought into Court, on motion of the parties for distribution of the same, the Court ordered that the holders of the mechanics' liens should be first paid, and then the Fireman's Fund Insurance Company. The insurance company appealed from the order.

William H. Patterson, for Appellant.

When the mortgage was given and recorded, all material men and workmen had been paid. No contract was then subsisting for additional work on the building, or the furnishing of other materials: and Stickney, without the consent of the mortgagee, could not afterward create liens which would be entitled to priority over the mortgage. (*English v. Foote*, 8 Sm. & Mar. 451; *Stillman v. Hawes*, 7 How. Miss. 423; *Farmer's Bank v. Winslow*, 3 Minn. 93.) Persons who commenced work and furnished materials subsequent to the mortgage, and with knowledge of it — for it was duly recorded — must be postponed to the mortgage. (*Crowell v. Gilmore*, 18 Cal. 370; *Soule v. Daws*, 7 Cal. 575; *Ferguson v. Miller*, 6 Cal. 402; *Guy v. Carriere*, 5 Cal. 511.) The mortgage lien attached to the house, in its nearly completed state, as to the land; and it will not do to say the house can be severed from the lot and sold to pay subsequent mechanics' liens. It would be impossible to sever the painters' or the carpenters' work subsequently done; and surely the mortgage must remain a lien on what existed at the time of its execution and record. (1 *McCarter*, N. J. 189; 1 *Oregon*, 220; *Green v. Green*, 16 Ind. 253; *Reese v. Ludington*, 13 Wis. 276; *Jessup v. Stone*, 13 Wis. 466; 36 *Penn. St.* 252.)

Taylor & Fifield, Gray & Haven, and L. S. Clark, for Respondents.

The language of section four of the Mechanics' Lien Law is too plain and explicit to admit of doubt in its construction, and the power of the Legislature to make the provisions therein contained cannot be doubted. The appellant certainly had an interest in the land in question. The language of the statute is comprehensive enough to embrace every sort of interest or claim whatsoever. But if it should be said that a mortgagee under our laws has no interest in the land, it is to be remembered that the appellant is not a mortgagee, but a *cestui que trust* under a trust deed, by which the entire legal estate passed into its trustees, and therefore it had an estate in the land. (*Kock v. Briggs*, 14 Cal. 256; *Preston v. Sonora Lodge*, 39 Cal. 117.) Appellant also had full knowledge of the construction of the building upon the land, and actual notice of its continued progress, but posted no notice whatsoever, in pursuance of the requirements of the statute. The law presumes, therefore, that appellant was willing to allow the construction to go on, and to subordinate its lien to the liens of the mechanics and material men who were contributing to it.

By the Court, CROCKETT, J.:

This is an action to enforce the liens of mechanics and material men, under the Act of March 30th, 1868 (Stats. 1867-8, p. 589), for labor performed and materials furnished in the construction of a building by the defendant Stickney. Whilst the building was in the process of construction, Stickney borrowed from the Fireman's Fund Insurance Company the sum of three thousand five hundred dollars, and, to secure the repayment thereof, executed a deed of

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trust upon the lot of land on which the building was then being erected, and which deed, of course, included the unfinished building. At the time when the deed was made and recorded there was nothing due to the mechanics and material men, and the labor and materials for which this action is brought was all performed and furnished after that time. It is not pretended that the insurance company, when it loaned the money to Stickney, was ignorant of the fact that the building was then in the progress of erection. On the contrary, the proof tends strongly to show that the loan was made for the purpose of enabling him to complete the building. On these facts the only question raised on the appeal is, whether the mechanics and material men have a lien either upon the land and building, or upon the building alone; and if so, whether such lien is superior to that of the insurance company. In construing this statute, we held, in *Preston v. Sonora Lodge*, 39 Cal. 117, that "it contains no provision authorizing, under any circumstances, the displacement or disturbance of a mortgage lien once attached, nor its postponement to any lien arising at a subsequent time; nor does it contemplate that the mortgagor and material man or laborer may, as the result of a contract made between themselves without consulting the mortgagee, *improve* the latter out of such absolute prior lien upon the premises as he may have theretofore lawfully obtained.

But the fourth section of the statute provides, that if the building be erected with the knowledge of the owner of the lands or of any person having or claiming an interest therein, it shall be held to have been erected at the instance of such owner or person claiming an interest, and such interest so held or claimed shall be subject to the lien of the material man or laborer, unless the owner or claimant, within three days after he shall have obtained knowledge of the construction, alteration, or repair, or the intended alteration or repair of the building or superstructure, give notice that he

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will not be responsible for the same; and the statute prescribes the method in which the notice shall be given.

In this case the proof shows that the insurance company had knowledge of the intention of Stickney to complete the building after the execution of the deed of trust, and permitted the work to proceed without giving the notice prescribed by the statute. The case is fully within the class of cases provided for in the fourth section; and I think the power of the Legislature to enact this provision is not only free from doubt but the justice and wisdom of the measure are obvious. If the owner of land, or any one claiming an interest in it, knowingly permits buildings and improvements to be erected on it without giving notice that it is done without his consent, it is eminently just that he shall be held to have acquiesced in it.

It is unnecessary in this case to decide whether a mortgage or judgment creditor having a lien has such an interest in the land as to bring him within the rule here laid down; but my impressions are strongly to the contrary, and the question was practically decided in *Preston v. Sonora Lodge*. The instrument, however, taken by the insurance company from Stickney is not a mortgage, but a deed conveying the fee, defeasible on the payment of the debt. It conveys the legal title, which is to be reconveyed if the debt is paid at maturity. It is something more than a mortgage lien, and clearly conveys an interest in the land; and such being its character, it brings the case fully within the letter and spirit of the fourth section of the statute.

Judgment affirmed.

Mr. Justice TEMPLE did not participate in the foregoing decision.

 Points decided.

[No. 2,779.]

F. A. WILL ET AL. v. WILLIAM SINKWITZ.

EFFECT OF REMITTITUR OF SUPREME COURT UPON DISTRICT COURT.—Where an order of the Supreme Court reverses an order of the District Court, by which a judgment in a County Court modifying a judgment in a Justice's Court has been modified, and remands the cause with directions to vacate the judgment of the County Court, the District Court has power under the remittitur from the Supreme Court to do nothing further than to vacate the order of the County Court; it cannot render judgment for the defendant unless so expressly ordered by the Supreme Court.

CLERICAL ERROR IN JUDGMENT.—Where, in such a case, the District Court renders judgment in accordance with the order of the Supreme Court, but the Clerk of the District Court uses an improper form in entering the judgment, by which the Court is represented as dismissing the cause, the mistake of the Clerk does not change the judgment; it is a clerical blunder.

EFFECT OF JUDGMENT.—In the case stated, the result of the judgment of the Supreme Court was to leave the cause in the County Court in the condition in which it stood when the papers were filed therein on appeal from the Justice's Court.

ERRONEOUS JUDGMENT.—Where an order of a superior Court is filed in a County Court, vacating a previous order of the latter Court which modified a judgment in a Justice's Court, and the County Court directs its previous order to be vacated in accordance with the decision of the superior Court, it is error for the County Court to grant a motion for judgment on the pleadings and the Justice's record in the case, the motion having been made prior to its order vacating the previous judgment.

NEW TRIAL.—In such a case the annulling of the judgment of the County Court makes a new trial of the cause indispensable.

NUISANCE—REMEDY BY ACTION FOR DAMAGES.—Where the acts complained of amount to nuisance, for which the person injured may have his action to abate the nuisance, he is not limited to that remedy, but may sue to recover damages sustained by the wrongful acts of the defendant.

WRIT of certiorari to review proceedings of the County Court of the City and County of San Francisco and set aside its judgment.

The facts are stated in the opinion.

N. B. Mulville, for the Petitioner.

The record of the first trial in the County Court disclosed the fact by the judgment (which was for three hundred dol-

Argument for Petitioner.

lars) that the subject matter exceeded the jurisdiction of that Court. When an inferior tribunal renders judgment for an amount beyond its jurisdiction, it is evident that the subject matter exceeded the jurisdiction of the Court, and on appeal or review the action should be dismissed. (*Ford v. Smith*, 5 Cal. 331; *Wrattan v. Wilson*, 22 Cal. 465.) The first judgment and proceedings in this case being vacated and set aside by this Court deprived the County Court of any further jurisdiction over the cause, and was virtually a dismissal of the action. The Fifteenth District Court so held by its decision on review vacating the judgment subsequently entered. The only question that can arise on certiorari is the jurisdiction of the Court; and if a superior Court vacates the judgment of an inferior one, it is virtually a decision that the inferior Court had not jurisdiction, which is equivalent to dismissing the action.

The next point in this case is, that the subject matter, as appears by the complaint, is a nuisance, and comes under the rule, "*sic utere tuo ut alienum non laedes*." The damages complained of as alleged arise from water flowing from defendant's to plaintiffs' property. (Prac. Act, Sec. 249.) Justice and County Courts on appeal have no jurisdiction in such cases; it brings into question the title and possession of real property.

If a cause of action exists at all in this case, it is a nuisance, which the County Court has only jurisdiction of by original proceedings under section eight of the Constitution, and not on appeal from a Justice's Court.

I think it evident that at the time of the last trial of this cause, and when judgment was entered for one hundred and seventy-five dollars and costs, that the said County Court had not jurisdiction over this case—either the subject matter thereof or the person of defendant.

Argument for Plaintiffs.

S. F. & L. Reynolds, for Plaintiffs.

The fact of a Court rendering judgment for an amount beyond its jurisdiction does not render void the subject matter of the action, but only the judgment so rendered. The decision or judgment of this Court was only to the effect to set aside the judgment of the County Court, and thereby left the case precisely where it was on the 2d day of March, 1870, the day on which it was first called for trial in the County Court, and the first time the case was ever tried in the County Court.

As to the second point made by the counsel for the defendant, there is nothing in the record to show it; nor is there anything upon which it can be based. This was an action, as appears by the complaint, for damages to personal property. The plaintiffs were not the owners of the building. They were only the occupants of the building wherein their goods were stored at the time they were injured. The action was brought in the proper form for damages, and they could not have or maintain an action to abate a nuisance. The plaintiffs had the right to bring the action for damages in the Justice's Court, so long as the amount sued for was within the jurisdiction of that Court. The amount for which the action was brought was within the jurisdiction of the Court, and that is what gives and shows the jurisdiction of the Court.

If there is anything in the objection to the jurisdiction of the Justice's Court, or to the County Court on appeal, on the ground that the action should have been one to abate a nuisance, instead of an action for damages, that objection should have been taken before the trial in the Justice's Court, either by a demurrer or an objection in the nature of a demurrer. But the objection comes too late after having submitted to two trials in the County Court, after the case was appealed.

The only effect of the decision of this Court was to set aside the judgment of the County Court, and that left the case in the same position that it was after it made its first appearance in the County Court, on appeal from the Justice's Court. No motion for new trial could be made in the County Court on the part of plaintiffs. The only and proper motion that could be made was the one which the plaintiffs did make.

The action of the County Court, in placing the cause on the calendar for trial, was not granting a new trial. The trial, and the proceedings resulting in a judgment, were set aside by this Court, and that left the case as if no trial had been had, and hence the notice of motion by plaintiffs. We respectfully submit that there is nothing in the record to show error in the action of the County Court, and that the same should be affirmed and the said writ be dismissed.

By the Court, RHODES, C. J.:

An action was commenced in a Justice's Court for the recovery of two hundred and ninety-nine dollars and ninety-nine cents, for the damages occasioned by certain wrongful and negligent acts of the defendant, mentioned in the complaint; and judgment having been rendered for the plaintiffs, the defendant appealed to the County Court. A trial *de novo* was had in the County Court, and that Court rendered judgment for the plaintiffs for three hundred dollars. A writ of certiorari was issued to the County Court by the District Court of the Fourth District; and on the hearing of the cause, the District Court modified the judgment of the County Court by striking therefrom the sum of one dollar. An appeal was taken to this Court from the judgment of the District Court; and this Court reversed the order of the District Court, and remanded the cause, with directions to vacate the judgment of the County

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Court. On the return of the remittitur, the District Court ordered that the judgment of the County Court be set aside and vacated. This order is followed by a formal judgment, whereby, "by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged, and decreed" that the plaintiffs "take nothing by this action as against William Sinkwitz, defendant," and that the defendant recover his costs. A certified copy of the decision of this Court, and of the order of the District Court, having been filed in the County Court, that Court ordered that the judgment theretofore entered in that Court be set aside and vacated. Three days prior to the entry of that order the plaintiffs had moved for judgment for two hundred and ninety-nine dollars and costs, on the pleadings and papers in said cause; and about one month subsequent thereto the County Court gave judgment for the plaintiffs for that sum and costs. The defendant thereafter procured from the District Court of the Fifteenth District, a certiorari to the County Court; and on the hearing thereof the District Court ordered that "the judgment of the County Court, and all the proceedings in that Court, in the action on which said judgment was entered, be and the same is hereby set aside, vacated, and annulled." This is followed by a formal judgment: "Wherefore, by reason of the law and the premises, it is ordered, adjudged, and decreed," that the judgment in the County Court be set aside, vacated, and annulled, and that the plaintiffs "take nothing by this action" as against the defendant, and that the defendant recover his costs. Soon after the entry of that judgment, the County Court, on the plaintiffs' motion, placed the cause on the calendar for trial; and a trial having been had, the County Court rendered judgment for the plaintiffs for one hundred and seventy-five dollars and costs. The cause now before this Court is a certiorari issued by this Court, to bring up for review the last mentioned judgment of the

County Court. This is a succinct history of this interesting case.

The only difficulties there are in this case, arise from the inattention of counsel in permitting the Clerk of the District Court, after the Court had pronounced its judgment, to enter up a judgment which did not accord with that which had been rendered — the Clerk, doubtless, using one of the common blank forms, without noticing that it was not the appropriate form. The Fourth District Court, in pursuance of the order of this Court, ordered the judgment of the County Court to be vacated. That was the extent of the order; but the District Court had no authority, under the remittitur from this Court, to adjudge that the plaintiffs take nothing by this action. Had this Court intended that the District Court should render judgment for the defendant, in the action in the County Court, this Court would have so expressly ordered; and reading the whole judgment, it does not appear that the District Court ordered judgment to be entered for the defendant. The result of the judgment was, to leave the cause in the County Court, in the condition in which it stood when the papers were filed therein on appeal from the Justice's Court.

The judgment which was rendered by the County Court, on the plaintiffs' motion, without a new trial, was clearly erroneous; but whether certiorari was the proper remedy to correct the error, is not a question which we can consider on the record now presented.

It is apparent from what has already been said, that when the first judgment of the County Court had been vacated as well as when the second judgment — that which was rendered on the plaintiffs' motion — had been vacated, it was proper that the cause should be placed on the calendar for trial. The annulling of the judgment made a new trial in-

Opinion of the Court — Rhodes, C. J.

dispensable, unless the judgment of the Fifteenth District Court amounted to a dismissal of the action. The judgment was, that the judgment in the County Court be vacated. The subsequent formal entry of the Clerk cannot be construed as giving the judgment a different effect—as changing entirely its nature. If the Court, on certiorari, may order the inferior tribunal to dismiss the action, it is clear that the statute does not authorize it, after vacating the judgment, to order a judgment to be entered for the opposite party. It is unnecessary, however, to determine whether such an order would be void; for, looking at the whole judgment, we construe this order to be a mere clerical blunder, and hold that it did not have the effect to add to or change the judgment, which it clearly appears was rendered by the Court. It did not directly dismiss the action.

The first point of the petitioners is that the judgment of this Court was virtually a dismissal of the action. It is apparent from what has already been said, that the judgment was not intended to have, and did not have, that effect.

The next point is that the subject matter of the action is a nuisance, and that, therefore, the Justice's Court had no jurisdiction of the cause of action. This is not an action to prevent or abate a nuisance, of which the County Courts, as well as the District Courts, have jurisdiction, but is an action for the recovery of damages occasioned by the alleged tortious acts of the defendant. Where the acts complained of amount to a nuisance, for which the person injured may have his action to abate the nuisance, he is not limited to that remedy, but may sue to recover the damages sustained by the wrongful acts of the defendant.

There is nothing in the petitioners' third point which requires further notice.

Writ dismissed.

Points decided.

[No. 2,400.]

**ELEANORA O. SALMON, EXECUTRIX OF THE LAST
WILL AND TESTAMENT OF FRANCIS SALMON, DECEASED,
v. ALLEN T. WILSON, ISAAC R. JEWELL, ET ALS.**

DEMURRER FOR AMBIGUITY.—A demurrer, on the ground of ambiguity, should be overruled, if enough appears to render the pleading demurred to easy of comprehension and free from reasonable doubt.

EJECTMENT BY EXECUTOR—ALLEGATION OF TITLE IN TESTATOR.—A complaint in ejectment by an executor is not necessarily defective because it fails to allege any title in the testator, as neither the legal title nor the right of possession may have been in him at his death, and yet both may have been afterwards acquired by the executor as such.

EJECTMENT BY EXECUTRIX—ALLEGATION OF SEIZIN.—Where a complaint in ejectment by an executrix, after setting forth the will, its probate, and the issuance of letters, averred that by virtue thereof she, as executrix, possessed herself of the real estate of the testator, and that she ever since has been and is the owner, seized in fee of an estate of inheritance therein, both as such executrix and as heir at law, and is entitled to the possession thereof: *held*, a sufficient averment of seisin and right of possession in her capacity of executrix.

DEED EXPRESSING MONEY CONSIDERATION, WHEN HELD GIFT.—In determining the character of a deed, claimed and purporting to be a gift, but also expressing a money consideration, resort must be had to the instrument itself; but if it can be ascertained from its face, interpreted in the light of surrounding facts, that it was intended to be a gift, it will be so held, without the need of proof *alunde*, on that point.

DEED OF GIFT, NOTWITHSTANDING MONEY CONSIDERATION.—Where Bartolome Bojorques conveyed to his eight children eight ninths undivided of a valuable six-league ranch, in consideration of love and affection, "and in the further consideration of four hundred and sixty-one dollars to him in hand paid by said parties of the second part:" *held*, that enough appeared on the face of the deed itself, in view of the value of the property conveyed in comparison with the paltry sum named, and in view of the condition of the parties, their relations, and the surrounding circumstances, to show the transaction a donation, and not a sale.

DEED OF GIFT "SUBJECT TO A MORTGAGE."—Where a deed of gift contained a provision that it was made "subject, however, to the payments, conditions, and agreements specified and contained in a certain indenture of mortgage;" *held*, that by accepting the deed the grantees did not become personally liable for, or assume the payment of, the mortgage debt, and that the transaction was not thereby rendered a sale.

CONSTRUCTION OF DEEDS AGAINST THE GRANTOR.—Deeds are construed most strongly against the grantor.

Statement of Facts.

TUSTIN vs. FAUGHT, 28 Cal. 241, in so far as it holds the deed of Bartolome Bojorques to his children of eight-ninths of the Rancho Laguna de San Antonio to be a deed of bargain and sale, and not a deed of gift, overruled.

ACKNOWLEDGMENT BY WIFE, WHERE HUSBAND NON-RESIDENT.—Where the certificate of acknowledgment to a deed of separate property by a married woman, made under the Act of February 14th, 1855 (Stats. 1855, p. 12), was dated February 26th, 1859, and set forth that she acknowledged on February 22d, 1859, and that her husband "does not now reside, and for one year next preceding February 22d, 1859, has not resided within the State of California;" *held*, that an objection to the certificate, on the ground of not stating that the husband was not a resident on the day of acknowledgment, was hypercritical and untenable.

DEED BY WIFE OF NON-RESIDENT—CERTIFICATE DATED AFTER ACKNOWLEDGMENT.—The statute relating to conveyances, by wives of non-residents, of their separate estate (Stats. 1855, p. 12), contemplates that some time may elapse, after the acknowledgment, and before the certificate, in order to make the necessary proofs as to the non-residence of the husband; but the certificate, when made, is the termination of a continuous transaction, and speaks as of the day of acknowledgment.

DEED OF UNDIVIDED INTERESTS, WITH SPECIAL RESERVATION—VESTING OF TITLE.—Where a father made a deed of gift to his eight children of eight-ninths undivided of a large grant, reserving one-ninth to himself, "to be laid out on that part of said rancho on which I now reside;" *held*, that the actual location of the reserved ninth was not a condition precedent to the vesting of the title to their undivided portions in the children.

EJECTMENT—PROOF OF OUSTER.—Where, in ejectment, the answer put in issue the plaintiff's title and right of possession, while it was not denied that defendant was in exclusive possession, holding for himself alone; *held*, that this was sufficient proof of ouster.

APPEAL from the District Court of the Seventh Judicial District, County of Sonoma.

This was an action of ejectment, brought against all the occupants (over a hundred in number) of the Rancho Laguna de San Antonio, in Sonoma and Marin Counties. Isaac R. Jewell, one of the defendants, answered separately; and the case, so far as he was concerned, was tried, and judgment obtained against him in March, 1870. He afterwards made a motion for a new trial, which being overruled, he took this appeal from the order as well as from the judgment.

Argument for Appellant.

The complaint, after giving the title of the Court and names of parties, commences with the declaration that "The said plaintiff in this action as well on her own account as on the account of the other heirs and devisees of Francis Salmon, deceased, complains of the above named defendants." It then alleges in the usual form the death of the testator, the leaving of a will, which is set forth in full, its proper probate and issuance of letters testamentary to the plaintiff, and her qualification; and then follows the allegation that she, "by virtue thereof, possessed herself of the real estate of said testator," etc., as given in the opinion. It also alleges ouster by the defendants, describes the land, and prays judgment of restitution, etc. To this complaint defendant Jewell, previous to putting in his answer, interposed a demurrer on the grounds that it did not state facts sufficient to constitute a cause of action, and that it was ambiguous and uncertain in not plainly setting out the party or parties plaintiff specifically, and in not specifically or in any manner describing the interests which plaintiff had in the land. The demurrer was overruled.

F. D. Colton, for Appellant.

1. The complaint is insufficient, because it nowhere alleges that Francis Salmon, the testator, was in his lifetime the owner of the land. The allegation that plaintiff "thereupon, by virtue thereof, possessed herself of the real estate of said testator hereinafter described," is not an allegation that Francis Salmon ever owned the land, or that it belonged to the estate. It is simply a recital to the effect that she possessed herself of the land, as being land of the estate. But this is no allegation of title in any one. A title in her, as executrix, is not set out at all; and no facts are shown to entitle her to recover as such. The allegation that she is seized in fee of an estate of inheritance, as executrix, is an impossible allegation, because an executrix, as such, cannot

Argument for Appellant.

have an estate of inheritance; she simply has a right of possession, founded upon the title of the testator.

Again, the complaint is ambiguous. It appears that the plaintiff complains as well on her own account as on account of the other heirs and devisees of Francis Salmon, deceased, and she alleges that she is seized of an estate of inheritance both as executrix and as heir at law of said testator. We contend that the parties plaintiff are not definitely set out, nor is the title relied on sufficiently alleged.

2. If the deed from Theodosia Bojorques Prudon to Salmon, Bliss, and Touchard was not properly acknowledged and certified in accordance with the statute (1 Hittell, 597) it was not executed, and is inoperative. (*Ewald v. Corbett*, 32 Cal. 497.) It is one of the express conditions of the statute that the husband shall not reside in the State on the day of acknowledgment; but this nowhere appears from the certificate. If it is sufficient that the husband was not a resident on the twenty-sixth of February, then it is sufficient if he was not a resident on the first of June following. If the Judge can delay making his certificate for four days, and then certify that on that day he was not a resident, then he can delay for four months, and then certify that on the day of making the certificate four months subsequent to the day of acknowledgment he was not a resident. For all that appears, the husband may have been present at the time the acknowledgment was taken. He may have been residing in the State, and in the Town of Santa Rosa, on the twenty-second, twenty-third, twenty-fourth, and twenty-fifth of the month; and from the certificate it would be inferred that for those four days he was residing in the State.

3. The deed from Bartolome Bojorques to his children is a deed of bargain and sale, and not a gift. The words of conveyance are, "give, grant, bargain, and sell," all showing upon the face of the deed that it was not a gift. It is not like the deed in *Peck v. Vandenburg*, 30 Cal. 13. In that case

Argument for Appellant.

the grantees, as appeared from the deed, were the owners of the equitable title to the land, and the grantor simply vested them with the legal title thereto. She states this to be the object of the deed. Her intent to give appears plainly and unequivocally from the deed itself. Not so with the deed in this case. Here the grantor provides carefully for his money and for the payment of his mortgage. This same deed has been before this Court, in *Tustin v. Faught*, 23 Cal. 241, and it was there held, that upon its face it was a deed of bargain and sale, and not a deed of gift.

4. Parol evidence is not admissible to vary or modify the conveying elements in a deed, except for the purpose of reforming it on account of fraud. (*McCrea v. Piermont*, 16 Wend. 465; *Westbrook v. Harbison*, 2 McCord Ch. 112; *Ryan v. Goodwin*, McMullen Eq. 451; *Gullett and Wife v. Lamberton*, 1 English, Ark., 109; *Sewell v. Baxter and Wife*, 2 Maryland Ch. Dec. 454, and cases cited; *Natley Young's Estate*, 3 Maryland Ch. Dec. 467; *Crawford v. Spencer*, 8 Cush. 418; *Logan v. Bond*, 18 Ga. 197; *Cook v. Whiting*, 16 Ill. 483; *Attorney General v. Clapham*, 31 English L. & Eq. 163.)

5. By the terms of the conveyance the land conveyed was made subject to the payment of the mortgage, according to the conditions and agreements specified therein. This mortgage was for four hundred and fifty dollars, with interest at the rate of ten per cent per month, compounded monthly. The payment of this mortgage might well be a strong inducement for the grantor to make the deed. By the terms of the deed, the grantees were bound to pay this mortgage. Such was the evident intention; and they received it with that understanding, and were bound to fulfill all obligations specified in it. (*Minor v. Terry*, 6 How. Pr. 208; *Ferris v. Crawford*, 2 Denio, 595; *Jumel v. Jumel*, 7 Paige Ch. 594; *Belmont v. Cowan*, 22 N. Y. 439; *Maynard v. Maynard*, 4 Edwards Ch. 716; *Notter v. Hughes*, 2 Kernan, 78; *Lewis v. Covilland*, 21 Cal. 178.) And it makes no difference that

Argument for Respondent.

the grantee was a *feme covert*. (*Cross v. Carson*, 8 Blackford, 138; *Barker v. Cobb*, 36 N. H. 344; *Garnett v. Scouten*, 3 Denio, 334.)

6. No ouster has been shown. Admitting the plaintiff's title, she has made out no case. If she has title, she is merely a tenant in common; and no refusal of joint occupation has been shown.

George Pearce, for Respondent.

1. Though the plaintiff alleged a fee simple, she was not bound to prove it, but might recover on proof of prior possession. (*Morton v. Folger*, 15 Cal. 275; *Stark v. Barrett*, 15 Cal. 361.)

2. The deed of Bartolome Bojorques to his children constituted a gift. (*Gale v. Colburn*, 18 Pick. 297; *Brewer v. Harely*, 22 Pick. 370; *Bryan v. Bradley*, 16 Conn. 474; *Peck v. Vandenburg*, 30 Cal. 11.) If it did not on its face, parol evidence was admissible to show the real consideration. (1 Greenl. Ev., Sec. 26, Note 1; *Wilkinson v. Scott*, 17 Mass. 257; *Fairly v. Fairly*, 34 Miss. 18; 2 Wash. on Real Prop. 655, 656, and cases cited; *Barker v. Koneman*, 13 Cal. 9; *Cole v. Saulsby*, 21 Cal. 47; *Bennett v. Solomon*, 6 Cal. 134; *McCrea v. Piermont*, 16 Wend. 460; *Bullard v. Briggs*, 7 Pick. 537; *Wallace v. Wallace*, 4 Mass. 135; *Peck v. Vandenburg*, 30 Cal. 11.)

3. When the different parts of a deed are inconsistent with each other, effect must be given to that part which is calculated to carry into effect the real intention, and that part which would defeat it must be rejected. (*Chitty on Cont.* 94; *Walker v. Giles*, E. C. B. 662-702; *Shep. Touch.* 88; 1 Steph. Com. 464; *Furnival v. Coombes*, 5 M. & G 736.)

4. The words used in the deed of Bartolome to his children in reference to his own share, do not constitute a reservation in the sense attempted to be put upon it (*Bouv. L.*

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Dict., Title, Reservation; 2 Wash. on R. P. 686, 687, 692); nor an exception (2 Wash. on R. P. 686; 38 N. H. 212; *Hurd v. Curtis*, 7 Met. 110; *Peltea v. Harris*, 13 Pick. 323); nor a condition (6 Petersdorff's Abr., Title, Condition, 35). The deed passed an estate *in presenti*, and created a tenancy in common of the whole tract. (*Lawrence v. Ballou*, 37 Cal. 518; *Schenck v. Encey*, 24 Cal. 110; *Lick v. O'Donnell*, 3 Cal. 59; *Gibbs v. Swift*, 12 Cush. 393; *Shrafe v. Wait*, 30 Ver. 738; *Jackson v. Livingston*, 7 Wend. 136; *Corbin v. Jackson*, 14 Wend. 619; *Long Island R. R. Co. v. Conklin*, 29 N. Y. 572.)

5. It is objected that it nowhere appears that the husband of Theodosia did not reside in the State on the day of the acknowledgment to her deed. What is the day of acknowledgment? Clearly, the twenty-second day of February; and the certificate shows that the husband did not on that day reside in, and had not for one year next preceding that day resided in, the State. The act of certifying an acknowledgment must follow the taking of the acknowledgment; and in such a case as this a reasonable time will be allowed until the testimony, provided for in the statute, is taken. The words used in the certificate — whenever that may be made — all refer to the day of acknowledgment; and the words “does not now,” etc., used in the certificate here are used in connection with, and in reference to, the word “acknowledged,” and are qualified thereby and by intendment of the statute, they being part only of an entire certificate of acknowledgment, made on the twenty-second of February.

6. No question arises in an action of ejectment about an ouster in a case when the defendant denies the plaintiff's title. (2 Greenl. Ev., Sec. 318; *Siglar v. Van Kassar*, 10 Wend. 414; *Carpentier v. Gardner*, 29 Cal. 163; *Owen v. Morton*, 24 Cal. 373; *Marshall v. Shafter*, 22 Cal. 194.)

Opinion of the Court — CROCKETT, J.

By the Court, CROCKETT, J.:

The demurrer to the complaint, on the ground that it is ambiguous, and does not state facts sufficient to constitute a cause of action, was properly overruled. The facts on which the plaintiff relies might, perhaps, have been stated with more perspicuity; but enough appears in the complaint to render it easy of comprehension and free from reasonable doubt, which is all that is necessary.

Under the second ground of demurrer, it is objected that if the plaintiff can recover at all, it can only be in her capacity of executrix, and not in her own right, and that the complaint fails to allege any title in her testator to the demanded premises. If this be conceded, the complaint is not necessarily defective. Neither the legal title nor the right of possession may have been in the testator at the time of his death, and yet both may have been since acquired by the plaintiff, in her capacity of executrix, prior to the commencement of the action. After setting forth the will, and alleging that it was duly probated and that letters testamentary were issued to the plaintiff, the complaint avers that "by virtue thereof (she) possessed herself of the real estate of said testator hereinafter described, and ever since then has been, and now is, the owner seized in fee simple of an estate of inheritance of, in, and to all of said land, both as such executrix and as heir at law of said testator, and is now entitled to the possession thereof." This is a sufficient averment of seizin and a right of possession in the plaintiff in her capacity of executrix.

The plaintiff and defendants claim title to the premises in controversy under one Bartolome Bojorques, who, in November, 1851, conveyed to his eight children, as tenants in common, eight ninths, undivided, of the "Rancho Laguna de San Antonio," reserving the remaining one ninth to himself, "to be laid out on that part of said rancho on which I now

reside." The deed recites that it was made "for and in consideration of the natural love and affection of the said party of the first part to his children, the said parties of the second part, and in the further consideration of the sum of four hundred and sixty-one dollars, to him in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged." In a subsequent portion of the deed, it is provided that the conveyance is made, "subject, however, to the payments, conditions, and agreements specified and contained in a certain indenture of mortgage" made by said Bartolome Bojorques to one Short, to secure the payment of four hundred and fifty dollars, with interest at the rate of ten per cent per month, on which mortgage there was then due four hundred and fifty dollars, and interest from the eighth day of March preceding. The mortgage included the whole rancho, which contained six square leagues. One of the children named as a grantee in the deed was Theodosia, then the wife of Victor Prudon, from whom, however, she had been separated for some years next prior to the date of the deed, in which she is described by her maiden name, "Theodosia Bojorques," and in which there is no reference to her husband. The plaintiff deraigns title under Theodosia, through a deed made by her, in which her husband did not unite, he being then, and for more than a year next preceding the execution of the deed, a non-resident of this State, as the plaintiff alleges. The defendants deraign title under certain other of the children named as grantees in the deed of November, 1851; and there has been no partition of the rancho between the several tenants in common, though an action is pending for that purpose.

At the trial, the plaintiff put in evidence the deed from Bartolome to his children, and offered to prove by parol that it was intended as a deed of gift, and not as a deed of bargain and sale, and that no valuable consideration whatever was paid or agreed to be paid by the grantees. The defend-

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ants objected to this proof as incompetent, but the Court admitted it, and the defendants excepted. The plaintiff then offered in evidence the deed from Theodosia, to which the defendants objected, on the ground that it was not acknowledged and certified in the form required by law to enable a married woman to convey her separate estate without uniting her husband in the deed; but the Court admitted the deed, and the defendants excepted. These rulings are claimed by the defendants to have been erroneous, and constitute the chief grounds of error relied upon on this appeal.

It becomes material, it is said, to determine whether the deed from Bojorques to his children was a deed of gift, or of bargain and sale, for the reason that in the former case the estate conveyed to Theodosia became her separate property and might be alienated by her without joining her husband in the deed, under the circumstances alleged to exist in this case; whereas, if the conveyance from her father was a deed of bargain and sale, made upon a valuable consideration, it is claimed that the estate conveyed became community property, and could not be transferred by her separate deed. In determining the character of the deed, resort must, of course, be had to the instrument itself; and if it can be ascertained from the face of it, interpreted in the light of the surrounding facts, that it was intended to be, in fact, a deed of gift, and that the transaction between Bojorques and his children was a donation, and not a sale, there will be no necessity for the inquiry whether parol evidence was admissible to prove it to be a gift. If the deed itself, viewed in the light of the circumstances under which it was made, establishes the gift, there was no need of proof *aliunde* on that point.

In *Peck v. Vandenburg*, 30 Cal. 11, this Court had occasion to consider a deed very similar to that now under discussion. In that case a mother conveyed to her eight children eight ninths of two large tracts of land, reserving one ninth to

herself, and the deed recited that it was made "in consideration of the natural love and affection which I have and bear to my said children, and for the further sum of five dollars, to me in hand paid before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged." The only appreciable difference between the recital of the consideration in that deed and in this is, that in the former the money consideration is stated at five dollars, and in the latter at four hundred and sixty-one dollars. In that case the record did not disclose the quantity of land conveyed; but in this case the quantity conveyed to the children was eight ninths of a tract of six square leagues, containing about twenty-five thousand acres, of which more than twenty-one thousand acres was conveyed to the children. In the former case the Court held that the consideration of five dollars, recited in the deed, was merely nominal, and was probably inserted by the scrivener under the belief that some such recital was essential to the validity of the conveyance; and the deed was, therefore, held to be a deed of gift on its face.

I think it is apparent in this case, as in that, on the face of the deed itself, construed in connection with the surrounding facts, that the money consideration named in the instrument was merely nominal, and that the transaction was, in fact, a donation, and not a sale. Here was an old man with a family of eight children, most of whom were married and living apart from him, and who was the owner of about twenty-five thousand acres of land situate in one of the most fertile portions of the State. He conveys to all his children eight ninths of this large estate in equal portions, reserving to himself only one ninth, including his homestead, and recites on the face of the deed that it is made "for and in consideration of the natural love and affection of the said party of the first part to his children, the parties of the second part;" and then adds, as a further consideration, the

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paltry sum of four hundred and sixty-one dollars, which is recited to have been paid to him by the children, equal to about fifty-eight dollars for each child; and each of whom was receiving, under the conveyance, about two thousand seven hundred acres of valuable land. If the recital of this paltry money consideration, so insignificant as compared with the value of the estate, is to convert the transaction into one of bargain and sale, no reason is perceived why the same result would not have ensued if the sum named had been one dollar or one cent for each of the children, instead of fifty-eight dollars. The disproportion between the price named and the value of the estate would only have been a trifle greater in the one case than in the other; but in either case is so enormously large as clearly to indicate that the money consideration did not, in fact, enter into the transaction as one of its material elements. It was clearly the intention of Bojorques to donate this large and valuable estate to his children in equal portions, and not to sell it to them. Hence we find the conveyance to his married daughters is made to them in their own names, excluding their husbands; and in the case of Theodosia, she is named by her maiden name, and her husband is not referred to. The parties to the deed must be presumed to have known that under the law, as it then was and now is, all property acquired by the wife during the marriage, by gift, bequest, devise, or descent, became her separate estate, and that all acquired otherwise became the common property of the husband and wife, and was subject to disposition by the husband without the consent of the wife. It is clear that Bojorques, in conveying this valuable property to his married daughters, had no intention to convey it, practically, to their husbands; and particularly in the case of Theodosia, who had been, for some years, living apart from her husband. But if we should hold that the insertion in the deed of an inconsiderable money consideration by the scrivener who drew it up

had the effect to convert the transaction into one of sale. I am convinced we would give an effect to this deed which never entered into the minds of the parties to it at the time it was made. When Bojorques conveyed to Theodosia her portion of the land, he little dreamed that he was virtually conveying it to her husband, Prudon, from whom she had been separated for six years. Our statute, which provides that all property acquired by the wife during the marriage, otherwise than by gift, bequest, devise, or descent, shall be common property, and subject to disposition by the husband, could not have been intended to work so flagrant a wrong as would result in this case were we to hold that the deed from Bojorques to his married daughters was in fact, and was intended to be a deed of bargain and sale, and not of gift. But enough appears on the face of the conveyance, when construed in connection with the condition of the parties, their relations to each other, and other circumstances, to render it apparent that the transaction was in fact a donation, and not a sale, in the true sense of the statute defining the rights of husband and wife; and this, too, without the aid or parol evidence to show the actual intention of the parties and the precise facts of the transaction. Some stress, however, is laid upon that clause of the deed which recites that the conveyance is made subject to the "payments, conditions, and agreements" contained in the mortgage to Short; and counsel insists that in accepting the deed the grantees became personally liable for, and assumed the payment of the mortgage debt, and that this rendered the transaction a sale, and not a gift. The mortgage to Short is not before us, and we are ignorant of its contents, except that it included the whole rancho, and was made to secure the payment of four hundred and fifty dollars, with interest at ten per cent per month from March 8th, 1851. This recital is but a declaration of the grantor that the whole tract was then subject to the mortgage to Short; and such recitals are usually inserted

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in deeds conveying mortgaged premises, in order to rebut a presumption that the existence of the mortgage had been concealed from the grantee. But a recital of this character imposes no obligation on the grantee to pay the mortgage debt unless there be some other clause in the deed indicating that such was the understanding and agreement of the parties. Deeds are construed most strongly against the grantor, and in the absence of any provision importing that the grantee shall assume upon himself the payment of a prior mortgage upon the premises, no such obligation arises. I find nothing in this deed indicating such an understanding.

I am aware that in *Tustin v. Faught*, 23 Cal. 241, this particular deed from Bojorques to his children was under consideration, and was held to be a deed of bargain and sale, and not a deed of gift. But from the report of the case this point does not appear to have been argued by counsel, or carefully considered by the Court. The opinion of the Court, by Mr. Justice CROCKETT, does not attempt an analysis of the deed, and, on this point, is unsatisfactory. I think the Court fell into an error in deciding on the character and legal effect of the instrument.

The next point urged by the appellant is that the deed from Theodosia to Salmon, Bliss, and Touchard is inoperative and void as a conveyance, because of a defect in the certificate of acknowledgment. The statute of February 14th, 1855 (Stats. 1855, p. 12), provides in what manner a married woman may convey her separate estate, in the absence of her husband. It requires the acknowledgment to be made before the District Judge of the county in which the land is situate, and only authorizes such a conveyance to be made by the wife, when the husband was not, and for one year next preceding the execution of the instrument had not been bona fide, residing in this State. The second section requires that the Judge taking the acknowledgment shall, "before he certify the same, be satisfied by

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the oaths of at least two credible, disinterested citizens of this State, that the husband of such married woman does not, and for one year next preceding the day of acknowledgment has not, resided in this State, which fact, and the name of the witnesses by whom the same was proved, shall be recited in the certificate of acknowledgment." The acknowledgment in this case was taken before the proper Judge, whose certificate is dated February 26th, 1859, and states that the deed was acknowledged by the wife on the 22d February, 1859, and that he is satisfied by the oaths of four credible, disinterested citizens of this State (whose names are given), that Victor Prudon, the husband of said Theodosia, "does not now reside, and for one year next preceding the 22d day of February A. D. 1859, has not resided, within the State of California." The only objection taken to this certificate is, that it does not state, as is alleged, that on the twenty-second of February (the day of the acknowledgment) the husband was not a resident of this State. It is conceded that the certificate states, that on the twenty-sixth of February, and for one year next preceding the twenty-second of February, Prudon was not a resident of this State; but it is said there is nothing in the certificate to show that on the twenty-second (the day of the acknowledgment) he was not residing in this State. This objection is hypercritical and untenable. If such fine-spun technicalities as this should prevail in interpreting certificates of acknowledgment, there would be but little safety in land titles. The certificate was manifestly intended to speak as of the day of acknowledgment; and when it says Prudon is not "*now*" a resident, it must be referred to the day of the acknowledgment, and not to the date of the certificate, four days later. The statute contemplates that some time may possibly elapse after the acknowledgment, and

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before the certificate, in order to make the necessary proofs as to the non-residence of the husband, and until the proof is made the transaction is continuous, and is finally terminated by the completed certificate, which speaks as of the day of the acknowledgment. This certificate is clearly good.

Another point made by the appellant is that the deed from Bojorques to his children was inoperative to vest the legal title in them until after the one ninth reserved by him had been definitely located so as to include his homestead. But there is no force in this proposition. There is nothing in the deed to indicate that the actual location of the one ninth was intended as a condition precedent to the vesting of the title. On the contrary, that clause of the deed was designed to be only a specification, in general terms, of the manner in which the reserved one ninth should be thereafter located on a final partition between Bojorques and his children. The provision for the location contains none of the elements of a condition precedent.

The only remaining ground of error relied upon is that there was no proof of the ouster complained of. But the answer puts in issue the plaintiff's title and right of possession; and even on this appeal it is insisted that the plaintiff has neither title nor right of entry, whilst it is not denied that the defendant is in the exclusive possession, holding for himself alone, and not for himself and the plaintiff, as one of his cotenants. Under all the authorities this is sufficient proof of ouster. (*Owen v. Morton*, 24 Cal. 373; *Carpentier v. Gardiner*, 29 Cal. 163; *Marshall v. Shafter*, 32 Cal. 194; 10 Wend. 414; 2 Greenl. Ev. Sec. 318.)

Judgment affirmed.

Mr. Justice TEMPLE, being disqualified, did not participate in the decision of this case.

Points decided.

[No. 2,341.]

**Q. K. MARSHALL v. U. CALDWELL, E. E. FORREST,
AND I. TRUEMAN.**

CONSTRUCTION OF WRITTEN CONTRACT—SALE OF LAND.—Where a party who owns but an undivided one-half of a tract of land enters into a contract by which he agrees that, upon the payment of the purchase money, he will convey the whole of the land to another party, who is induced to regard him as the owner of the entire premises, the vendor is deemed to have sold not only his own interest in the land, but the whole of the land.

REMEDY—ALLEGATION IN COMPLAINT.—In the face of such an agreement, the vendor will not be permitted to aver, if he brings an action to recover possession from the party holding under the contract, that he sold less than the whole title to the land, unless he can also aver that the written contract, by reason of fraud, mistake, or the like, does not show the real contract.

RIGHT TO RESCIND—SPECIFIC PERFORMANCE.—In the case stated, upon a discovery by the vendee that the plaintiff held only the undivided half of the land, he is entitled to proceed at once to rescind the contract; or he may proceed to have the contract specifically enforced to the extent of the plaintiff's interest in the land.

RESTORATION OF POSSESSION—RENTS AND PROFITS.—In proceeding to specifically enforce the contract, it is not incumbent on the defendant to restore, or offer to restore, the possession to the plaintiff; nor is the plaintiff entitled to any portions of the rents and profits accruing since the contract was made.

OBLIGATION OF VENDOR TO CONVEY.—If the vendor in such a case is unable to perform the entire agreement, and can convey only an undivided half of the land, he may be compelled to convey that interest.

OBLIGATION OF VENDEE TO TENDER PAYMENT.—To entitle the vendee in the case stated to a decree compelling the vendor to convey his undivided half of the land: *held*, that it was necessary for him to tender as the purchase money only one-half of the contract price.

APPEAL from the District Court of the Seventh Judicial District, County of Solano.

The facts are stated in the opinion of the Court.

L. P. Marshall, for Appellant, argued that as the contract of sale contained an express provision whereby the plaintiff agreed to execute a deed to the defendant warranting the title as against himself and all persons claiming from him, but against no others, he can be deemed to have sold only

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his own interest in the land. He also argued that the cross complaint was insufficient to constitute a defense to the action of the ejectment on the ground of covenant for conveyance, because that ground of defense is destroyed by asserting title in another, and by averring that the vendee took possession without averring a surrender, or offer to surrender, possession to plaintiff; and also, that it is inequitable, first, for the defendant, by himself and assignor, to accept the possession from plaintiff of the undivided one half of the land to which he has not the legal title, and receive to his own use the rents and profits for a long space of time — to wit, for more than three years — without rendering to plaintiff any return for such benefits; and, second, to refuse to surrender up such possession, and resist the action of ejectment. These acts being inequitable, he cannot claim any equitable relief whatever. The maxim is, "He who seeks equity must do equity." (*Walker v. Sedgwick*, 8 Cal. 404; *McCracken v. San Francisco*, 16 Cal. 638.)

John M. Coghlan, for Respondents.

The rule is well settled that where a party contracts to sell land, as he is unable to make a complete title to all the property sold, or where there has been a substantial misdescription of it in important particulars, Courts of equity will not suffer the vendor to take advantage of his own wrong, or misdescription, but will allow the vendee to proceed with the purchase *pro tanto*, or to abandon it altogether. "The general rule (for it is not universal) in all such cases," says Mr. Justice STORY, "is, that the purchaser, if he chooses, is entitled to have the contract specifically performed as far as the vendor can perform it, and to have an abatement out of the purchase money, or compensation for any deficiency in the title, quantity, quality, description, or other matter touching the estate." (Story's Eq. Jur. Sec. 779; *Mortlock v. Buller*, 10 Ves. 315; *Attorney General v. Day*, 1 Ves. 218; *Voor-*

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Lees v. De Meyer, 2 Barbour, 50; *Pingree v. Coffin*, 12 Gray. Mass. 316; Fry on Spec. Perf. Sec. 299; *Gilbert v. Peteler*, 38 Barbour, 517; *Luckett v. Williamson*, 31 Miss. 54; *Bell v. Thompson*, 34 Ala. 633; *Collins v. Smith*, 1 Head. Tenn. 251; *Wright v. Young*, 6 Wis. 127.) The objection that the tender is not properly alleged is untenable. When acts to be done by two parties are mutual and concurrent, an allegation in the complaint that plaintiff offered to perform his part of the contract, and a continued readiness to perform, and a refusal by defendant, is sufficient to sustain an action for specific performance; the tender in such cases only going to the question of costs. (*Stevenson v. Maxwell*, 2 Comstock, 408; *St. Paul Division v. Brown*, 9 Minn. 157.) Especially when the vendor, as in the case at bar, refuses to perform. (*Stone v. Sprague*, 20 Barbour, 509; *Bellinger v. Kitts*, 6 Barbour, 281.) The offer to perform, and the right to a tender, if it ever existed, is waived by the neglect of applicant to discharge the estate from the cloud upon his title. (*Holmes v. Holmes*, 12 Barbour, 143.)

By the Court, RHODES, C. J.:

The plaintiff sues in ejectment, and relies for a recovery on his legal title. The defendant Forrest, the vendee of Caldwell, sets up in his cross complaint a contract made between the plaintiff and Caldwell, by which the plaintiff sold to Caldwell the premises in controversy, and covenanted to convey the same to him upon the payment of the purchase money therein mentioned; and alleges that he entered into possession of the land under the contract; that the plaintiff falsely and fraudulently represented that he owned the whole land; but that in truth he owned only the undivided half of it; that he offered to accept a deed from plaintiff of so much of the land as the plaintiff was the owner of, and to pay the plaintiff therefor a proportionate

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part of the purchase money; and he prays for a specific performance of the agreement as to the undivided half of the land.

The contract, as already remarked, shows that the plaintiff sold the whole land, and not, as he now contends, only his interest in the land. True, he could not convey any greater interest in the land than he held, but the contract recites a sale of the entire title. The covenants which, by the terms of the contract, are to be inserted in the deed, do not limit the extent of the interest attempted to be sold, for upon a sale in fact of the entire title, the vendor may restrict the covenants, whether express or implied, in such manner as the parties may agree. Nor indeed will the plaintiff be permitted to aver, in the face of the agreement, that he sold less than the whole title to the land, unless he can also aver that the written contract by reason of fraud, mistake, or the like, does not show the real contract.

Upon the discovery by the vendee, that the plaintiff held only the undivided half of the land, he was entitled to proceed at once to rescind the contract; but he was not obliged to adopt that course. He was entitled to proceed, as he has done in this case, to have the contract specifically enforced to the extent of the plaintiff's interest in the land. The discussion, therefore, of the rules of law which may be applicable, when the vendee elects to rescind the contract on account of the fraudulent representations of the vendor, are immaterial, for the vendee elects, not to rescind, but to affirm the contract, so far as the plaintiff is able to perform it.

It does not expressly appear, that at the time of the sale, the plaintiff had the possession of the land, but as Caldwell acquired the possession under the contract, it may be assumed, as both parties seem to concede, that the plaintiff then held the possession. Whatever possession he may have had, and whatever may have been the source of his right of

possession, it is clear that such right passed to the vendee by virtue of the sale. In proceeding to specifically enforce the contract, it is clear that it is not incumbent on the defendant to restore or offer to restore the possession to the plaintiff. In such case it is equally clear that the plaintiff is not entitled to any portion of the rents and profits accruing since the contract was made, for the reason that he was not, and is not now, entitled to the possession of the premises if the defendant is entitled to a specific performance of the contract. That is the only remaining question.

The cross complaint of defendant Forrest is sufficient to entitle him to a judgment for a specific performance of the agreement, and in this respect it is sustained by the findings. The plaintiff does not controvert the position—and there is no doubt of its soundness—that if he is unable to perform the entire agreement, and can convey only an undivided half of the land, he may be compelled to convey that interest. To entitle the defendant to the relief, it was necessary for him to pay or tender as the purchase money only one half of the contract price. The offer to pay that sum is alleged, and the finding is in accordance therewith. The possession which the plaintiff had will be referred, for its right, to his title to the undivided half of the land which he then held; and as the defendant is entitled to such possession, the plaintiff is neither entitled to be restored to the possession jointly with the defendant, nor to any separate compensation for such possession beyond the one half of the stipulated price for the whole land.

The question as to the correctness of the ruling of the Court, in permitting the defendant to amend his cross complaint in respect to the allegation of the fraudulent representation of the plaintiff as to his title to the land, need not be noticed; as in the view we have taken of the nature of the cross complaint, the amendment was immaterial.

Judgment affirmed.

Statement of Facts.

[No. 2,618.]

THE EEL RIVER NAVIGATION COMPANY v. JUSTUS STRUVER.

SERVICE OF SUMMONS UPON CORPORATION—PRESIDENT DE JURE.—In an action against a corporation, where the summons was served upon Bristol, who had been duly elected its President and presided at several meetings of its Board of Trustees, and who had never resigned, or been removed, or his office declared vacant, or a permanent President chosen in his place—though he had left the county and no longer took any part in the management of the corporation affairs, and at the meeting of the Board after his so leaving the county, another person was elected President pro tem. for that meeting, and was regarded by the stockholders as the President: *held*, that Bristol was still President *de jure*, and the service upon the corporation valid.

APPEAL from the District Court of the Fourth Judicial District, City and County of San Francisco.

In December, 1867, Justus Struver, as the assignee of E. W. Linsley & Co., commenced an action in the Fourth District Court against the Eel River Navigation Company to recover a balance alleged to be due for goods sold and delivered. The summons was served in the same month, in San Francisco, upon J. D. Bristol as the President of the corporation. No appearance being made a default was entered and judgment by default taken against the corporation in January, 1868, for six thousand eight hundred and twenty-two dollars and sixty-one cents. It was this judgment which the present action was brought to set aside.

The Eel River Navigation Company was organized as a corporation by filing its certificate in the County Clerk's office of Humboldt County, on October 2d, 1865; and Ferndale, in that county, named as the principal place of business. On the next day a meeting of the Trustees mentioned in the certificate was held at Ferndale, and Bristol, who was one of the number, was elected President for three months. He attended and presided over another meeting of the

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Trustees, held on October fifth, and soon afterwards left Humboldt County and never returned or afterwards took any part whatever in the concerns of the corporation. On October fourteenth, at a meeting of the Trustees — Bristol being then absent — N. Patrick was elected President pro tem. for that meeting; and it appears that he continued to act as President *de facto*. None of the other officers, or agents, or stockholders, knew anything about the service on Bristol until several months after the entry of judgment against the corporation.

There having been a judgment in the present action for defendant, the plaintiff appealed.

M. G. Cobb, for Appellant.

If Bristol were ever President at all, it was only for the first three months of the existence of the corporation. (Hitt. Dig. 933, 936.) If he remained President after the first three months, he was simply President *de jure*, and Patrick was President *de facto*. But Patrick, so far as Struver was concerned, was President *de jure* at the time of the service of the summons. (*Touhy v. Chase*, 30 Cal. 524; *People v. Allen*, 6 Wend. 487; *Rumsey v. People*, 19 N. Y. 41; *Golt v. Eves*, 12 Conn. 248; *Pond v. Negus*, 8 Mass. 230; *People v. Peck*, 11 Wend. 612.) Even if Patrick were only President *de facto*, service should have been made on him and not on Bristol, even if Bristol were President *de jure*. (Ang. & Ames on Cor., Sec. 286; *Berrian v. Methodist Soc. of N. Y.*, 4 Abbott Pr. 424; *McCall v. Byram Manufacturing Co.*, 6 Conn. 435.)

Courts, of law and equity both, will not tolerate any fraud, trick, or misrepresentation, in the service of process, by means of which the spirit and intent of the law is violated, even though its letter be strictly complied with. (*Bulkley v. Bulkley*, 6 Abb. 311; *Carpenter v. Spooner*, 2 Sandf. 717; 2

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Code Rep. 140; *Goupel v. Simonson*, 8 Abb. 474; *Haight v. Husted*, 5 Abb. 170; *Wells v. Gurney*, 8 Barn. & Cress. 769.)

Walter Van Dyke, for Respondent.

No other President than Bristol was ever elected, or attempted to be elected. Patrick was never elected other than President pro tem. He was neither President *de jure* nor *de facto*—there was not even the color of an election as President. (Ang. & Ames on Cor., Sec. 287.)

There is no sufficient showing for the interposition of a Court of equity; no reason given why a motion to open the default was not made. (Pr. Act, Sec. 68; *Bibend v. Krentz*, 20 Cal. 109; 2 Story Eq. Jur. Secs. 887, 888; *Floyd v. Jaynes*, 6 John. Ch. 479; 7 Cranch, 336.)

This appeal being from the judgment only, the appellant is bound by the findings, and they sustain the judgment. (*Harper v. Minor*, 27 Cal. 107.)

By the Court, CROCKETT, J.:

This is an appeal by the plaintiff, on the judgment roll alone, from a judgment for the defendant. The action is to set aside a judgment obtained by the defendant against the plaintiff, on the ground that one Bristol, on whom the summons in that action was served, as President of the corporation, was not, when served, the President, or indeed an officer of said corporation; that the corporation or its officers had no knowledge of the pendency of the action until long after the judgment by default was entered, and that it has a meritorious defense.

It appears from the findings that Bristol was duly elected the President of the corporation soon after its organization, and presided at several meetings of the Board of Trustees; that he subsequently ceased to reside in the county in which the corporation had its principal place of business, and after

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he left the county, at a meeting of the Board one Patrick was elected President pro tem. for that meeting; but Bristol never resigned his office, and was never removed, nor was his office declared vacant; that Bristol thereafter took no part in the management of the affairs of the corporation, and Patrick was regarded by the stockholders as the President; but no permanent President was ever chosen in place of Bristol.

Upon these facts, I think the Court below properly held the service upon Bristol as President to be valid and sufficient to give the Court jurisdiction over the corporation. Service upon Patrick as President *de facto* might, and probably would have been, good; but Bristol was President *de jure*, and I think the service upon him was clearly valid.

Judgment affirmed.

[No. 2,042.]

**BENJAMIN BRUNDAGE v. SAMUEL ADAMS AND
JAMES DEVLIN.**

SERVICE OF STATEMENT.—A statement on motion for a new trial need not be served unless there is a rule of Court requiring service. The statute only requires such statement to be filed.

WAIVER OF NOTICE OF MOTION FOR NEW TRIAL.—Proposing amendments to a statement on motion for a new trial is a waiver of a failure to serve a notice of the motion, unless the party proposing the amendments makes the objection, or reserves his right to make it when he proposes his amendments.

ASSESSMENTS ON MINING INTERESTS.—The statute of 1865-6 in relation to levying assessments against the owners of interests in mining claims for the purposes of working the same, applies only to copartners in the claim, and has no reference to those who are mere owners and shareholders, without the partnership relation.

LIEN.—To warrant such assessment, if the partnership relation does not exist, the joint owner must be notified that thenceforward he will be deemed a copartner for the purpose of working the claim, and the service of the notice changes the relation of the parties, and creates a mining partnership.

Argument for Appellant.

CONSTITUTIONAL LAW.—Constitutionality of the Act of April 2d, 1866, providing for assessments on interests in mining claims not discussed or decided.

APPEAL from the District Court of the Sixteenth Judicial District, Kern County.

The Court below rendered judgment in favor of the plaintiff. The defendants appealed from the judgment and from an order denying a new trial.

The other facts are stated in the opinion.

Whiting & Naphtaly, for Appellant.

No evidence, aside from the deeds, is offered to show that defendants were either "the owners or occupants of a mining claim;" that they ever "associated themselves together" for any purpose; or that any single act was done by which they could be brought within the power of the law.

We insist that effect is to be given to the word "such," and that before the deed becomes evidence of the facts recited in it, it must, at least, be shown that the parties whom it is sought to divest of their property, by means of it, are of the class of persons toward whom the Act is directed; that they are either owners or occupants of a mining claim, and that they have associated themselves for the purpose of working or prospecting a mining claim. It is only after these and many other preliminary facts are shown to exist that any proceedings whatever are authorized.

But even admitting that these deeds are competent evidence of the facts therein recited, they do not recite sufficient to bring the respondent within the Act of 1866. Section one of that Act premises that it is applicable only "whenever two or more persons being owners, occupants, or locators of any mining claim, or where any two or three persons shall have associated themselves together * * * for the purpose of working or prospecting any mining claim,

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or any of the public lands of the United States, shall, after being notified in writing by said mining company, that they have been associated in said mining claim, be deemed to be copartners for the purpose of prospecting or working said mining claim, and shall be subject to the provisions and liabilities imposed by this Act."

Quint & Hardy, for Respondent.

The same rules of law which apply to sales for unpaid taxes are applicable to this case. Prima facie the deed is evidence that all the proceedings were regular, and in accordance with law. The burden of showing irregularity is thrown upon the defendants. (*O'Grady v. Bartisel*, 23 Cal. 287; *Moss v. Shear*, 25 Cal. 38; *Wetherbee v. Dunn*, 32 Cal. 106.) In this case no attack is made, nor attempt to prove any irregularity in the proceedings. As a general rule, Courts will take notice of whatever ought to be generally known within the limits of their jurisdiction. They take notice who fill the various county offices within their jurisdiction. (*Wetherbee v. Dunn*, 32 Cal. 106.) If the defendants were not notified as the law required—if the instruments evidencing the plaintiffs' title were not genuine, how easy for them to have shown the fact. The question of notice was a matter within their own knowledge.

By the Court, WALLACE, J.:

The Court below should not have denied the motion of the defendants for a new trial because they had not served their statement in support of the motion. They had filed it within the time provided in the stipulation of June twenty-third. Neither the stipulation, nor the statute, nor any rule of the Court below which has been called to our attention required them to serve it. (Sec. 195.)

The point is now, however, made in argument here, that

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the motion for a new trial was correctly denied, because the defendants, though they filed, did not serve their notice of intention to move for a new trial. But the answer is, that the plaintiff did not make this objection, nor reserve his right to make it, when he proposed his amendment to the statement. Had he done so the fact of service might possibly have been shown, or a waiver of it in some way made to appear.

The action is brought to quiet the alleged title of the plaintiff to certain mining ground, being an undivided interest in the Delphi mining claim, in Kern County. The answer denies the plaintiff's title. On the trial the plaintiff undertook to show that he had acquired the interest and estate formerly owned by the defendants in the mine. For this purpose he offered and read in evidence, against the objections of the defendants, a conveyance made by Ross, the Sheriff of Kern County, running to the plaintiff as grantee, and purporting to convey to the latter the estate of the defendant Adams in the premises.

This conveyance in substance recites that in the Clear Creek Mining District, in Kern County, an assessment was levied against the owners and shareholders of the Delphi claim, for the purpose of defraying the expenses of prospecting and working it; that Adams, owner of an undivided interest, neglected and refused to pay, after notice given; that thereupon his interest in the claim was advertised for ten days, and was sold by the Sheriff to the plaintiff, pursuant to the provision of "An act concerning partnerships for mining purposes," etc. The plaintiff also read in evidence, against the objections of the defendants, a conveyance to himself made by the Sheriff, and purporting to convey to the plaintiff the interest of Devlin, the other defendant, in the mining claim, and reciting, *mutatis mutandis*, the same matter recited in the Adams deed, already mentioned.

The objections taken by the defendants to the introduc-

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tion of these deeds were numerous, and among the rest was the objection that there was no authority of law shown in the Sheriff to convey the property of the defendants to the plaintiff, and that the conveyances do not sufficiently set forth a compliance with the requirements of the Act of the Legislature to which they refer. The argument upon either side had proceeded here upon the assumed constitutionality of the statute itself, through the provisions of which the plaintiff claims to have acquired the title of the defendants; and we shall, therefore, determine the case without reference to that question.

It will be seen that the statute (1865-6, p. 828) in the first section, distinctly designates the person who "shall be subject to the provisions and liabilities imposed by the Act." Such persons must be copartners — "copartners for the purpose of prosecuting or working said mining claim," in the language of the statute. It is not enough that they are "owners and shareholders," as these deeds recite that Adams and Devlin were, or that they are associated together for the purpose of working or prospecting a mining claim on the public lands. So long as these and no other relations exist between the parties their interest in the mining claim is not subject to be divested by such proceedings as those here relied upon. Notice must first be given to such occupant, locator, or person associated, that he will be thenceforward deemed and held to be a copartner "for the purpose of prospecting or working said mining claim." Such a notice given to those who are owners, or shareholders, or locators, or occupants, etc., by one who is jointly concerned with them in the enterprise, would have the effect, under the provisions of the statute, to change the relations of the parties *inter sese*, and create a mining copartnership between them; and only after that had been effected, a notice or notices looking to the levying of an assessment, etc., under section two of the Act, etc., may be

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served, and other proceedings taken, according to the further provisions of the statute. There is no authority whatever to proceed as here attempted under the statute, unless the mining copartnership be first created between the parties; and there being no evidence tending to show that fact, the Court below should have excluded the conveyance offered by the plaintiff.

Judgment and order denying new trial reversed, and cause remanded.

CROCKETT, J., being disqualified, took no part in this decision.

[No. 2,795.]

NICHOLAS MARQUEZ v. JOHN B. FRISBIE ET AL.

PROOF OF RIGHTS OF CLAIMANTS UNDER THE SUSCOL ACT.—It was the special duty of the Register and Receiver of the United States Land Office at San Francisco to take proof of the necessary facts entitling applicants, under the Act of Congress of March 3d, 1862, relative to the Suscol Rancho, to the benefit of that Act; and where there is no charge of fraudulent proofs, the award of the Register and Receiver will be regarded as conclusive.

PRE-EMPTION OF LANDS INCLUDED IN THE SUSCOL RANCHO.—By the Act of March 3d, 1863, relative to the Suscol Rancho, all the lands included in the grant to Vallesjo are withdrawn from the operation of the general preemption laws of the United States, and an attempt to preempt such lands under the general laws is futile, and confers no title, either legal or equitable.

APPEAL from the District Court of the Fifteenth Judicial District, City and County of San Francisco.

The facts in this case are substantially the same as in *Hutton v. Frisbie*, reported in 37 Cal. 475, except that in this case the plaintiff claimed to have been in possession of the premises in suit ever since 1853, and alleged that the patentee, Frisbie, never was in occupation of it. Defendants demurred to the complaint on the ground that it did not

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state facts sufficient to constitute a cause of action, and that the Court had no jurisdiction of the subject of the action. The demurrer was sustained, upon the authority of *Hutton v. Frisbie*, supra, and plaintiff appealed.

M. A. Wheaton, for Appellant.

The plaintiff settled upon the land before it was improved or used, and has resided ever since upon it. Upon this point we insist that by the terms of the Suscol Act (12 U. S. Stats. at Large, 808, Sec. 2), the patentee was not entitled to enter in the Land Office, under that Act, lands which he had never reduced to possession, but which had been held in adverse possession against him before and at the time of the rejection of the grant claim, and ever since. (Sec. 2 of Suscol Act, 12 U. S. Stats. at Large, 808.) As to the other points in the case, we submit them upon the argument and authorities filed in *Hutton v. Frisbie*.

William H. Patterson, for Respondent, relied upon the points and authorities filed for the respondent in *Hutton v. Frisbie*.

By the Court, CROCKETT, J.:

It is conceded by the plaintiff's counsel that this case comes strictly within the decision in *Hutton v. Frisbie*, 37 Cal. 475, unless it can be distinguished from it on the ground that the plaintiff was in the actual possession of the premises in controversy for many years prior to the passage of what is known as the Suscol Act (12 U. S. Stats. at Large, 808), and that Frisbie, the patentee under that Act, had not at any time reduced this land into his actual possession; and it is insisted that, under the second section of the Act, Frisbie was not entitled to enter lands of which he had never been

Argument for Respondents.

[No. 2,523.]

JOHN WILSON v. DANIEL SHACKELFORD AND
OSCAR WILSON.

UNLAWFUL DETAINER — POSSESSION OF PREMISES WITHOUT ACTUAL PRESENCE.—Where a person entered upon a vacant quarter section of public land, erected a small dwelling-house upon it, slept there several nights, and then, locking the house and taking the key with him, returned to an adjoining county, where he had previously resided, with intention immediately to return with his family to the new house as his home, but found his wife too ill to be removed, and she continued so for several months: *held*, that in contemplation of law he remained in possession, and that such possession was sufficient to maintain an action of unlawful detainer, against a person entering in his absence and refusing to surrender, under section three of the forcible entry and unlawful detainer Act of 1866. (Stats. 1865-6, p. 768.)

SHELBY v. HOUSTON, 38 CAL. 410.—On the point that a person may be an occupant and have peaceable and undisturbed possession of premises within five days preceding an unlawful entry, within the meaning of section three of the forcible entry and unlawful detainer Act of 1866 (Stats. 1865-6, p. 768), without the actual presence of himself or any person in his behalf, affirmed.

APPEAL from the County Court of Santa Clara County.

The facts are stated in the opinion of the Court.

Fisher & Newman, for Appellant.

The plaintiff was only required to have the immediate right of possession of the premises as against the defendants to enable him to recover. His actual personal presence was not indispensable. (*Minturn v. Burr*, 16 Cal. 107; *Shelby v. Houston*, 38 Cal. 410.)

Hatch & Tully, for Respondents.

The very object of the Legislature, as we think, in using the words "occupant" and "actual occupant," in the third section of the forcible entry and unlawful detainer Act, was by limiting the right of action to the person who was in the actual possession at the time, to distinguish between the special remedy which the statute affords and the ordinary

remedy afforded by the possessory action of ejectment. Under the construction given in *Shelby v. Houston*, we can not see why this action in the County Court can not be substituted for the action of ejectment in very many cases where that action has hitherto been considered the proper and only remedy. Certainly it can be so substituted in all cases where the plaintiff relies for recovery upon mere prior possession. We submit that the statute bears a different construction from that put upon it by *Shelby v. Houston*.

By the Court, CROCKETT, J.:

This is an action for unlawful detainer under the third section of the Act of 1866 (Stats. 1865-6, p. 768.) On the trial the Court granted a nonsuit, and the plaintiff having moved for a new trial, which was denied, has brought this appeal. The proof was that in October, 1869, the plaintiff erected on a quarter section of public land in Santa Clara County a small dwelling-house, in which he slept for several nights, and then returned to San Mateo County, where he had previously resided, with the intention immediately to return with his family to the new house as his home; but on his arrival at his home in San Mateo found his wife too ill to be removed, and she so continued for several months; that on leaving the new house for San Mateo he locked the door and took the key with him; that in the ensuing month of January, during the plaintiff's absence, the defendants entered the new house and have ever since occupied it; that they obtained access to it by removing some of the boards from the side, and have refused to surrender the possession for more than five days, after a proper demand made. On the facts the Court below granted a nonsuit, on the ground that the plaintiff had failed to show that he was the actual occupant of the premises within five days before the entry of the defendants. That the plaintiff, in contemplation of law,

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was in possession of the house when the defendants entered is too plain to admit of debate. He had recently erected and occupied it, and was only temporarily absent, having the door locked and the key in his possession. But the defendants insist that this is not sufficient to maintain the action under the third section of the statute, which, it is claimed, requires an actual occupation of the premises by the plaintiff or some one in his behalf within five days before the entry. This precise question was before the Court in *Shelby v. Houston*, 38 Cal. 410, and was decided adversely to the construction now contended for. It is unnecessary to repeat the reasons for the construction adopted in that case, and which are fully stated in the opinion of the Court.

Judgment reversed and cause remanded for a new trial.

[No. 2,204.]

THE PEOPLE OF THE STATE OF CALIFORNIA v.
HORACE HAWES.

STIPULATION IN COURT BELOW, WHEN NO PART OF APPEAL RECORD.—

Where a transcript on appeal contained neither bill of exceptions nor statement, and the only points raised depended upon a stipulation embodied in it, to the effect that for the purpose of a trial in the Court below and an appeal certain isolated facts (not, however, constituting the case to be determined) were agreed on. *Held*, that such stipulation was not an exception, nor a statement on appeal, nor a part of the judgment roll, and that therefore neither it nor the points depending upon it could be considered by the appellate Court.

APPEAL from the District Court of the Twelfth Judicial District, San Mateo County.

This was an action against the defendant, Hawes, and certain real estate, known as the "Redwood Farm," to recover taxes, amounting to seven hundred and sixty-eight dollars and eighty-seven cents, levied for the fiscal year 1868-9.

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The transcript on appeal, besides the pleadings, findings, and judgment, contained, under the head "Statement," a stipulation, dated June 14th, 1869, whereby it was agreed to submit the cause to the District Court upon the evidence and statement of facts therein given, and that upon them and the pleadings the Court should determine all questions of law and fact, and proceed to render final judgment, subject to appeal; and that, in case of appeal by either party, the same might be taken directly, without any previous application for new trial; and that this statement should stand for the statement on appeal. The evidence and facts set forth in the stipulation related to the time and manner of making up the assessment roll and levy of road tax in San Mateo County in 1868. There was nothing in the record purporting to be an objection or exception, nor anything purporting to be a statement, except the foregoing stipulation. There was a judgment on September 30th, 1869, for plaintiff, as demanded in the complaint, and defendant appealed.

Horace Hawes, for Appellant.

George W. Fox, District Attorney of San Mateo County, for Respondent.

By the Court, WALLACE, J.:

The appeal is from the judgment, and rests upon the judgment roll, being in this case the pleadings, findings, and judgment—no bill of exceptions or statement appearing in the record. A stipulation is found embodied in the transcript, from which it would appear that for the purpose of a trial in the Court below and an appeal to this Court, if one should be thereafter taken, certain isolated facts were agreed upon (not, however, making up the case to be determined),

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and also agreeing that certain evidence might be offered on the trial, subject to objection, etc. This stipulation is not, by statute, part of the judgment roll. It is not an exception under section one hundred and eighty-eight, nor a statement on appeal under section three hundred and thirty-eight, and we can not therefore consider it or the points of the appellant, depending, as they do, wholly upon it.

The judgment is therefore affirmed, as of the 10th day of January, 1871.

Mr. Justice CROCKETT did not participate in the foregoing decision.

[No. 2,723.]

FREDERICK F. LOW, GOVERNOR, HENRY W. CLEAVELAND, J. D. WHITNEY, WILLIAM ASHBURNER, J. W. RAYMOND, E. S. HOLDEN, ALEXANDER DEERING, GEORGE W. COULTER, AND GALEN W. CLARK, CONSTITUTING AND KNOWN IN LAW AS "THE COMMISSIONERS TO MANAGE THE YOSEMITE VALLEY AND THE MARIPOSA BIG TREE GROVE," v. J. M. HUTCHINGS.

YOSEMITE VALLEY — THE STATE AS TRUSTEES — POWER OF LEGISLATURE.

— Congress having, in 1864, granted to the State of California the Yosemite Valley in trust for certain purposes, and with a proviso that it should remain inalienable forever, the State Legislature has no power to make an unconditional and absolute grant of it to a third person in violation of such trust.

PRE-EMPTION RIGHT DEFEASIBLE BY GOVERNMENT BEFORE MONEY PAID.—

Though a qualified preëmptioner enter upon public land, with intention to preëmpt the same, and perform all the acts necessary to perfect his preëmption right, except the payment of the purchase price, the Government may, nevertheless, at any time before the price is actually paid or tendered, devote the land to another purpose, and thereby wholly defeat the right of preëmption.

HUTCHINGS AND LAMON SPECIAL ACT INOPERATIVE WITHOUT RATIFICATION BY CONGRESS.—The Act of February 20th, 1868, granting certain

Argument for Appellants.

lands, held in trust by the State in Yosemite Valley, to Hutchings and Lamon, being in terms not to take effect until after its ratification by Congress, cannot, in the absence of such ratification, have any force, or serve as a muniment of title, or protect the contemplated grantees against an ejectment brought by the Commissioners appointed to manage the property.

APPEAL from the District Court of the Thirteenth Judicial District, Mariposa County.

The District Judge, after reciting the facts, concluded his findings in the following language: "That it would operate as great and irreparable injury to defendant to be ejected from the lands in controversy, before the final action of Congress upon the Act of Legislature last mentioned; and as conclusion of law the Court finds that the defendant is entitled to judgment. The case of *Hutton v. Frisbie*, in 37 Cal. 495, and others cited by the plaintiffs' attorney, I do not consider in point—and I further decide that when a pre-emptioner enters upon the unsurveyed public lands, under the sanction of a public law, and makes improvements and becomes a bona fide settler, he acquires such rights as the Government cannot divest or take from him."

There having been a judgment for defendant in accordance with the findings, the plaintiffs appealed.

The other facts are stated in the opinion.

Alex. Deering, for Appellants.

So far as the Act of the Legislature figures in this case, it may be disposed of by referring to its second section, which provides that it shall take effect "when ratified by Congress," and as Congress has not ratified it, it has no operation. But if it were in force, the Legislature had no more right to alienate any of the Yosemite Valley than any private individual; and its action was an unwarranted interference with matters that it had no right to attempt to control.

Argument for Respondent.

The only question involved in this case is, whether the defendant has acquired such rights, by merely settling on the land, as the Government could not divest? Were this question an open one counsel might claim the privilege of a more lengthy discussion; but as this Court has in four cases decided it, and it has been explicitly passed upon and decided by the Supreme Court of the United States, those decisions will be cited, with full confidence that although overruled by the learned Judge in the Court below, they will be received as authority in this Court. (*Hutton v. Frisbie*, 37 Cal. 476; *Hastings v. McGoogin*, 27 Cal. 84; *Page v. Hobbs*, 27 Cal. 487; *Page v. Fowler*, 28 Cal. 609; *People v. Shearer*, 30 Cal. 550; *Frisbie v. Whitney*, 9 Wallace, 191.)

L. F. Jones and J. B. Campbell, for Respondent.

We submit that there is more than one question in this case, and that one of them is, not whether the Government could have divested such rights as the defendant had acquired, but, rather, have such rights as defendant had acquired been divested? The case here is quite different from that passed upon in *Hutton v. Frisbie* and *Frisbie v. Whitney*. Defendant settled under the general laws, and subsequently Congress passed the Act of June 30th, 1864, granting the Yosemite Valley, and including defendant's land, to the State. There are no words in the Act indicating any intent to affect any rights or privileges which had then already accrued to a preëmption settler; and there was nothing in "the condition of things which called for such legislation," from which such an intent could be inferred. Applying the reasoning in *Hutton v. Frisbie*, to the effect of the Act of June 30th, 1864, the conclusion must be precisely the reverse of that reached in respect to the Act of March 3d, 1863, affecting the Suscol Ranch, which was involved in that case. The defendant has in his favor all "the equities which lie at the foundation of the preëmption policy" and

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all the equities which this Court conceded to the defendant in *Hutton v. Frisbie*. In that case the plaintiff sought, through the general preëemption laws, but against their spirit, to deprive the defendant of lands bought in reliance upon the Vallejo title. In this the plaintiffs seek through a special Act of Congress to deprive the defendants of land settled up and improvements bought in reliance upon the general preemption laws.

The conditions annexed to the grant by Congress are conditions subsequent, repugnant to the nature of the estate to which they are annexed, and are therefore void. (1 Greenl. Cruise, Title 13, Secs. 2, 20, 22; 1 Washb. R. P., Chap. 14, Sec. 6; 4 Kent, 150.) The State, therefore, took the fee, discharged of the conditions, and Congress would have no effective ratifying power; so that the defendant derived title under the special Act of February 20th, 1868, and is lawfully in possession.

But, independently of the foregoing considerations, the Acts and proceedings of the Legislature equitably operate as an estoppel against the maintaining of this action by the State or by her agents, the plaintiffs, in her behalf. If the judgment of the court below is right, it will be affirmed, though the reasons given should not be correct or full.

By the Court, CROCKETT, J.:

In the year 1864 the Congress of the United States, by special Act, granted to the State of California the Yosemite Valley and the grove of big trees in Mariposa County in trust for certain purposes, and with a proviso that they shall remain inalienable forever. The Act also requires the State to appoint a Board of Commissioners to manage the property in the execution of the trust, with power to make leases of portions of the land for a term or terms not exceeding ten years. In the year 1866 the Legislature

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accepted the grant, and appointed the plaintiffs a Board of Commissioners to manage the property, under the provisions of the Act of Congress, and with power to sue and be sued in respect to said lands in their official capacity. This action is ejectment in the ordinary form, brought by the Commissioners to recover one hundred and sixty acres of land situated in the Yosemite Valley, and in the occupation of the defendant. It appears from the findings of fact that in 1864, about forty days prior to the passage of said Act of Congress, the defendant, who was a duly qualified preëmptioner, entered upon the premises in controversy with the bona fide intention to preëmpt the same under the preëmption laws of the United States; that he purchased a dwelling-house and other improvements then on the premises, and has ever since resided upon and occupied said premises with his family; that he was, and at all times since his entry has been ready and willing to prove up his preëmption claim and to pay the purchase price therefor, but was hindered from doing so because the land had not been surveyed and sectionized, and was, therefore, not open to entry; that, with the intention to preëmpt the land as soon as an opportunity to do so was afforded, he had continued to make permanent and valuable improvements thereon.

If these were all the facts, there could be no possible doubt of the plaintiff's right to recover, under the principles announced in *Whitney v. Frisbie*, 9 Wallace, U. S. R. 191; *Hutton v. Frisbie*, 37 Cal. 475; reaffirmed in *Marquez v. Frisbie*, decided at the present term. These cases decide, after elaborate argument, and it may now be considered as finally settled, that if a qualified preëmptioner enter upon a portion of the public domain, with the intention to preëmpt the same, and performs all the acts necessary to perfect his preëmption right, except the payment of the purchase price, the Government may, nevertheless, at any time before the price is actually paid or tendered, devote the land to another

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purpose, and thereby wholly defeat the right of preëmption. It is unnecessary to repeat here the process of reasoning by which the courts have arrived at this result. It will be found to be elaborately stated in the cases referred to; and, whether deemed to be satisfactory or otherwise, must be accepted as settling the law on that point.

But it is claimed that the defendant's case does not come within the principle of these decisions, because in February, 1868, the Legislature of this State passed an Act which on that day became a law, whereby the State granted to the defendant the premises in controversy. If the grant had been wholly unconditional and absolute in terms, and had taken effect *in presenti*, it would have been clearly void for want of power in the Legislature to make it. It would have been in open and flagrant violation of the trust on which these lands were conveyed to the State, and, therefore, void. But the Legislature was evidently aware that it had no power to make the grant without the sanction of the United States, nor did it attempt to make it, except with the approval of Congress; for the second section of the Act provides that "this Act shall take effect and be in force from and after its ratification by the Congress of the United States." Congress, however, has not as yet ratified it, and, consequently, the act has not yet taken effect, and is not as yet in force. As a muniment of title, it is and will continue to be wholly inoperative until ratified by Congress. Nor can the memorial of the Legislature, requesting Congress to ratify the grant to the defendant, improve his status in the Courts. Whatever consideration these proceedings may be entitled to at the hands of the Commissioners, as an argument why they should forbear, for the present, to press their demand for the possession, it is clear that they establish no equities in the defendant of which the Courts can take cognizance. The Legislature has not, either expressly or by implication, abridged or modified the powers of the Com-

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missioners; and so long as these remain unimpaired, and the trust remains in force under which the State holds these lands, the right of the plaintiffs to their possession cannot be successfully resisted. From the facts found by the Court the defendant's case appears to be one of peculiar hardship, entitling him to relief in some form; but, however great the hardship upon the defendant, his only remedy is an appeal to Congress for relief in some appropriate form. The Courts can afford him none as the case now stands.

Judgment reversed, with an order to the Court below to enter judgment for the plaintiffs on the findings.

[No. 2,859.]

THE PEOPLE OF THE STATE OF CALIFORNIA v.
JAMES C. EDWARDS.

CHALLENGE OF JUROR FOR IMPLIED BIAS.—The unqualified expression of an opinion as to the guilt or innocence of a prisoner on trial is ground of challenge of a juror for implied bias.

ANSWER TO CHALLENGE.—It is no answer to such challenge to say that in the mind or thought of the party challenged the opinion was qualified, though in its form of expression it was unqualified. The admitted fact being that he had unqualifiedly expressed his opinion upon the question of the guilt or innocence of the prisoner, he was thereby, in judgment of law, incompetent to serve as a juror.

EVIDENCE OF CHARACTER OF PRISONER.—In a criminal case proof of bad character of the deceased is admissible only when it tends in some way in connection with the immediate circumstances under which the killing was done, to show that the prisoner had sufficient grounds, as a reasonable man, to fear that he was himself about to receive at the hands of the deceased some great bodily harm, and that he acted under the influence of fear in killing the deceased.

APPEAL from the District Court of the Thirteenth Judicial District, County of Tulare.

The facts are stated in the opinion.

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Croffroth & Spaulding, for the Appellant, argued that it was error to overrule the challenge of Carrol for implied bias, and cited *People v. Gehr*, 8 Cal. 359; *People v. Williams*, 6 Cal. 207; *People v. Cottle*, ib. 227; *People v. Reynolds*, 16 Cal. 129; *People v. King*, 27 Cal. 507; *People v. Bodine*, 1 Denio, 281; *People v. Wood*, 29 Cal. 636; *People v. Weil*, 40 Cal. 268. They also argued that the Court erred in refusing to permit the defendant to introduce proof of the violent and turbulent character of the deceased, citing *People v. Murray*, 10 Cal. 309; *State v. Monroe*, 5 Georgia, 137; *State v. Reynolds*, 1 Kelley, 236; *State v. Queensberry*, 3 Stew. & P. 308, 315; *State v. Pritchett*, 22 Alabama, 39; *State v. Franklin*, 29 Alabama, 14; *State v. Dupree*, 33 Alabama, 380; *State v. Tackett*, 1 Hawks, N. C. 210; *State v. Bellers*, 2 Halstead, 220, 230-237; *State v. Smith*, 12 Richard, S. C. 430; *State v. Hicks*, 6 Jones, 588; *Com. v. Payne*, 1 Metc. Ky. 370; *State v. Reppy*, 2 Head, Tenn. 217; *State v. De Forest*, 21 Ind. 23; *Com. v. Wilson*, 1 Gray, Mass. 337; *People v. Campbell*, 16 Ill. 17; 1 Wharton Cr. Law, 641, 642; 2 Wharton Cr. Law, 1026, 1027.

Attorney General Jo Hamilton, for the Respondent.

[No brief on file.]

By the Court, WALLACE, J.:

The prisoner was convicted of the crime of murder in the second degree, in killing one Ragan.

In impaneling the trial jury, R. Carrol, testifying as to his competency to serve as a juror, in answer to questions propounded by prisoner's counsel, stated that he had formed an opinion as to the guilt or innocence of the prisoner, but did not know whether that opinion was qualified or unqualified; that his opinion was formed from rumor and from what he

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had heard of the case from those who pretended to know the facts; that he believed the statements of these persons, though he did not know whether they were witnesses or not; that he still entertained the same opinion, and that considerable evidence would be required to remove that opinion, and that unless such evidence was produced to change his opinion it was fixed and certain; that he had talked with different persons, and had expressed his opinion without any qualification.

In answer to inquiries made by the Court, he stated that he had no prejudice against the defendant; that he could decide the case impartially; that the opinion he had formed would not influence his judgment; that he would be governed by the evidence, etc.

Upon these facts a challenge for implied bias, interposed by the prisoner, was overruled by the Court below, and Carrol was challenged peremptorily by the prisoner, whose peremptory challenges were exhausted during the impaneling of the jury.

In overruling the challenge for implied bias the Court below manifestly erred.

The statute (Section 347) provides that a challenge for implied bias may be offered for any one of certain causes therein enumerated, among them, that the proposed juror has "formed or expressed an unqualified opinion or belief that the prisoner is guilty or not guilty of the offense charged."

Here it is undisputed that Carrol had "expressed his opinion without any qualification."

The statute declares that the unqualified expression of an opinion as to the guilt or innocence of the prisoner is ground of challenge for implied bias. When such challenge is interposed it is no answer to say that in the mind or thought of the party the opinion was qualified, though in its form of expression it was unqualified. In *People v. Cottle*, 6 Cal. 228, one of the jurors, on his examination as to his competency,

said that he had not formed or expressed an unqualified opinion as to the guilt or innocence of the defendant; that he had formed a qualified opinion, founded upon report merely, which opinion he had expressed, but that, in expressing it, he had not expressed any qualification. In that case Mr. Chief Justice MURRAY said: "It is argued by the Attorney General that there is a difference between expressing an unqualified opinion and the unqualified expression of an opinion. And so there is, if we resort to a verbal criticism or mere metaphysical disquisition. It was not the intention of the Legislature to leave the rights of parties to rest upon so narrow and dangerous a foundation. Their obvious intention was to exclude from the jury box every one who had either formed an unqualified opinion, or, having formed an opinion, had expressed it without qualification."

The answers made by Carrol to the inquiries propounded by the Court had no bearing whatever upon the question in hand. It was of no sort of import whether he, in fact, had any prejudice against the prisoner or not, nor whether he supposed that, as a juror, he would be governed by the evidence or not. The admitted fact being that he had unqualifiedly expressed his opinion upon the question of the guilt or innocence of the prisoner, he was thereby become, in judgment of law, incompetent to serve as a juror—just as if it had appeared that he was related by consanguinity to the prisoner (also a ground of challenge for implied bias)—in which case it would be idle to inquire of the proposed juror whether or not, in his opinion, he could give his accused kinsman an impartial trial.

The prisoner offered to show that the deceased was a man of violence, of turbulent character, and bloodthirsty. The evidence was excluded, and, we think, properly. The deceased was unarmed when he was assaulted, and the prisoner approached him from behind, and, while the deceased was

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peaceably conversing with an acquaintance, shot him in the back, the ball entering his body "a little to the left of the backbone, nearly at the lower edge of the shoulder blade," giving him a mortal wound; and when he had fallen, the prisoner shot him again, and a third time, each wound being, in the opinion of the medical witness, mortal. It is said in *People v. Murray*, 10 Cal. 310, that if a contest has occurred between the deceased and the prisoner, "the reputation of the deceased may sometimes be given in proof, to show that the defendant was justified in believing himself in danger when the circumstances of the contest are equivocal. But here there was, confessedly, no contest, nor even an altercation between the deceased and the prisoner at the time of the killing; for, as we have seen, the shot was fired from behind; and the deceased does not seem to have been even aware of the proximity of the prisoner at the moment. Under such circumstances, the character of the deceased, as being peaceable or otherwise, is of no import. Bad as it may have been, the prisoner had no right to kill him on that account. The bad character of the deceased, when allowed to be proven, should tend, in some degree, in connection with the immediate circumstances under which the killing was done, to show that the prisoner had sufficient grounds, as a reasonable man, to fear that he was himself about to receive, at the hands of the deceased, some great bodily harm, and that he acted under the influence of that fear in killing him. There must be some fact transpiring at the time of the killing indicating the then immediate purpose of the deceased toward the prisoner to be hostile, or at least equivocal, in its character, and which may be illustrated by the known reputation of the deceased, if he had one, in the community as a man of violence, etc.

Here there was no such fact; and the inquiry into the character of the deceased was correctly disallowed.

Judgment reversed, and cause remanded for a new trial.

Points decided.

[No. 2752.]

THE PEOPLE OF THE STATE OF CALIFORNIA v.
AH SAM.

INDICTMENT FOR POSSESSING UNFINISHED FORGED BANK BILLS—TWO DESCRIPTIONS OF SAME OFFENSE.—In a criminal case, under the seventy-sixth section of the Act concerning crimes and punishments, the indictment in one count charged the defendant with having in his possession "five hundred certain false, forged, and counterfeit blank and unfinished bank-bills, each made in the form and similitude of a bill for the payment of money made to be issued by * * * the Chartered Bank of India, Austria, and China, a foreign corporation then lawfully organized and incorporated under the laws of the United Kingdom of Great Britain and Ireland," doing business at Hongkong, with intent to procure the bills to be finished in order to utter them as genuine bills, and defraud the said bank. In a second count, which was preceded by a statement that the offense charged therein was the same as that described in the first count, it charged that the bills were in the form and similitude of bills for the payment of property. *Held*, that it was but a different description of the same offense, and that there was nothing repugnant in saying that the unfinished bills have the form and similitude of those which have been finished.

MOTION DEFINED, AND HOW MADE.—A motion is an application for a rule or order made *vice voce* to a Court or Judge. Making out and filing a written application for such rule or order is not sufficient. The attention of the Court must be called to it, and the court moved to grant it.

MOTION FOR NEW TRIAL.—A motion for a new trial must be made *vice voce*, and, if desired, the grounds of the motion and the rulings of the Court thereon may be embodied in a bill of exceptions, and can be reviewed by the Supreme Court in no other way.

CHARGE AS TO INCORPORATION IN INDICTMENT FOR POSSESSING COUNTERFEIT NOTES.—In an indictment for possessing counterfeit notes with intent to utter them, if the legal existence of the corporation be not made an issue, it is not necessary to charge that the banking house whose bills have been imitated was an incorporated company. It would be equally an offense whether the company be actually incorporated or not, so it is acting as a corporation, and issues bank bills which are current anywhere.

PROOF OF INCORPORATION BY REPUTATION.—Where an indictment for possessing counterfeit bills charged that the bills were in the form of the bills of an incorporated banking company, doing business in Hongkong: *Held*, that it was competent to prove by reputation the existence and incorporation of the company.

GUILTY POSSESSION OF COUNTERFEIT NOTES.—To constitute the crime of possessing forged notes with intent to pass them, the law only requires

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the guilty possession. It is not necessary that the intent to fill up unfinished notes should be proven by an attempt to do so. Possession, with knowledge of the purpose for which they are designed, is sufficient.

APPEAL from the Municipal Criminal Court of the City and County of San Francisco.

The facts are stated in the opinion. The indictment was as follows:

Ah Tuck and Ah Sam are accused by the Grand Jury of the City and County of San Francisco, State of California, by this indictment, found this 25th day of August, A. D. 1870, of the crime of forgery, committed as follows: The said Ah Tuck and Ah Sam, on the 9th day of July, A. D. 1870, at the city, county, and State aforesaid, feloniously, falsely, and willfully did have and keep in their possession five hundred certain false, forged, and counterfeit blank and unfinished bank bills, each made in the form and similitude of a bill for the payment of money, made to be issued by an incorporated bank, viz., The Chartered Bank of India, Australia, and China, a foreign corporation then lawfully organized and incorporated under the laws of the United Kingdom of Great Britain and Ireland, and then carrying on business as such banking corporation at Hongkong, in China, which said five hundred unfinished bank bills so had and kept in the possession of the said Ah Tuck and Ah Sam are each in the words and figures following, viz.:

\$5.	INCORPORATED BY ROYAL CHARTER.	\$5.
No.—		No.—

HONGKONG, —, 18—.

The Chartered Bank of India, Australia, and China promises to pay the bearer, on demand, at its office here, five dollars or the equivalent in the currency of the island, value received.

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By order of the Court of Directors.

Entered ——. Acc't ——.

—, Manager.

HONGKONG.

With intention to fill up said blank and unfinished bills, and permit, cause, and procure the same to be filled up and completed in order to utter and pass the same and to cause the same to be uttered and passed as true and genuine bills of said corporation, to defraud said The Chartered Bank of India, Australia, and China, contrary to the form of the statute in such case made and provided.

And in order to charge the commission of the said crime of forgery in another count and in a different way, the said Grand Jury accuse the said Ah Tuck and Ah Sam of the said crime of forgery, committed as follows, viz: The said Ah Tuck and Ah Sam, on the 9th day of July, A. D. 1870, at the City and County of San Francisco aforesaid, feloniously, falsely, and willfully did have and keep in their possession the said five hundred false, forged, and counterfeit blank and unfinished bank bills, each made in the form and similitude of a bill for the payment of property made to be issued by an incorporated bank, viz., The Chartered Bank of India, Australia, and China, a foreign corporation then organized and lawfully incorporated under the laws of the United Kingdom of Great Britain and Ireland, and then carrying on business as such banking corporation at Hongkong, in China; which said five hundred blank and unfinished counterfeit bank bills so had and kept by the said Ah Tuck and Ah Sam in their possession are each in the words and figures following, viz:

\$5.	INCORPORATED BY ROYAL CHARTER.	\$5.
No.—		No.—

HONGKONG, —, 18—.

The Chartered Bank of India, Australia, and China, promises to pay the bearer, on demand, at its office here,

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five dollars or the equivalent in the currency of the island, value received.

By order of the Court of Directors.

Entered ——. Acc't ——.

—, Manager.

HONGKONG.

With intention to fill up said blank and unfinished bills, and permit, cause, and procure the same to be filled up and completed, in order to utter and pass the same and to cause the same to be uttered and passed as true and genuine bills of said corporation, to defraud said The Chartered Bank of India, Australia, and China, contrary to the form, force, and effect of the statute in such case made and provided, and against the peace and dignity of the people of the State of California.

Darwin & Murphy, for Appellant.

Attorney General Jo Hamilton, for Respondent.

By the Court, TEMPLE, J.:

The defendant was indicted jointly with one Ah Tuck, under the seventy-sixth section of the Act concerning crimes and punishments, for having in his possession blank and unfinished bank bills, in the form and similitude of a bill for the payment of money, made to be issued by a corporate bank, to wit: The Chartered Bank of India, Australia, and China, being a corporation doing business at Hongkong, with intent to fill up and complete the same, or to cause it to be done, and to pass or cause them to be passed, etc.

The defendant having been convicted on motion in arrest of judgment made several objections to the sufficiency of the indictment. The first is, that the indictment charges

two offenses. It is in two counts, but in the second it refers to the first, as recommended in *People v. Thompson*, 28 Cal. 214, in such manner as to identify the offense as the same already described. And besides, the second count is preceded by a statement that the offense therein described is the same. In the first count the defendant is charged with having in his possession blanks in the form and similitude of bills made, etc., for the payment of money; in the second it is charged that they were in the form and similitude of bills for the payment of property. This is evidently but a different description of the same offense, and was probably designed to meet a doubt in the mind of the prosecutor as to whether the blank bill was in legal effect a bill for the payment of money or property—it being for the payment of five dollars or its equivalent in the currency of the island. Nor is either count in the indictment repugnant in itself. The statute describes the offense as having in possession blanks having the form or similitude of bills for the payment of money or property, made to be issued, etc. The indictment substantially follows the language of the statute. The resemblance required is of blank bills to those which are finished and completed by the bank, excepting, of course, that the blanks are not filled. Nor does the fact that they have the form and similitude of bills made to be issued imply that they are finished. There is nothing repugnant in saying that the unfinished bills have the form and similitude of those which have been finished.

It is unnecessary to discuss the question whether the statement in the first count, that the blank was in the form of a bill for the payment of money, or the statement in the second count, that the blank had the similitude of a bill for the payment of property, is inconsistent with the blank which is set out in the indictment. Under our statute the different counts contained in the indictment neither in fact nor in theory state different offenses. The two counts are but dif-

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ferent narratives of the same acts constituting the offense. They are added either through a doubt as to the legal effect of certain facts or to avoid a possible variance between the allegations and the proof.

The supposed repugnance is one of description merely, and the copy of the blank being set out, the party could not be injured by a mistake as to its legal effect. The main purpose of the two counts, as we have said, was probably to meet this doubt, and if the statement in one count in this respect is incorrect, the other must be correct. We think the motion in arrest of judgment was properly overruled.

After the motion for an arrest of judgment had been denied, the defendant moved the Court for a new trial. The minutes of the Clerk show that the "defendant, by his counsel, moved the Court for a new trial, and filed in writing his grounds thereof." Whereupon it was ordered, that the motion for a new trial be stricken from the files, the defendant, by his counsel, excepting. The motion for a new trial was then denied. These facts appear in the minutes of the Clerk and not in the bill of exceptions. The order striking the "motion for a new trial" from the files is earnestly insisted upon as error here, and we shall consider it without passing upon the question whether it is properly brought up.

A motion is properly an application for a rule or order, made *viva voce* to a Court or Judge. It is distinguished from the more formal applications for relief by petition or complaint. The grounds of the motion are often required to be stated in writing and filed. In practice the form of the application itself is often reduced to writing and filed. But making out and filing the application itself is not to make the motion.

If nothing more were done, it would not be error in the Court to entirely ignore the proceeding. The attention of the Court must be called to it. The Court must be moved

to grant the order. (3 Stephens' Com. 679; Burrill's Law Dict., word "Motion.")

The statute neither required nor authorized this motion to be made in writing. It must be made *viva voce*, and, if desired, the grounds of the motion and the ruling may be embodied in a bill of exceptions, and can be reviewed here in no other way. The form of the application filed would not be evidence to us of the application or motion actually made. Again, the "motion," or the grounds of the motion which was filed, do not appear in the transcript. It may have contained matter disrespectful to the Court, or a brief with which the record should not be incumbered. If the document were unexceptional in every respect, we see no harm in allowing it to be filed; and, on the other hand, the refusal could not possibly injure the defendant. In that view the controversy appears, to some extent, to be a personal one between the counsel and the court, in which no rights of the defendant or the people are involved. There was no error in refusing to allow the document to be filed.

The next question is one of greater importance and of much more difficulty. The indictment charges the defendant with feloniously having in possession certain blank and unfinished bills in the form and similitude of a bill for the payment of money, to be issued by an incorporated bank, viz.: The Chartered Bank of India, Australia, and China, a foreign corporation then lawfully organized and incorporated under the laws of the United Kingdom of Great Britain and Ireland, and then carrying on business as such banking corporation at Hongkong, in China, etc., with intent, etc., to defraud the said The Chartered Bank of India, Australia, and China. On the trial, the prosecution was permitted to prove the existence of The Chartered Bank of India, etc., by reputation, that it was acting as a corporation and as a banking house, and as such issued bank bills, which were received as current in certain countries.

The materiality of the evidence, if it be material, arises entirely from the unnecessary allegations of the indictment. It was not necessary to charge that the banking house whose bills were imitated, was an incorporated company. If it were a banking company, actually issuing bank bills, which were current anywhere, it is sufficient. The corporate character of the company is supposed to become material just as, in an indictment for stealing a *black* horse, though it was unnecessary to aver that the horse was black, yet it being averred it becomes material, in order to establish the identity of the crime. So, here, the fact that the company was incorporated becomes material only as a matter of description, and is not an element of the crime. We do not admit the justice of the comparison. It would be equally an offense whether the company be actually incorporated or not, so it is acting as a corporation and issues bank bills which are current. So, too, as a matter of identity, we think the description is satisfied by proof that the company is known as a corporate company and is acting as such, and as such issues bills which come within the statute. The case is widely different where a suit is pending, in which the legal existence of the corporation may be made an issue. (*U. S. v. Amedy*, 11 Wheat. 392; *People v. Frank*, 28 Cal. 507.)

But admitting that, under the averments in the indictment, it became material to prove that The Chartered Bank of India, Australia, and China was an incorporated company, we think the proof offered and received for that purpose was competent. It is enacted in the seventy-ninth section of the Act concerning crimes and punishments, that upon the trial of any person for forging the bill or note of an incorporated company or bank, or for passing, or attempting to pass, or having in possession with intent to pass, such bills, the incorporation of such company or bank may be proved by general reputation. This section does not include the particular offense charged in this indictment; but the

inference cannot be, therefore, drawn that it was the intention of the Legislature that such evidence should not be competent in this class of cases. The special mention of certain offenses in the statute is evidence that the law was not intended to apply to others; but cannot be understood as equivalent to a positive provision, that a different rule shall prevail in other cases. Statutes prescribing rules of evidence are not always designed to effect a change in the common law rules. They may be intended to declare what the common law is, for the purpose, merely, of making that certain which before was doubtful. Such, we think, was the object of the statute; and the particular offense charged in this indictment was, no doubt, omitted from the list of the more important kindred offenses by mere oversight. We can conceive of no possible reason why any distinction should be made.

The decisions upon the subject are conflicting. Many of the earlier cases hold that in all cases where it becomes material to prove a foreign corporation, it can only be done in the same way as any foreign law or statute is proven. (*Stone v. State*, 20 N. J. 401.)

This is undoubtedly the rule in civil cases, where the fact of the legal existence of the corporation is in issue. But in criminal prosecutions a different rule has generally been adopted, and, we think, now universally prevails. In such cases there is no presumption that there is better evidence in the possession of the party offering it, which he withholds. The defendant is entitled to a speedy trial; and the ends of justice would be entirely defeated if such evidence were necessary. Besides, such evidence would be equally necessary on the preliminary examination, or before the Grand Jury, or in any proceeding to prevent the commission of the crime. It is said, also, that the fact that bills are forged upon a bank purporting to be incorporated, raises a presumption that it is so. It is a sort of an admission, on

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the part of the wrong-doer, of the character of the person against whom the crime is committed. Proof by reputation in such matters is not very liable to lead to error. If the bills of a company purporting to be incorporated are generally received, and passed as current, it is very strong, though not conclusive, evidence that the company is incorporated. Such evidence is received on the same principle that it is permitted to prove that the signatures to a forged bank bill are not genuine, by experts, without calling the officers themselves, or any person who has seen them write. It is necessary to receive such proof in furtherance of justice. It is very analogous to the rule which allows a party to prove the official character of an officer, by proving that he has acted as such. The existence and character of a bank is generally as well known where its bills are current as the fact that one acting as Constable rightfully performs such functions. The views here expressed are, we think, fully sustained by the following authorities: *People v. Davis*, 21 Wend. 309; *Saser v. State of Ohio*, 13 Ohio, 453; *Reed v. State of Ohio*, 15 Ohio, 217; *Denio v. People*, 1 Parker's Crim. Cases, 469.

We think the preponderance of authority decidedly in favor of the competency of the evidence; but if it presented only a case where the decisions were conflicting, we should decide in favor of the rule adopted by the statute in kindred cases.

There is but one other question in this case which we think is worth while to notice. That arises upon this state of facts, as appears from the bill of exceptions: The blanks, the possession of which is charged in the indictment, were printed by one Baker, who, before printing them, revealed the matter to the city police, and had an arrangement with them by which the police should be in ambush, ready to seize the defendants and the blanks immediately after they had been handed to them by Baker. Baker had from the police assur-

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ances that the blanks would be paid for, and without such assurances he would not have printed them. The ambush was laid according to the arrangement, and upon a signal being given by Baker, according to an understanding between him and the police, the latter appeared and seized Ah Sam and Ah Tuck, and took from them the impressions soon after they had come into their hands.

It is claimed that the defendants never had such a possession of the blanks as is contemplated by the statute; that they were printed for the police, under a contract with them, and were really delivered to them according to contract, and were the property of the police; that the mere handing of them to the defendants, to be immediately taken away by the real owners, was no more than laying them upon a counter for them to take. They were given to the defendants at the request of the police, and remained, during all the time they were in defendants' hands, completely under the control of the police; that the defendants did not have them as their property, and, during the time they held them, could not have intended to pass them; that they must have had the ability to commit the offense, as well as the intention, and that ability they never had any more than they would have when immured in a dungeon; that the intention meant by the statute is potential, and not a mere desire which there are no means to effectuate, and which does not, and cannot, result in any act; that Baker and the police never parted with the possession of the blanks, but determined not to do so, and all the time supervised the handling of them by the defendants.

The police laws cannot be tested by any such metaphysical niceties as these. The problem proposed is similar, if not the same, as that which has baffled the best intellects of the world of all ages, in attempting to reconcile the foreknowledge and providence of divinity with the freedom and the moral responsibility of man. The law adopts the theory of

the responsibility of man, notwithstanding the controlling supervision of Providence.

The defendants were not under duress, nor compelled by the police, prior to the arrest, to do anything whatever. They contracted with Baker for the blanks as freely and as completely as though the authorities had not permitted him to do so. They had absolute control of their own actions when they received the blanks, and up to the very time they were arrested. The knowledge or intention of the police did not interfere with their freedom prior to that time. They had the ability to commit the crime as fully as they would have had if the police had arrested them at the same time, without any understanding with Baker, and upon mere suspicion. There was no circumstance of restraint upon them up to the time of their arrest. Suppose the police had not arrested them at the time, but had continued to watch them without their knowledge, with the power to arrest them at any time until they had filled up and passed the bills, would it be contended that they were not guilty of forgery or counterfeiting because they had all the time been supervised and controlled by the police?

To constitute the crime, the law only requires the guilty possession. It is not necessary that the intent to fill them up should be proven by an attempt to do so. The person in possession may be unable to do so. He may intend to do it, or to cause it to be done, at some future time, when opportunity, convenience, and safety may serve him. His intention may be sufficiently manifested by the circumstances of his possession alone.

The instruction asked — to the effect that to find the defendant guilty they must find that he had the intent to fill up the blank, or cause it to be done, and to pass or cause it to be passed; that both intents must concur — was correct as a definition of the offense, and was substantially given by the Court. Like the fifth instruction, however, asked for, it ignored the

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proposition that, although Ah Sam was a mere messenger, he was properly convicted if he knew the purposes for which the blanks were designed.

The judgment and order are affirmed.

Mr. Chief Justice RHODES did not express an opinion.

[No. 2,671.]

**THE PEOPLE OF THE STATE OF CALIFORNIA v.
I. F. EATON AND A. W. THOMPSON.**

COMPLAINT ON RECOGNIZANCE—NAME OF ACCUSED—DEMURRER FOR AMBIGUITY.—Where a complaint on a forfeited recognizance set forth that the name of the accused for whose appearance to answer it was given, and the name by which he was indicted, was Antonio Martini, but that it was given in the recognizance as Antonio Martinez, and that the same person was intended: *held*, that a demurrer on the ground of ambiguity and uncertainty as to the person accused was properly overruled.

SUIT ON RECOGNIZANCE—VARIANCE IN NAME OF PERSON ACCUSED.—In an action on a recognizance, where it appeared that the accused was named Martini in the indictment and Martinez in the recognizance, and there was testimony that the same person who was held to answer by the name of Martinez was indicted by the name of Martini: *held*, that a motion for nonsuit on the ground of the variance of names was properly overruled, and that a finding that the person indicted was identical with the person held to answer, was justified.

RAISING OF BAIL—LIABILITY OF SURETIES ON RECOGNIZANCE.—It is no defense to an action on a forfeited recognizance, that after it was given the bail was raised, and a new order of arrest issued, without notice to the sureties, and that the officers were so negligent in their proceedings that the accused heard of them and absconded before he could be re-arrested.

APPEAL from the District Court of the Seventh Judicial District, Sonoma County.

One Antonio Martini, having been arrested on a charge of rape upon the person of a child of tender years, and brought before a Justice of the Peace in the City of Petaluma, was

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bound over to answer at the next term of the County Court of Sonoma County, and his bail was fixed at one thousand dollars. The defendants gave the required recognizance, and the accused was released from custody. This was June 4th, 1869. On July fifth Martini was indicted by the Grand Jury; and on July fourteenth he was called in the County Court for arraignment, but he failed to appear, and the recognizance was declared forfeited. Afterward, this action was commenced by the District Attorney against the sureties to recover the amount for which they had so become bound.

The complaint set forth, among other things, that the name of the accused appeared in a portion of the proceedings before the Justice, and in the recognizance, to be Antonio Martinez, but that he was the same person indicted as, and whose true name was, Antonio Martini. To this complaint defendants interposed a demurrer for ambiguity and uncertainty, on the ground that it appeared from it that a portion of the proceedings before the Justice were against Antonio Martini, and another portion against Antonio Martinez, and it was uncertain against which person they were in fact had. This demurrer having been overruled, defendants answered, and set up as one of their defenses that on June seventh, and after their recognizance was given, the plaintiff, by its duly constituted officers, without the knowledge of defendants, caused a new warrant of arrest to be issued against the accused, and fixed the bail at two thousand five hundred dollars, and that the accused, hearing thereof, had absconded; on account of which proceedings, defendants claimed that they were prevented by the State from surrendering the accused, as they otherwise might have done, so as to exonerate themselves.

The cause was tried before the Court below without a jury, and there was evidence that the person held to answer as Martinez was the person indicted as Martini. When the plaintiff rested, defendants moved for a nonsuit on the ground

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that, on account of the difference in the names, facts sufficient to constitute a cause of action had not been shown. This motion was overruled, and defendants then proposed to prove the matters set up affirmatively in their answer, to which offer plaintiff objected, on the ground that the matters so alleged would not constitute a defense. The objection was sustained, and the proffered evidence ruled out. The proper exceptions having been entered, and judgment rendered for plaintiff, and a motion for new trial denied, defendants appealed.

A. W. Thompson, for Appellants.

1. There is a variance between the *allegata* and *probata*, in this: the amended complaint avers that the proceedings before the Justice were against Martini; while the proof shows that they were against Martinez. (*Stout v. Coffin*, 28 Cal. 65; *Hess v. Fox*, 10 Wend. 437; *Lake v. Silk*, 3 Bing. 297.)

2. There is neither averment nor proof that defendants knew that Martini and Martinez were the same person. The sureties had a right to stand on the precise terms of their contract. (*People v. Buster*, 11 Cal. 215.)

3. The contract between plaintiff and defendants was that Martinez should be free from proceedings on this charge until the July term of the County Court next to ensue, and that he should be so free was the sole consideration. (*Mattoon v. Elder*, 6 Cal. 57.) This contract was deliberately broken by plaintiff, and defendants are discharged. (*Chitty on Contracts*, 641; *Zôe v. Culverwell*, 35 Cal. 291.)

4. The sureties were prevented by plaintiff from complying with the terms of the contract, in this: that by the carelessness of plaintiff in allowing the prisoner to know of the issuance of the second warrant, and by the acts and proceedings by plaintiff in the matter of said second warrant, the prisoner was, by plaintiff, induced to abscond. (*Chitty on*

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Contracts, 639; *Shaw v. Hurd*, 3 Bibb, 372; *Marshall v. Craig*, 1 Bibb, 379; *Borden v. Borden*, 5 Mass. 67; Theobald on Sureties, p. 51, Sec. 223.)

Attorney General Jo Hamilton, for Respondent.

By the Court, CROCKETT, J.:

The demurrer to the complaint and the defendants' motion for nonsuit were properly overruled. The complaint, though somewhat inartificially drawn, is substantially good, and states a cause of action. The variance between the name of the accused, as stated in the indictment, and in the recognizance, was sufficiently accounted for to justify the Court in finding that the person indicted was identical with the person charged before the Justice, and for whose appearance the recognizance was given. Nor did the Court err in refusing to permit the defendants to prove the affirmative matter set up in the answer. If proved, it would have constituted no defense to the action. In substance it amounted only to an averment that after the accused had been released from custody on the recognizance of bail here sued upon, his bail was raised by the Court; and an order for his arrest was issued, hearing of which he absconded, and cannot now be found. The answer, it is true, avers that the officers of the law negligently permitted the accused to hear that the order of arrest was issued, whereby he was afforded an opportunity to escape; and that they willfully concealed from these defendants the fact that such an order had been issued. But if true, this would not exonerate the bail. When higher bail is required, there may, in many cases, be very sufficient reasons why the former bail should not be informed of the fact until after the accused is arrested: and I am not aware of any rule or principle of law which relieves the former bail from liability on the ground that the officer requiring additional bail had conducted himself so

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negligently as to permit the accused to hear of the fact before his arrest. There would be but little chance to fix the liability of bail if they could escape on such pretexts as this.

Judgment affirmed.

[No. 2,831.]

JAMES GANNON v. GEORGE DOUGHERTY.

COUNTERCLAIM — PLEADING MUST SHOW ITS EXISTENCE AT COMMENCEMENT OF ACTION.— Where an answer, in setting up counterclaims in the nature of a promissory note and work and labor, failed to show when the note was due or the work and labor performed: *held*, that it did not appear that the counterclaims relied on existed in favor of defendant at the commencement of the action, and that a demurrer on the ground of not stating facts sufficient to constitute counterclaims was properly sustained.

DAMAGES FOR FRIVOLOUS APPEAL.— Where an appeal is clearly without merit, damages will be imposed by the appellate Court.

APPEAL from the District Court of the Fifteenth Judicial District, City and County of San Francisco.

This was an action upon a contract entered into by the parties in April, 1865, by the terms of which defendant was to pay plaintiff two thousand one hundred dollars in gold out of certain moneys to be collected for street work in San Francisco. The defendant, in his answer, set up as a counterclaim that plaintiff had made a promissory note for one thousand dollars to one Babcock, and that afterwards Babcock indorsed, assigned, transferred, and delivered it to defendant, who was the owner and holder thereof, and that no part of it had been paid; also, that plaintiff was indebted to defendant in the sum of one thousand five hundred dollars for work and labor done and performed at plaintiff's request.

The plaintiff demurred to the answer, in so far as it set up a counterclaim, on the ground that it did not appear

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therefrom when said note was made or delivered, or when it was made payable, or that the same was at the time of filing said answer due, or that said note was given for a valuable or any consideration; also, that it did not appear when or where said work and labor was done or performed, or the nature or kind of such work and labor.

The demurrer was sustained, and afterwards defendant, declining to amend, and there being a judgment for plaintiff, and motion for new trial overruled, defendant appealed.

H. F. Crane, for Appellant.

The averment of the date of the note in the counterclaim was not necessary to constitute a cause of action. It could only be important in view of the statute of limitations; and that statute could not be taken advantage of, except by being specifically pleaded. The general demurrer did not reach the point. (*Green v. Palmer*, 15 Cal. 416; *Maynard v. Talcott*, 11 Barb. 569; *Frisch v. Coler*, 21 Cal. 71.)

The usual count for work and labor does not show that the value thereof is due; but the Court will presume it due; and if not due, it is a matter of defense. The same may be said as to the matter of consideration of the note.

The answer gave the plaintiff sufficient notice of the counterclaims, and the Court below erred in sustaining the demurrer. (*Wallace v. Bear River M. Co.*, 18 Cal. 461.)

James Mee, for Respondent.

Courts will never presume a cause of action where none appears. (*Barron v. Frink*, 30 Cal. 486.) And this rule will apply to both counts of the counterclaim.

The demurrer was not general, but special, pointing out, as required by statute, wherein the pleading did not state facts sufficient to constitute a counterclaim.

Opinion of the Court — Wallace, J.

By the Court, WALLACE, J.:

The demurrer was properly sustained; it did not appear that the counterclaims relied upon existed in favor of the defendants at the time of the commencement of the action.

There is nothing in the other points; the appeal is without merit, and the judgment is affirmed, with ten per cent damages.

Mr. Justice CROCKETT did not participate in the foregoing decision.

[No. 2,850.]

JANE MELEY v. RICHARD N. COLLINS ET AL.

DELAY TO ATTACK FORGED DEED AS ESTOPPEL.—In an action to recover possession of land held by an innocent purchaser who derails title through a forged deed which has been of record five years with knowledge of the plaintiff, the delay of the plaintiff to attack the forged deed is not material if it be not relied upon as extinguishing the plaintiff's title by the operation of the statute of limitations; and such delay does not estop the plaintiff to say that the alleged deed is not his deed.

OBLIGATION OF OWNER AS TO HOSTILE TITLE.—The owner of property is justified in relying upon his title, and he is under no obligations to proceed against all persons who may assert a hostile title, although another person might be deceived by the apparent genuineness of such hostile title.

OBLIGATION OF OWNER AS TO FORGED DEED.—It is not the duty of the owner of real estate, if his own interests do not require it, to attack a forged deed to his property.

PROTECTION TO PURCHASER UNDER FORGED DEED.—A purchaser may protect himself from injury resulting from a forged deed by exacting the necessary covenants from the vendor.

APPEAL from the District Court of the Fourth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

McAllister & Bergin, for Appellant.

Argument for Appellant.

The charge of the Court and the instructions given at the request of the respondent, proceed upon an assumed estoppel arising out of the record of the forged deed, and we assume, as Court and counsel did on the trial, that the alleged deed of the appellant Meley to Gilbert was a forgery.

Does the recording of a forged deed of real estate work an estoppel upon the real owner in favor of an innocent purchaser for value? It would seem impossible to give but one answer to the question in whatever way we may regard it. View it in the light of the scope and language of the recording Act itself, and how does it stand? According to the rules of the common law there was no mode provided for or effect accorded to the recording of conveyances of real estate; every one was bound, at his peril, to ascertain all outstanding incumbrances or previous conveyances. *Caveat emptor*. To relieve against the inconveniences of this rule the statute has prescribed a mode for the recording of all conveyances or incumbrances on real estate, and declared that when thus properly recorded they shall be constructive notice to all persons of their contents, and all subsequent purchasers, mortgagees, or lien holders are deemed to purchase with notice thereof. The statute, however, expressly provides that the certificate of acknowledgment, record, etc., shall not be conclusive and may be rebutted. (Sec. 31.)

Made ex parte, as are acknowledgments and records of deeds, etc., it is unnecessary, in face of the express language of the statute, to inquire whether they could legally amount to any more than prima facie evidence of their contents; suffice it to say, the statute has declared they shall not be conclusive, but shall be open to rebuttal. The party must, therefore, at his peril, examine the records; he does so and finds the title of record clear, he takes his conveyance in due form; if he do not cause it to be duly recorded, a subsequent purchaser in good faith and for value, whose conveyance is first recorded, will secure priority of title. This

Argument for Appellant.

is a result to which he has contributed and for which he should suffer. He, however, duly records his deed. Is there any rule of law or justice that enjoins it as a duty on him to thereafter keep watch of the records of the County Recorder's office? He complied with all the requirements of the law, was diligent, and secured his title. Is ceaseless vigilance upon the records thereafter the price of his retaining it? Where is the justice or policy that would compel him to keep continuous watch of the records? Must he be equally vigilant and watchful of the records to keep, as to acquire a clear title to, his property? Is there any express statutory provision to this or any similar effect? Certainly none that we have been able to discover. (*Everts v. Agnes*, 4 Wis. 352; 6 Wis. 463; *Van Armage v. Miller*, 4 Whart. 382; *Arrison v. Harmstead*, 2 Barr, 195; *Smith v. South Royalton Bank*, 32 Verm. 353; *Berry v. Anderson*, 22 Ind. 40; *People v. Bostwick*, 32 N. Y. 445; *Ely v. Wilcox*, 20 Wis. 529; *Hooker v. Pierce*, 2 Hill, 650; *Connecticut v. Bradish*, 14 Mass. 296; *Trall v. Bigelow*, 16 Mass. 418; *Day v. Clark*, 25 Verm. 402.)

These authorities show that a party whose conveyance is duly recorded is not obliged to thereafter keep constant watch of the records, lest some party, without his consent or authority, should fraudulently or feloniously attempt to convey away his property. Nor are the instructions and charge of the Court any more tenable upon the doctrine of estoppel. It will be borne in mind that in the case at bar the deed was forged. The appellant never made it, nor knew of its contents till long afterward, nor authorized or consented to its being recorded. It was neither in law nor in fact her act or deed, and it is difficult to conceive how, under such circumstances, it can operate equitably to estop her. One of the most familiar and essential characteristics of an estoppel

Argument for Appellant

in pais is, as laid down in the case already cited, that the declaration or admission be made with intent to influence the conduct of the party claiming the benefit of the estoppel, or those under or through whom he claims; and a no less essential and distinguishing feature of it is that the estoppel must be mutual and reciprocal. Strangers are not bound by and cannot invoke the benefit of an estoppel. (*Strong v. Strickland*, 32 Barb. 289; *Reynolds v. Loundsbury*, 6 Hill, 554; *Pennell v. Hinman*, 7 Barb. 649; *Carpenter v. Stilwell*, 1 Kern. 71-73; *Christianson v. Linford*, 3 Robertson N. Y. 224; 21 Ala. 424; 8 Gill, 239.)

There was here no statement, declaration, or act of the appellant, made to, or intended to influence the conduct of the respondent Collins, to whom she was an entire stranger, and therefore there can be no estoppel. Nor can the subsequent knowledge of the appellant, that there was a forged deed of record to her property, create such estoppel. Admitting that she subsequently learned this fact, she likewise knew that it was a forgery to which she never consented. She did nothing to authorize or justify the respondent in supposing that she ever adopted or sanctioned the forgery. She was guilty of no act, and did not omit performance of any duty toward him, by reason of which she can be estopped. There was no relation of trust or confidence between her and the respondent Collins, that devolved upon her the duty of procuring an adjudication of the forgery of this alleged conveyance. She had in all respects complied with the law; obtained a conveyance in due form, and of unquestionable validity, of these premises; had it duly recorded; and was entitled to rely upon the law for her protection. The only statement she ever made of record, upon which the public would be justified in relying, was legal and true — that she acquired title to the property from her grantor. We have sought in vain to discover any principle of law or equity upon which she can be estopped. Can the mere knowledge

Argument for Appellant.

of the existence of a forged deed of record to her property, and her failure to institute legal proceedings to have it declared a forgery, estop her in the face of the statute of frauds? The court will bear in mind that this is not the case of actual, positive fraud, and it is obvious that if she can for these reasons be divested of her title to her property, the statute of frauds is not only virtually, but in effect, fully repealed. Here the appellant accidentally, after the forgery, learned it; but once admit that notice of it will devolve upon the party the duty of instituting judicial proceedings to declare such a forgery a nullity, under pain of forfeiting the title to his land, and it requires no prophet to foretell that the next step will be to hold that examination of the records would furnish the necessary means of ascertaining the existence of record of any forged title, and that, thus having the means of information, inquiry must be made, or the party will be chargeable with notice, and consequently bound to institute legal proceedings to have it adjudged void, or be forever estopped from asserting title; and it will readily be seen that, to protect the title to real estate, not only must the owner search the record in advance of his purchases, but he must constantly keep himself informed upon the subject, at the peril of being divested of his property in favor of some alleged innocent purchaser for value, without his act, knowledge, or consent, under a forged conveyance. We are free to confess that we have been unable to find any authority in support of such a principle of law. We can conceive of no view of law, justice, or public policy that will sanction it, and we submit that it is utterly inadmissible in the face of our statute of frauds, were there anything in such a principle itself to recommend it to our adoption.

If these views be correct, and of their correctness we cannot for a moment doubt, the instructions of the Court to the jury were erroneous, and the judgment must be reversed

Argument for Respondent.

Jarboe & Harrison, for Respondent.

The instructions given at the request of the defendants, and the charge of the Court, correctly presented to the jury the law applicable to the facts developed on the trial. The position of the defendants is, that whether the plaintiff executed the deed to Gilbert or not, she by her acts so conducted with reference to the property in controversy, and so held Gilbert out to the world as the owner of the same, that she is estopped from setting up any right or claim thereto.

Respondent does not assume, as do counsel for appellant, that this deed was a forgery. On the contrary, he assumes and maintains, as he did at the trial, that it was the deed of Mrs. Meley, signed and executed by her. This was one of the questions litigated between the parties, and submitted to the jury for their determination. It was made a special subject of instruction to them by the Court. There was much testimony offered upon this point at the trial — conflicting testimony, too, and from which the jury would have been fully authorized to find in favor of the defendant.

But, irrespective of this question, we maintain that the appellant is, under the facts developed in the present case, estopped from asserting any claim to the land in controversy.

The appellant gravely propounds to the Court: "Does the recording of a forged deed of real estate make an estoppel upon the real owner in favor of an innocent purchaser for value?" Of course it does not. Respondent does not insist upon any such proposition, and all the argument and citation of authorities by the appellant upon this branch of his brief are inapplicable.

The question of estoppel could not arise under such a state of facts, unless it was the party himself who recorded the forged deed. In that case there would be some "act" or "admission" on the part of the party sought to be estopped, but in the case supposed by the appellant the party whose

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deed was forged had nothing to do with the transaction on the recording of the instrument, and knew nothing about it until it was sought to be enforced against him.

Such a state of facts, and the argument based thereon, has no application to the question now before the Court, for the simple reason that there is not a particle of identity or parallelism between them. Throughout every line of the instructions given to the jury, in the present case, is the predominant idea that the plaintiff knew, was cognizant of, assented to, and acquiesced in the fact that there was a deed on record from herself to Gilbert, and that she also "consented" to let that deed remain on record, and thus held Gilbert out to the world and to the defendants as the owner of the land in question. It was only upon the condition that they found such to be the facts that they were instructed that the plaintiff had so conducted with reference thereto as to preclude her right to recover.

We insist that these instructions were correct, and that the plaintiff was estopped by her acts and negligence from asserting any claim to the land.

Appellant lays down as a proposition of law, and occupies considerable time in endeavoring to show, that a person, in order to be estopped by his acts or conduct, must have *intended* to influence the conduct of some one. We do not understand that such is the unqualified definition of an estoppel. It is true that that word is used in some of the cases as one of the elements necessary to create an estoppel. It is, in fact, so used by Justice COWEN, in the case of *Dezell v. Odell*, 3 Hill, 219, referred to and cited in *Davis v. Davis*, 26 Cal. 40, and which appellant has erroneously given in his brief as the language of this Court in the latter case.

It is also found in other cases in the same connection, but we conceive the meaning of the Court in them all to have reference to the objective result of the particular act, rather than to the motive of the person who performs the act. It

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is not necessary that the person who is estopped should have exercised a particular volition, with reference to the effect to be produced by his act, but it is sufficient if the act has produced that effect independent of or even contrary to the actual volition of the person acting.

In nearly all the cases in which the "intention" is named as an element of the definition of estoppel, there is also found "carelessness" or "culpable negligence" as an equivalent. In *Biddle Boggs v. Merced Mining Company*, 14 Cal. 368, the Court gives as one of the elements of an estoppel "that he made the admission with the express intention to deceive, or with such careless or culpable negligence as to amount to constructive fraud." (Story's Eq., Sec. 385, et seq.; *Griggs v. Wells*, 10 Ad. & E. 97.)

The books are full of authorities to the effect that when one having title to real estate stands by and suffers another to purchase without making known his claim, he shall not afterwards be permitted to assert his claim against such person (*Wendell v. Van Renssalaer*, 1 John. Ch. 354; 2 Smith's Lead. Cases, 5th Am. ed. 660; *Storry v. Barker*, 6 John. Ch. 166; *Brewster v. Baker*, 16 Barb. 618; *Hicks v. Cram*, 17 Vt. 449); and "standing by" is held to mean not "actual presence," but such knowledge as under the circumstances makes it his duty to speak. (*State v. Holloway*, 8 Blackf. 47; *Thompson v. Blanchard*, 4 Comst. 309.)

In *Pickard v. Sears*, 6 Ad. & E. 469, the rule is laid down as follows: "When one by his word or conduct willfully causes another to believe the existence of a certain state of things and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time."

"Willfully," in this connection, means "knowingly." (28 Me. 539; *Stephens v. Baird*, 9 Cow. 274; *Frost v. Saratoga*

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Ins. Co., 5 Denio, 154; *Plumb v. Cattaraugus Ins. Co.*, 18 N. Y. 392; *Wendell v. Van Renssalaer*, 1 John. Ch. 354.)

In none of these cases was there any "intention" developed on the part of the party acting, yet the Court held him estopped by his acts. (*Manufacturers' Bank v. Hazard*, 30 N. Y. 230; *Brookman v. Metcalf*, 4 Robt. 568.)

Under the principles laid down in the foregoing cases, we maintain that the plaintiff is estopped from asserting her claim to this land. The fact that after she found out that the deed in question had been placed on record, and that thereby Gilbert was held out to the world as the owner of the land, she lived in the same house with him for a period of several months, and took no steps to procure the cancellation of the deed, characterizes her as guilty of "such careless or culpable negligence as to amount to constructive fraud," upon any one who should thereafter become a bona fide purchaser of the lot, for value, from or under said Gilbert.

Knowing as the plaintiff did, that the instrument purported to be a conveyance from herself to Gilbert, and knowing, too, that this instrument was spread at full length upon the face of the public records of the county, and that every person who examined those records must see that deed, and must conclude that Gilbert was the owner of the lot, and yet, with all this knowledge inevitably existing in her mind, taking no steps, and doing no act to counteract its effect, but silently and quietly allowing all its influence to have operation upon the mind of any one who should choose to act upon it, she must be regarded by the Court as having acquiesced in and consented to the representation of ownership thus held out, and thus have become a party to the transaction, from the effects of which she is not now at liberty to withdraw. She "kept silent when she should have opened her mouth and spoken," and she shall not now be allowed to open her mouth and speak.

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By her conduct she willfully (*i. e.* knowingly) caused the whole world to believe that Gilbert was the owner of the lot, and induced the defendant to act upon that belief in the purchase of the lot, and she is now concluded from averring that Gilbert was not the owner. She stood by from 1861 until 1867, holding Gilbert out as the owner of the lot, and allowed the defendant to purchase the same, and pay his money therefor, upon the faith and understanding of a fact which she could at any time contradict, and she cannot now dispute that fact.

By allowing that deed to remain on record unchallenged and uncontradicted, she acted the same as though she had allowed it to be posted upon her own door post, by which she passed in and out every day, without removing it. She accepted it as correct, and held it out to the world as her act.

We do not claim that the putting of a forged deed upon record would affect the rights of an owner of land, nor that the plaintiff's right to the land in controversy would have been in the slightest degree affected by the mere recordation of the deed to Gilbert, if she never had executed it. We do not claim that the presumptive knowledge of all deeds placed on record, which the law ascribes to every citizen, would require any action on his part to overcome the effect that the recording of a forged deed might produce; but we rely upon the fact that, after the plaintiff had actual, positive knowledge that this deed was on record, she culpably and negligently allowed it to remain without challenge or controversy, and thereby induced the defendant to purchase the lot, relying upon the tacit representations that she thus held out to him, and all others who might choose to act upon them. We concede the proposition urged by appellant—that a party cannot be divested of his land by a forged deed; but we claim, also, that a party may so act with reference to a forged deed that he will be held

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to have accepted it, and will be bound by its terms. If one, knowing that a deed has been forged, declares that it is genuine, he is precluded from disputing that fact as against one who has acted upon that declaration; and we say, further, that such declaration may be as potently made by his silence as by his express statement in words.

We maintain, moreover, that after the plaintiff had found out that this instrument was on record, and had consented that Gilbert should continue to hold the title to the premises for a period of two years, she held Gilbert out to the world as the owner of the lot, and is estopped from questioning the title of any purchaser under Gilbert, for value, and without notice of the relation which Gilbert held to the lot.

The plaintiff, by her acts and conduct, placed herself within the operation of that rule applicable in morals as well as in law: "Whenever one of two innocent parties must suffer by the act of a third, he who enabled such third person to occasion the loss must bear it." In *Young v. Grote*, 4 Bing. 253, it was held that when one had so negligently drawn a check, that the amount of the check was increased by forgery, and the person upon whom it was drawn had paid the larger sum, the loss must fall upon the drawer, and not the bank, inasmuch as it was through the fault of the drawer that the loss had occurred. (*Bank of U. S. v. Bank of Georgia*, 10 Wheat. 333; *Gloucester Bank v. Salem Bank*, 17 Mass. 33.)

Assuming that the plaintiff is equally innocent with the defendant, and that in any event one of the parties must bear a loss arising out of the fact that the deed to Gilbert had been placed on record without the knowledge of the plaintiff, still it is the plaintiff who must bear that loss, inasmuch as it was her act which enabled Gilbert to occasion

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the loss. It was in her power to prevent the effect which that deed and its recordation would have, and she negligently stood by and refrained from taking any step thereto. She even consented that Gilbert should hold the title for two years, and she did this, we suppose, upon the faith of his promise that he would give her back the lot. Having ascertained that her faith was not well founded, she cannot now be allowed to set up his faithlessness as a reason why the respondent should suffer. She brought herself within the spirit of the principle laid down by the Supreme Court of Wisconsin, cited in appellant's brief as the reason for upholding deeds fraudulently made to bona fide purchasers: "No matter what fraudulent representations induced the grantor to do these acts, an innocent third person shall not be made to bear his misfortune, or suffer for his credulity." In the present case, the defendant ought not to suffer from the fact that the plaintiff, having placed reliance upon the statement of Gilbert that he would give her back the lot, refrained from taking any steps to have the deed canceled, and found out, too late, that Gilbert had been false to her, and had fraudulently conveyed the lot to an innocent purchaser.

The authorities cited by appellant upon the subject of the fraudulent delivery or procurement of a deed placed in escrow, are not applicable to the present case, for the reason that the doctrine of estoppel urged by us could not possibly arise. In all those cases, the grantee was in nowise connected with the fraud, and not aware that it had been committed until an attempt was made to enforce the fraud against him.

The principle upon which all those cases proceed is that of special agency: that one dealing with a special agent is bound to ascertain the extent of his powers, and acts at his peril if he fails to make inquiry; that when a deed is delivered by one other than the grantor, the recipient is bound

to regard the person delivering as merely a special agent, and that any act of such agent beyond his powers is utterly without authority or effect, and a transaction to which the grantor is in nowise a party. It is held, however, in some of these cases (4 Whart. 382; 32 Verm. 353), that the grantor may so act as to recognize and adopt the fraudulent act of the depository, and thereby be bound by it.

Nor do we conceive that the authorities cited upon the subject of prior registration of a subsequent deed can have any influence in determining this case. These all proceed upon an entirely different principle of law — *i. e.*, the effect of constructive notice. That an estoppel binds privies in estate needs no further citation than Coke on Litt. 352, and the various subsequent cases in which the principle has been affixed. We do not contend that strangers are bound by or can invoke it. We maintain, however, that the appellant is not a stranger, but a privy in estate under the purchase from Gilbert, in whose power it was to say to the plaintiff that her holding Gilbert out as the owner had estopped her from asserting her claim against him.

In conclusion, we maintain that the instructions of the Court were correct; that they were authorized by the facts in the case; and that the jury were fully authorized, from the evidence presented to them, to find in favor of the conditions upon which the charge was predicated, and then applying the law, as thus laid down, to the facts so found by them, render their verdict for the defendant.

By the Court, RHODES, C. J.:

In June, 1859, the plaintiff was the owner of the premises in controversy. The defendant Collins produced a deed of the premises, dated June 4th, 1859, and recorded the same month, which purported to have been executed by the plaintiff to one James A. Gilbert, and proved by a subscribing wit-

Opinion of the Court — Rhodes, C. J.

ness. He also produced a deed of the premises from Gilbert to McKenzie, dated October 16th, 1865; and a deed from McKenzie to the defendant Collins, dated April 28th, 1866 — and proved that the latter paid the purchase money. The plaintiff's evidence tended to show that the deed from her to Gilbert was a forgery; and it was shown that some time after the date of the deed, but prior to 1861, she learned of its existence, and ascertained that it had been recorded. The defendant's evidence tended to prove that Collins, at the time of his purchase, had no knowledge that the plaintiff claimed that the deed from her to Gilbert was a forgery. This action was commenced in 1867.

The question presented for decision arises on the instructions. The Court laid down this rule of law: That if the plaintiff became aware that the alleged deed from her to Gilbert was of record within about one year from the time it was recorded; and if Gilbert returned to this State in 1861 and boarded with her for a time; and if during that time she was aware of the existence and recordation of that deed; and if she took no steps to have the deed set aside and annulled, then, if the defendant Collins, in 1866, purchased the property for a valuable consideration, relying upon the genuineness of the purported deed from the plaintiff to Gilbert, without any knowledge that she claimed that the deed had been forged, the defendant is entitled to recover. The reason assigned is, that as she took no steps to have the deed annulled, she thereby permitted the parties claiming under it to deal with the property as their own; and that as the defendant purchased the property under these circumstances, the plaintiff is estopped to say that the alleged deed is not her deed.

It will be assumed, for the purposes of the argument, that the deed is a forgery. The circumstance that, during a portion of the time, Gilbert was within, and during another portion of the time was without, the State, may be dis-

carded; for the plaintiff could readily have commenced her action against him in either case. The case does not show that the plaintiff knew of the respective sales of the property by Gilbert and his vendee, or that either of them intended to effect a sale, until after the respective conveyances had been executed. The length of time intervening between the notice to the plaintiff of the recordation of the deed, and the purchase of the property by the defendant, is not material to the question. It is not relied on as extinguishing the plaintiff's title by the operation of the statute of limitations. If the plaintiff is estopped to set up her title because the defendant purchased the property five years after the plaintiff knew that the deed was of record — she not having taken any steps during that time to attack the deed — then the delay of one year or one month would afford the defendant the same advantage. The proposition advanced in the instructions, when stripped of accidental and immaterial circumstances is, that if the defendant purchased the property and paid the consideration without any notice that the deed in question was a forgery, and after the plaintiff knew that the deed was of record, and before she had taken any steps to have it annulled, she is estopped to allege that it is not her deed.

The cases which lay down the familiar doctrine — that one who stands by, and purposely or negligently suffers his property to be disposed of by another, is estopped to assert his title to the property — have no application here, for the plaintiff did not “stand by” while Gilbert or his vendee was selling her property. The provisions of the Registry Act do not support the proposition of the defendant, for no such result is dictated by the Act. The defendant's position, however, would be the same as that which is now taken, had he seen the deed in Gilbert's hands, instead of the record of the deed. No authorities are cited by the defendant which directly sustain his position.

Opinion of the Court — Rhodes, C. J.

As neither the forged deed nor either of the subsequent deeds affected the plaintiff's title, she must recover upon her legal title, unless the defendant has made out a good equitable defense. Was it not incumbent on him to have pleaded his equitable defense — the matter of estoppel *in pais*, relied upon by him? The question is not discussed by counsel, and it will not be necessary to decide it in this case.

Could it be shown to be the duty of the owner of property, whenever another person asserts title to such property, or is apparently the owner of it, to proceed at once to vindicate his title and destroy the apparent title in such other person, there would be but little difficulty in holding that his neglect so to do, could be relied upon as an estoppel by a purchaser from such person, in good faith and for a valuable consideration. If such were the rule, there would be no difficulty in finding cases in point. Among the innumerable cases, in which the owner of personal property has sought to recover the possession from a person who had bought the property from one who had obtained the possession by a larceny or by force, no one is brought to our attention which holds that the delay of the owner in suing for the recovery of the property impaired his title. And yet, possession is *prima facie* evidence of title — evidence of as high an order as the record of a deed. Other illustrations might be found in cases of forged bills and notes, and forged indorsements. The owner of property is justified in relying upon his title; and he is under no obligation to proceed against all persons who may assert a hostile title, although another person might be deceived by the apparent genuineness of such hostile title. We have never heard it asserted that it was incumbent on the person who has acquired title to lands by adverse possession, to commence an action to quiet his title against the person whose title had been extinguished by the adverse possession, though the title of the

Statement of Facts.

later appeared of record to be the true title. In the case at bar, it cannot be said that the plaintiff, by any act or neglect, induced the purchase by the defendant. It was not her duty, if her own interests did not require it, to take the necessary steps to have the deed to Gilbert annulled. It is true that a purchaser from him, relying on the record, might be injured, but he could readily protect himself by exacting from his vendor the necessary covenants.

Judgment reversed and cause remanded for a new trial.

[2,828.]

JAMES REGAN v. OWEN McMAHON ET AL.

JUDGMENT IN PARTITION.—If tenants in common own, some in fee, others a life estate, and the deed creating the life estate gives the remainder to such children, and the lawful issue of deceased children, of the person owning the life estate, as shall be living when the life estate terminates, a judgment of partition, made before the life estate terminates, should not fix the quantity of interest of those claiming the remainder. Such judgment sufficiently protects those claiming the remainder, if it allots the life estate, subject to the right of those holding in remainder.

Issue.—When it is uncertain to whom, and in what proportions a remainder may descend, after the termination of a life estate, a judgment in partition, made before the life estate terminates, should not ascertain the interest of those holding in remainder.

APPEAL from the District Court of the Twelfth Judicial District, City and County of San Francisco.

In the year 1839 the Mexican Government granted to Francisco Sanchez the Rancho San Pablo, lying in what became the County of San Mateo after the admission of California as a State. The grant was confirmed by the United States authorities; and said Sanchez, on the 5th day of March, 1856, conveyed the same to Arcenia Miramontes, Pedro Higuera, and Ramon de Zaldo, in trust.

First — To permit Teodora Higuera de Sanchez, then the

Statement of Facts.

wife of said Francisco, to have, during her natural life, for her sole and separate use and benefit, the possession, use, and enjoyment of said rancho.

Second — To hold the undivided one half of said rancho for said Teodora absolutely, and to convey the same in fee simple, as she should in writing direct.

Third — To hold the other undivided half of said rancho until the decease of said Francisco Sanchez and said Teodora Higuera de Sanchez, and then to convey the same unto the then living children of said Francisco Sanchez by said Teodora, share and share alike; and if any of said children should then be dead, leaving lawful issue, then to convey the share which would have gone to said deceased child to the then living issue of such deceased child. On said fifth day of March said trustees granted and surrendered to said Teodora, by a conveyance in writing, for her sole and separate use and benefit, the sole possession, use, and enjoyment, during her life, of said rancho. Said Francisco died in September, 1862. At the time of the execution and delivery of said deed to said trustees there were living nine children of said Francisco Sanchez and his wife, said Theodora Higuera de Sanchez; said children being Pedro Sanchez, Luis de Sanchez, Luisa Sanchez, Rosalia Sanchez, the wife of Frank N. Gutierrez, Tomas Sanchez, Francisco Sanchez, Cipriano Sanchez, Guadalupe Sanchez, Geneveva Sanchez, the wife of Lorenza Pacheco.

The plaintiff, who had acquired an undivided interest in the rancho, commenced this action for a partition on the 16th day of November, 1868. Said Teodora and the children, and a large number of other persons who claimed under Teodora and the children, were made defendants. Two of the children, Guadalupe Sanchez and Geneveva Sanchez de Pacheco, died during the pendency of the suit. George F. Sharp was one of the defendants.

The Court partitioned the rancho among the different

owners, in fee and of life estates. At the time the partition was made said Teodora was living.

The final decree contained the following provision:

"It further appearing that the defendants Tomas Sanchez, Cipriano Sanchez, Francisco Sanchez, Juan Bernal, Pedro Sanchez, George F. Sharp, Patrick Flannelly, Patrick Feeny, Robert Inches, and Clorinda Perez and José Garcia, and the plaintiff James Regan, are entitled to remainders in certain portions of said rancho. It is, therefore, ordered and decreed that such portions of said rancho as are allotted to said plaintiff, and to various defendants, for and during the life of said Teodora Higuera de Sanchez, are so allotted, subject to the rights of said plaintiff and defendants, so holding remainders as aforesaid."

The other facts are stated in the opinion.

John Hunt, Jr., for Appellant.

The decree does not provide for appellant's rights, in the event of Rosalia surviving any or all of her brothers and sisters.

J. B. Harmon and J. P. Hoge, for Respondents.

The statute does not permit appellant's interest to be set apart in some specific tract of land. He has a vested remainder only, to come into possession after the decease of Teodora Sanchez — an event which has not occurred. Until that event the land can be actually divided only among those persons who have fee simple or life estate interests therein.

By the Court, WALLACE, J.:

Under the conveyance in trust Teodora, the mother of Rosalia, the appellant's grantor, became seized of an estate

Argument for Appellant.

that the premises mentioned in the complaint herein were allotted upon such partition to plaintiff; that immediately after such partition plaintiff inclosed said premises with a fence, consisting of posts, in size three by four inches and four and one half feet high, set in the ground eight feet apart, with two rails nailed thereon, which were two inches by three inches in size; this was in the Fall of 1853.

"Fourth — That during said period of time, said plaintiff did not live upon or cultivate said premises, and did no other acts of possession upon said premises beyond the fencing above mentioned.

"Fifth — That defendant entered upon said premises on May 28th, 1862, by virtue of purchase and conveyance from Stuart Smith, and immediately built a small house thereon, and inclosed the same with a fence, and put a tenant therein, and has ever since and now does keep possession of the same.

"Sixth — That said premises are within the charter line of 1851, of the City of San Francisco, as it was incorporated in 1851."

The other facts are stated in the opinion.

John R. Jarboe, for Appellant.

The judgment is not supported by the findings, but is directly antagonistic to them. The facts found show that the property in question was subject to and under the will and control of the plaintiff, he being in the exclusive occupation thereof. This constitutes a complete common law possession, which is the only possession necessary to establish in this action. The Court having found the plaintiff's occupation and possession down as late as the Fall of 1853, the law presumes it to have continued in the same condition until it was interrupted by the defendants, which the Court finds was on the 28th day of May, 1862. There is no pretense that Stuart Smith, from whom defendant derails title,

ever had a title or was ever in possession. The findings show title in the plaintiff, and an entry and ouster by the defendant, without any justification or authority for such entry.

E. A. Lawrence, for Respondent.

A brush fence three feet high was held not to constitute possession in *Hutton v. Schumacher*, 21 Cal. 453. The fence in this case was only a temporary brush fence. The plaintiff must recover on the strength of his own title, and hence it is for him to show how long the fence continued. (*Wolf v. Baldwin*, 19 Cal. 306; *Polack v. McGrath*, 39 Cal. 15; *Borel v. Rollins*, 30 Cal. 408.)

By the Court, CROCKETT, J.:

The action is ejectment, and was tried before the Court without a jury. Written findings were filed, and a judgment entered for the defendant, from which the plaintiff appeals on the judgment roll alone, unsupported by a statement on appeal. The ground of error relied upon is that, on the facts expressly found, the plaintiff, and not the defendant, was entitled to judgment. But we must presume, in support of the judgment, that the Court found not only the facts included in the written findings, but also such other facts within the issues as are necessary to support the judgment. It is not enough that the written findings do not, of themselves, warrant the judgment; but to procure a reversal, the express findings must be absolutely inconsistent with the judgment, conceding all the other facts within the issues to have been found in accordance with it.

The facts within the issues not expressly found are presumed to have been in accordance with the judgment, which must, therefore, be affirmed, unless the express findings affirmatively show it to be erroneous. This has been too often decided by this Court to merit further discussion. The plain-

Points decided.

tiff relies solely on prior possession as proof of title, and the answer not only denies the plaintiff's title and right of possession, but sets up as a separate defense an abandonment of the plaintiff's claim prior to the commencement of the action. If it be conceded that in 1853 the plaintiff had the actual possession of the premises by means of a sufficient inclosure, he may, nevertheless, have abandoned the possession, or conveyed all his title to the defendant, or to a third person, prior to the commencement of the action, either or both of which facts it was competent for the defendant to prove under the issues: and we must presume, in support of the judgment, that one or both of them were proved. If no other facts than those expressly found were proved at the trial, it should have been made so to appear, either in the findings themselves or on a motion for a new trial, or by a statement on appeal, in order to rebut the presumption that these facts were proved and found. But as the case is presented on the judgment roll, the presumptions arising from the implied findings are not rebutted, and no error is shown.

Judgment affirmed.

[No. 914.]

ROBERT H. VANCE AND FAXAN H. ATHERTON v.
JOSE DEMETRIO PENA, JESUS PENA, JUAN
PENA, GAVINIO PENA, SUMATRIA PENA,
NESTORIA PENA, AND FRANCISCO PENA.

COVENANT TO CONVEY LAND — REASONABLE TIME.—Where a vendor covenanted in his deed of conveyance to procure reconveyance to himself, of such portions of the land described in the deed as he may have conveyed to others, or to convey other lands of equal value, etc.: held, that the vendor must procure such conveyance within a reasonable time; and eight years is not a reasonable time for that purpose.

BREACH OF COVENANT — STATUTE OF LIMITATIONS.—Such covenant is

Argument for Appellants.

broken, upon a failure to procure such conveyance within a reasonable time, or to convey to the vendee other lands of equal value; and the statute of limitations will commence running from such breach.

APPEAL from the District Court of the Seventh Judicial District, County of Solano.

The case of *Vance v. Fore*, mentioned in the opinion, was an action of ejectment brought against the grantees of Clark and Curry to recover possession of the six hundred acres of land conveyed by Peña to Clark and Curry prior to the deed to Vance. It is reported in 24 Cal. 435. This action was brought against the children of Peña — to enforce a performance of the covenant with Vance — Peña having died intestate in 1863. The defendants had judgment, and the plaintiffs appealed.

The other facts are stated in the opinion.

[For reports of other questions litigated by the parties, see 21 Cal. 142; 33 Cal. 631; 36 Cal. 328.]

S. F. Reynolds, for Appellants.

Vance had no cause of relief upon the covenant until after the determination of the ejectment case against Fore et al. 24 Cal. 435. It was part of the covenant and agreement that Peña should have all necessary time to obtain those lands, either by a reconveyance, if he, upon examination, found that he had before conveyed the lands, or if he believed it was even a doubtful question, then sufficient time to have that question settled by the proper Courts; and that Vance was bound to such time, and had no action or suit against Peña until after such time. But if we are mistaken in this, then we insist that Peña could reasonably and fairly require such time; and can not insist upon the running of the statute, while he was having this proper and reasonable time, to recover those lands by an action for his benefit. That the statute should run against a party under

Argument for Respondents.

such circumstances, would be, in the language of *Kane v. Cook*, to permit the defendant to take advantage of his own wrong, and to sustain a defense which, in conscience, he ought not to be permitted to avail himself of. Courts of equity will interpose and prevent the bar of the statute, and will not let it apply when it would be against conscience. (*Kane v. Cook*, 8 Cal. 449; 2 Story Eq. Sec. 1521 (a); Angel on Limitations, Sec. 115, notes.) No notice was required to be given before commencement of the suit. The filing of the bill is sufficient notice. It only affects the question of costs. This Court has so determined. But suppose notice, under the covenant to convey other lands, would have been required to have been given to Peña, before the bill was filed. That was rendered unnecessary, on the ground that by the conveyance to the defendants he had placed his other lands in their hands. The plaintiffs, therefore, are excused from the necessity of giving the notice under the covenant. (*Delemater v. Miller*, 1 Cow. 75; *Main's Case*, Coke's Rep. 5th Book, 21.)

M. A. Wheaton, for Respondents.

One of the conditions upon which Peña agrees to convey "other lands" is "upon reasonable notice." Peña had a right to put in his covenant whatever conditions he chose, and he did put in the above condition, that he should have reasonable notice; and it is not alleged that any notice whatever was ever given Peña. It is said no notice was necessary, because he conveyed the land. Had the action been against Peña for damages, because he had put it out of his power to fulfill his covenant, the authorities of counsel would have been in point; but they do not apply where the action is against the grantee instead of being against the grantor. (*Connelly v. Pierce*, 7 Wend. 129; *Hackett v. Hudson*, 3 Wend. 249; *Fuller v. Hubbard*, 6 Cow. 13.)

The cause of action was barred by the statute of limita-

Argument for Respondents.

tions. It was agreed on the argument that this suit was commenced the first day of August, 1865. The covenant was executed by Peña the 7th day of November, 1853, nearly twelve years before; and the deed to Curry and Clark was executed in January, 1853. Peña was, therefore, liable upon his covenant, if at all, the moment he executed it. The most that he could have claimed would have been a reasonable time in which to procure a reconveyance to himself. Seven years might be allowed him as a reasonable time in which to obtain the reconveyance, and still this action would have been barred. The suit commenced by Vance, with Peña's "knowledge and approbation," had nothing to do in preventing the statute from running. Peña's covenant was not made dependent upon the result of that suit, either by its terms or by the fact that it was commenced with Peña's "knowledge and approbation." "Knowledge and approbation" of a suit on the part of a person does not make him either a party or privy to it, nor do they make the judgment binding upon him — still less upon his heirs or assigns.

If Vance ever had a cause of action against these defendants, it was as soon as the land came to their hands, especially if they received it for the purpose of cheating and defrauding the plaintiff out of it. Yet more than four years elapsed from the time the last deed was given by Peña (May 17th, 1861) and the commencement of this action. True, the plaintiffs say that the conveyance was made by Peña to these defendants to defraud these plaintiffs, and also alleges that plaintiffs had no knowledge of the conveyances until after Peña died; this, however, does not bring their case within the fourth subdivision of the seventeenth section of the statute of limitations, because the conveyances were no fraud. Peña had a perfect right to convey the lands to his

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children. His natural affection for his offspring was a good legal consideration; if the covenant was binding upon and run with the land, the conveyances were made subject to the covenant, and could not defraud the plaintiffs. If the covenant did not run with the land, but was binding upon Peña as a personal obligation, then the conveyances could not have injured the plaintiffs, even by inducing or deterring their action, as they did not know of the conveyances until after the death of Peña had barred a personal action. In four years from the time the cause of action accrued the action was barred. (Statute of Limitations, Sec. 17; *Peña v. Vance*, 24 Cal. 150.)

By the Court, RHODES, C. J.:

The complaint states, that in 1853, Peña, the father of the defendants, conveyed to Vance a tract of land which formed a portion of a rancho which had been granted to Vaca and Peña. The tract conveyed is situated southerly of Alamo Creek, but there is excepted therefrom all lands which had theretofore been conveyed by Vaca and Peña. The deed contained a covenant of warranty, and also a further covenant, in the words following:

“And I, the said Peña, do hereby covenant and agree to and with the said Vance, and his heirs and assigns, that if any of the lands lying on the southerly side of said creek have heretofore been conveyed by said Vaca and Peña to any person or persons except that portion thereof that one William Fore has purchased and occupies, or claims at the date hereof, that in that case the said Peña will hereafter convey any of such portions of such lands as shall be conveyed to him, unto the said Vance, or his heirs or assigns, and in case the said Peña shall not be able to procure a conveyance to himself of such portions of said lands lying on the southerly side of said creek which may have been con-

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veyed heretofore as aforesaid, then said Peña shall, and will, upon reasonable notice, convey unto said Vance, or his heirs or assigns, other lands in said County of Solano (of him said Peña), in quantity and quality of equal value to such lands as may have been conveyed, as aforesaid, on the southerly side of said creek, excepting, however, any lands now possessed by said Fore under claim of title."

Before the execution of the deed to Vance, Peña had conveyed to Currey and Clark six hundred acres of the lands described in the deed to Vance. An action was brought by Vance, with the knowledge and approbation of Peña, to recover from the grantees of Currey and Clark the six hundred acres of land, and judgment was rendered against Vance; and in April, 1864, the judgment was affirmed by the Supreme Court. No portion of the six hundred acres was reconveyed to Peña, nor was any part of the same conveyed to Vance. In 1859, Peña owned seven thousand acres of land — part of the same rancho — and in that and the two following years he conveyed the same to the several defendants without any consideration, and for the purpose of preventing the application of the lands to the satisfaction of his covenant with Vance. The defendants took with notice of the deed to Currey and Clark, and the deed and covenants to Vance; and it is alleged that they hold the lands in trust for the performance of the covenant to Vance, and are bound to convey so much thereof as may be necessary for the full performance of the covenant. Other facts are stated in the complaint, but they are not material to a correct understanding of those grounds of demurrer which will be noticed.

The decision on the former hearing was that there was no breach of the covenant, as it did not appear that "Vaca and Peña" had conveyed the six-hundred-acre tract to Currey and Clark. The soundness of that construction of the covenant is questioned by the plaintiffs. They contend that,

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looking at the whole contract, the clause is to be read "*Vaca or Peña*." It will not be necessary, however, to express any opinion on that question.

One of the grounds presented by the demurrer to the complaint, is that the action is barred by the statute of limitations; and a further ground is that it is not alleged that "reasonable notice" was given to Peña or his assigns to convey any land to the plaintiffs. On the latter point, the position of the plaintiffs is that notice in fact was unnecessary, and that the want of notice would only affect the question of costs. That position may be accepted as correct, without discussion of the question whether the words of the covenant mean or necessarily imply an actual notice.

The question is, when was the covenant broken by Peña?

At the time Peña executed his conveyance to Vance, the six-hundred-acre tract had been conveyed to Currey and Clark, and it became his duty to procure a reconveyance of the six-hundred-acre tract, or to convey to Vance other lands, in accordance with his covenant. He was not relieved of that duty because he claimed, believed, or protested that the deed to Currey and Clark did not include any of the lands which were described in the conveyance to Vance. His denial that such was the purpose or effect of the deed to Currey and Clark, did not alter the fact that it did convey to them the six-hundred-acre tract. His covenant was not that he would procure a reconveyance of the lands which he believed, claimed, or admitted he had theretofore conveyed to others; or that, failing to procure such reconveyance, he would convey to Vance other lands in lieu thereof. His obligation arose from the fact, not from his admission or belief of the fact, of such prior conveyance. The covenant, therefore, was broken by his failure to convey to Vance, within a reasonable time, the land theretofore conveyed to Currey and Clark, or other lands as provided in the covenant.

Admitting—as the plaintiffs contend—that Peña was entitled to a reasonable time in which to procure, or attempt to procure, a reconveyance to him of the six-hundred-acre tract, it cannot be claimed that eight years is within the limits of a reasonable time for that purpose—it not being alleged that there was any obstacle in the way of his proceeding forthwith to procure the reconveyance; and, even allowing eight years as a reasonable time in which to attempt to procure a reconveyance, more than four years thereafter elapsed before this action was commenced. It is also contended that the plaintiffs had no cause of action against Peña or the defendants, until the determination of the action of *Vance v. Fore*, in April, 1864. The covenant is not conditional upon the event of any litigation then pending, or thereafter to be instituted. It cannot be implied from the covenant that the parties, at the time of the execution of the deed, contemplated that an action should be brought by either of them to test the question, as to whether any of the lands described in the deed had theretofore been conveyed by Peña. The fact that an action was brought by Vance for that purpose, with the “knowledge and approbation of Peña,” did not suspend the running of the statute, if it had already commenced to run.

Judgment affirmed.



EXTRA ANNOTATION
TO
PRECEDING VOLUME



VOLUME XLI.

By WILLIAM FOSTER.

Revised to include citations to Volume 147, by CHARLES L. THOMPSON.

41 Cal. 15-17. CARUTHERS v. MCGARVEY.

Sale of corn is not complete until it is weighed or separated from the other corn in the field, p. 16.

Cited in *Blackwood v. Cutting Packing Co.*, 76 Cal. 217, 9 Am. St. Rep. 203, holding that under section 1140 of the Civil Code the sale of a crop of apricots on the trees was not complete, because they were not identified; Cited in *Carpenter v. Glass*, 67 Ark. 139, denying right of purchaser of flour to maintain replevin therefor, under facts stated.

41 Cal. 17-21. WATSON v. SAN FRANCISCO & HUMBOLDT BAY RAILROAD COMPANY.

Complaint, that is a jumble of several causes of action in one count, lacks the directness and precision required by the code, p. 20.

Cited in *Coogrove v. Flak*, 90 Cal. 77, holding that a complaint where several causes of action were mingled in one count, contrary to section 427 of the Code of Civil Procedure, was demurrable; *Claffin Co. v. Simon*, 18 Utah, 161, noted under *Buckingham v. Waters*, 14 Cal. 146.

Opening a Default rests in the legal discretion of the trial court, upon such conditions as the circumstances warrant; if the application is made so immediately after entry of default as to cause no considerable delay to plaintiff, the discretion of the court should tend toward obtaining a judgment on the merits, pp. 20, 21.

Cited in *Melde v. Reynolds*, 129 Cal. 311, and *Winchester v. Black*, 134 Cal. 127; noted under *Roland v. Kreyenberg*, 18 Cal. 455; *Hanthorn v. Oliver*, 32 Or. 62, 67 Am. St. Rep. 519, holding application improperly denied; *Coos Bay etc. Co. v. Endicott*, 34 Or. 576, holding application properly granted. Cited in the following cases, where the lower court refused to open the default, and it was held an abuse of discretion on appeal; *Reidy v. Scott*, 53 Cal. 73; *Pearson v. Drobaz Co.*, 99 Cal. 428; *Grady v. Donahoo*, 108 Cal. 214; *Miller v. Carr*, 116 Cal. 381, 86 Am. St. Rep. 182; *Benedict v. Spendiff*, 9 Mont. 88; *Horton v. New Pass Co.*, 21 Nev. 189; *Simpkins v. White*, 43 W. Va. 204. Cited in the following cases, where the lower court opened the default, and the

appellate court refused to interfere; *Vinson v. Los Angeles Pac. R. R. Co.*, 147 Cal. 483, applying rule to order granting relief from default in preparing statement on motion for new trial; *Cameron v. Carroll*, 67 Cal. 501; *Dougherty v. Nevada Bank*, 68 Cal. 276; *Lodtman v. Schluter*, 71 Cal. 97, where the lower court revoked an order of dismissal for want of prosecution; *Chamberlin v. Del Norte Co.*, 77 Cal. 151; *Wolf v. Canadian Pacific Co.*, 89 Cal. 337; *Harbaugh v. Honey Lake Co.*, 109 Cal. 72. Cited in the following cases, where the lower court refused to open the default, and this action was affirmed on appeal; *Garner v. Erlanger*, 86 Cal. 62; *Williamson v. Cummings Co.*, 95 Cal. 653; *Bauer v. Wolf*, 115 Cal. 101; *Evans v. Fall River Co.*, 4 S. Dak. 123; *Masten v. Indiana Car etc. Co.*, 25 Ind. App. 187. Cited in note to 56 Am. Dec. 394, 397, on discretion in opening default.

41 Cal. 22-29. HENLEY v. HOTLING.

The evidence ought to be so clear as to leave no doubt that the real intention of the parties was to execute a mortgage. . . A mortgage is a security for the performance of an agreement, which is usually to pay a sum of money. . . . If there is no debt, there is no mortgage, pp. 27, 28.

Cited in *Holmes v. Warren*, 145 Cal. 463, where there was controversy as to whether deed absolute in form was mortgage or absolute deed, evidence is admissible for plaintiff to show receipts for purchase money and contract for sale and purchase of land; *Montgomery v. Spect*, 55 Cal. 353, holding that a deed was intended as a mortgage; *Manassa v. Dinkelspiel*, 68 Cal. 406, holding that a deed given in satisfaction of a debt was not a mortgage, and could not be varied by an oral agreement; *Eaton v. Rocca*, 75 Cal. 97, to similar effect; *Mahoney v. Bostwick*, 96 Cal. 58, 31 Am. St. Rep. 177, holding that evidence of a deed being a mortgage was plain and convincing; *Ganceart v. Henry*, 98 Cal. 284, holding that parol evidence of a deed being a mortgage was not sufficiently clear "to establish an equity superior to the deed"; *Rawlins v. Ferguson*, 133 Cal. 473, *McGinn v. Lee*, 10 N. Dak. 169, *Tripler v. Campbell*, 22 R. I. 266, and *Ewing v. Keith*, 16 Utah, 318, holding mortgage not so established; *Blumberg v. Beikman*, 121 Mich. 653, and *Spalding v. Brown*, 30 Or. 167, conditional sale shown; *Muller v. Flavin*, 13 S. Dak. 609, holding mortgage shown; *Larson v. Dutiel*, 14 S. Dak. 482, holding deed not a mortgage; *Hays v. Carr*, 83 Ind. 284, holding that one who alleges a conditional sale to be a mortgage must prove it; *Winters v. Swift*, 2 Idaho, 66, 69, holding that a deed was not a mortgage because it contained no acknowledgment of debt or promise to repay; *Reed v. Bond*, 96 Mich. 140, holding a deed to be a conditional sale, not a mortgage; to same effect in *Buse v. Page*, 32 Minn. 114, 115, and *Gassert v. Bogk*, 7 Mont. 599; *Rockwell v. Humphrey*, 57 Wis. 416, holding a deed to be a mortgage, because the relation of debtor and creditor existed; *Schriber v. Le Clair*, 66 Wis.

599, and *Cowell v. Craig*, 79 Fed. Rep. 685, 689, holding a deed to be a conditional sale, not a mortgage; notes to 17 Am. Dec. 300, 304, and 4 Am. St. Rep. 699, on the point that intention of parties is to govern; and note to 50 Am. Dec. 196, 197, on burden of proof.

41 Cal. 29-33. EX PARTE VOLL.

Bail after Conviction is a matter of discretion, p. 30.

Cited in *Ex parte Hoge*, 48 Cal. 5, admitting a defendant to bail pending appeal; *Ex parte Smallman*, 54 Cal. 36, refusing to allow bail pending appeal; to same effect in *Ex parte Brown*, 68 Cal. 177, 183, holding that bail should not be allowed after conviction, unless extraordinary circumstances have intervened: *Ford v. State*, 42 Neb. 420, holding that bail may be taken pending a writ of error, upon a showing of probate error causing reversal: *United States v. Hudson*, 65 Fed. Rep. 75, holding that allowance of bail after conviction is a matter of statute in state courts, and there is no statute allowing it in federal courts; and *In re Boulter*, 5 Wyo. 267, 272, holding that one convicted of a felony is not entitled to bail pending proceedings is error.

41 Cal. 34-37. RICH v. TUBBS.

Homestead, under the law of 1862, was vested in the surviving spouse upon the death of either, and could not be set apart by the probate court as it was under the law of 1860, p. 36.

Cited in *Estate of Fath*, 132 Cal. 612 (quoted in *Saddlemire v. Stockton etc. Soc.*, 144 Cal. 654), holding such title not affected by order creating probate homestead; *Estate of Headen*, 52 Cal. 297, 299, holding that the amendment of 1874 to section 1265 of the Civil Code did not make the section a statute of succession so that the homestead of a deceased husband descended to his heirs, but the wife as survivor was entitled to the whole: *Herrold v. Reen*, 58 Cal. 447-449, holding that under the statute of 1862 the homestead vested in a wife after death of a husband, and a mortgage of it by her was valid; *Watson v. Creditors*, 58 Cal. 557, 558, holding that under the statute of 1862 the homestead vested in a husband after his wife's death and was liable for his debts thereafter; *Estate of Burton*, 63 Cal. 38, holding that under section 1465 of the Code of Civil Procedure a probate court might set apart for the wife a homestead out of her husband's estate, though none had been declared in his lifetime: *Levins v. Rovegno*, 71 Cal. 282-284, holding that the law of 1860 the homestead of a deceased wife descended one-half to her daughter and one-half to her husband, and "no act on the part of the probate court was necessary to or could change the title"; *Lyrrell v. Baldwin*, 78 Cal. 474, holding that under the statute of 1862 a surviving husband took the homestead after death of his wife, "and the law in force at the time of the death we think controls on the subject of homesteads and rights of survivors," so that the homestead

was not thereafter liable for the husband's debts: *Estate of Ackerman*, 90 Cal. 210, 13 Am. St. Rep. 117, holding that a surviving husband, who had sold the homestead after the wife's death, had no right to have another homestead out of the wife's separate estate: *Gruwell v. Seybolt*, 82 Cal. 10, holding that under the law in force at the death of a husband, his wife had the right to a homestead that she had previously declared on his separate property: *Collins v. Scott*, 100 Cal. 451, holding that upon death of a husband the wife succeeded to a homestead that had been declared on community property, and the children had no rights therein; and *Smith v. Shrieves*, 13 Nev. 309, 317, 323, holding that where a declaration of homestead has been filed the whole goes to a surviving spouse, but if there has been no declaration, one-half goes to the survivor and one-half to the children.

41 Cal. 37-40. PEOPLE v. RENFROW.

Challenge of Juror, for actual or implied bias, must specify the grounds relied on, pp. 38, 39.

Cited in *People v. Owens*, 123 Cal. 486, noted under *People v. Dick*, 37 Cal. 277; *People v. Walsh*, 43 Cal. 448, holding that a challenge "for implied bias, specifying nothing, was properly denied"; to same effect in *People v. Buckley*, 49 Cal. 242; *People v. Cochran*, 61 Cal. 549, holding that "I challenge the juror" was insufficient: *State v. Raymond*, 11 Nev. 107, holding that the grounds of bias must be specified; to same effect in *Southern Pacific Co. v. Rauh*, 49 Fed. Rep. 701, and *Shields v. State*, 149 Ind. 400.

Circumstantial Evidence may be ground for a verdict, p. 40.

Cited in *State v. Van Winkle*, 6 Nev. 352, holding that it depends on the circumstances whether circumstantial evidence is better than direct.

41 Cal. 41-55. MAHONEY v. MIDDLETON.

Constructive Notice.—The purchaser from a vendee of land has constructive notice of an earlier deed of the first vendor to a stranger, that was not recorded until after the recording of the second deed, but before the making of the third, p. 50.

Affirmed in *Clark v. Sawyer*, 48 Cal. 143. Cited in *County Bank v. Fox*, 119 Cal. 64, holding that a second mortgage had no priority over a first mortgage by being recorded first, because the second mortgagee and his assignees had constructive notice of the first mortgage; *Parrish v. Mahany*, 10 S. Dak. 285, 66 Am. St. Rep. 721, holding mortgagor under facts entitled to protection as bona fide purchaser; *Woods v. Garnett*, 72 Miss. 85, as to the purchaser of a second mortgage; and, as to the purchaser of a mortgage on a vessel, in *The W. B. Cole*, 59 Fed. Rep. 186.

Judgment-Roll being silent as to the issuing and service of process, it will be presumed that process was duly issued and served on the defendants, p. 51.

Distinguished in *Weeks v. Garibaldi Co.*, 73 Cal. 603, where the judgment below was held invalid as to certain defendants, for failure of the record to show affirmatively that the court had jurisdiction of their persons; because the attack on the judgment, by appeal therefrom, was direct, while in the principal case it was collateral. Cited in *Estate of Eichhoff*, 101 Cal. 601, holding that where the record in a divorce suit was made evidence in a petition for administration, service in the divorce suit was presumed, and saying that if a court "makes a record of the facts giving it jurisdiction, or of its exercise of such jurisdiction, there is no occasion to invoke any presumption. It is only where the record is silent that the necessity for presumption arises." Cited in *Lee v. Rogers*, 2 Sawy. 567, holding that the purchaser of land affected by a judgment need not "look beyond the record to see whether the judge committed any error or not"; and note to 94 Am. Dec. 785, as to collateral attack on a judgment.

Appearance by Attorney gives the court jurisdiction of the person of the client, p. 51.

Cited in *Shay v. Superior Court*, 57 Cal. 542, holding that on application for certiorari it was too late to complain of the insufficiency of notice and undertaking on appeal from a justice's court, because petitioner had appeared by counsel at the trial in the appellate court and defended the suit upon its merits; and *Blyth Co. v. Swenson*, 15 Utah, 363, to the point that where a defendant moves to set aside a valid judgment on the ground that the attorneys appearing for him had no authority, he must show: "1. That he has a good defense; 2. That he has been diligent in presenting his grievances to the court; 3. That the attorneys in truth had no authority to represent him."

Judgment in Ejectment "does not transfer to the successful party the title of the adverse party, but if presented in the proper mode, whenever such adverse title is drawn in issue, it shuts out all proof of such adverse title," p. 53.

Cited in *Breon v. Robrecht*, 118 Cal. 472, 62 Am. St. Rep. 248, holding a former judgment conclusive; *Hentig v. Redden*, 46 Kan. 236, 26 Am. St. Rep. 95, holding a judgment in ejectment final as to matters that could have been litigated therein; and in note to 54 Am. Dec. 546, on estoppel by judgment.

Judgment on Ejectment may determine the interests had by each of two plaintiffs. Plaintiff cannot recover a part of the land already in his possession. The judgment is evidence in a later suit for damages and mesne profits, pp. 53-55.

Cited in *Burgel v. Prisser*, 89 Cal. 73, holding that in a suit by co-

tenants for mesne profits the court may settle the respective interests of the parties; and notes to 54 Am. Dec. 416, and 50 Am. St. Rep. 845, on recovery by plaintiff in ejectment.

41 Cal. 55-60. **CURTIS v. SPRAGUE.**

Counterclaim by maker of note in suit against him by indorsee thereof; commented on without decision, p. 59.

Cited in *Leavitt v. Peabody*, 62 N. H. 192, holding that in a suit by the indorsee of an overdue note the maker cannot set off debts due from the payee.

41 Cal. 61-63. **WALSWORTH v. JOHNSON.**

Pending Suit between the same parties is no ground for abatement, where the plaintiff in one suit is defendant in the other, p. 63.

Affirmed in *Monroe v. Reed*, 46 Neb. 330. Cited in *Valley Bank v. Shenandoah etc. Bank*, 109 Iowa, 46, holding former judgment not res judicata when issues and relief were different; *Pratt v. Howard*, 109 Iowa, 506, noted under *Ayres v. Bensley*, 32 Cal. 630.

41 Cal. 63-66. **CRANE v. SALMON.**

Quitclaim Deed to a rancho, for which a patent issued later, conveyed all rights under the patent to the grantee of the deed, p. 66.

Affirmed in *Stanway v. Rubio*, 51 Cal. 46. Cited in note to 58 Am. Dec. 588.

41 Cal. 66-67. **PEOPLE v. MURRAY.**

Refusal of an Instruction, substantially given, is not error, p. 67.

Affirmed in *People v. Ah Chung*, 54 Cal. 403.

Circumstantial Evidence need not be absolutely incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt, p. 67.

Cited in *People v. Padillia*, 42 Cal. 540, holding that the jury must be "entirely satisfied of the guilt of the accused"; *People v. Ramirez*, 56 Cal. 538, holding instructions on circumstantial evidence correct; *People v. Gosset*, 93 Cal. 644, holding that facts proven must be "inconsistent with any reasonable hypothesis" of defendant's innocence; *State v. Willingham*, 33 La. Ann. 539, holding that "conclusion" and "hypothesis" are synonymous in this connection; *State v. Rover*, 13 Nev. 24, holding it correct to refuse to charge that circumstantial evidence must be absolutely incompatible with innocence of defendant; *Territory v. Lerazo*, 9 N. Mex. 571, holding instruction on subject improperly refused; but see *Johnson v. State*, 53 Neb. 106, where requested instruction was held to be erroneous; note on this point in 62 Am. Dec. 183.

41 Cal. 68-78. TILDEN v. SACRAMENTO COUNTY.

Mandamus does not lie to control judicial functions of a board of supervisors in disallowing a claim against the county, p. 70.

Cited in *Sullivan v. Gage*, 145 Cal. 767, mandamus does not lie to compel state board of examiners to allow claim for fees for attorney for receiver illegally ordered by court in action by state to dissolve corporation; *Mountain v. Multnomah Co.*, 8 Oreg. 474, holding that the action of a county court in dealing with certain matters regarding the militia, intrusted to it by statute, could be examined by the statutory writ of review; *Sawyer v. Mayhew*, 10 S. Dak. 23, denying writ to review discretionary action by state auditor as to adjustment of claims.

41 Cal. 78-85. GAMBETTE v. BROCK.

Judgment Against a Married Woman, in a case where coverture would have been a defense if pleaded, cannot be impeached collaterally on this ground; though erroneous, it is not void until reversed or set aside, pp. 82, 83.

Cited in *Crane v. Cummings*, 137 Cal. 202, noted under *Moore v. Martin*, 38 Cal. 428; *Vantilburg v. Black*, 3 Mont. 468, holding that a judgment against husband and wife on their joint note, secured by mortgage of husband's property, was not void until set aside in a direct proceeding, the wife having failed to plead coverture; *McCurdy v. Baughman*, 43 Ohio St. 84, holding that although coverture would have been a good defense if pleaded, enforcement of a judgment could not be enjoined for this cause, "unless the facts bring the case within some such ground of relief as fraud, conclusion or coercion"; *Smith v. Borden*, 17 R. I. 221, 33 Am. St. Rep. 868, holding such a judgment binding until set aside by appeal or some appropriate method; and notes on this point in 55 Am. Dec. 600, 601, and 57 Am. St. Rep. 169.

Wife may Establish a Homestead, by her own residence upon it with her family, if the husband has no home or fixed residence elsewhere, or [no] other family than his wife, p. 84.

Cited in *Boreham v. Byrne*, 83 Cal. 26, 27, holding that under the law of 1860 a declaration of homestead by the husband alone, failing to state that "he or his wife was at the time residing with their family on the premises . . . was manifestly insufficient"; *Stout v. Rapp*, 17 Neb. 470, holding that where a husband lived on the wife's land, he was not entitled to an exemption of personal property from execution, allowed by statute to persons who had no homestead, for there could not be two homesteads in the same family; and notes on homestead in 60 Am. Dec. 613; 70 Am. Dec. 346, 349; 91 Am. Dec. 644.

41 Cal. 85-88; 10 Am. Rep. 266. **UPTON v. ARCHER.**

Filling Blank in Deed, by inserting name of grantee, cannot be done by grantor's agent, unless authorized in writing, p. 87.

Cited in *Dolbeer v. Livingston*, 100 Cal. 620, 622, holding that a surety on a bond, who signed and gave it to the obligor before certain blanks in it were filled, was estopped from disputing the validity of the bond: *Herr v. Denver Co.*, 13 Colo. 414, holding that a chattel mortgage, with the grantee's name omitted, was invalid as against the rights of third parties; and *State v. Matthews*, 44 Kan. 604, 606, holding that where an agent, authorized by parol to fill a blank in a deed, filled it with the name of a wrong grantee, who obtained a loan upon mortgage of the land, the deed was good with regard to the mortgagee's rights. Affirmed, as to parol authority being insufficient, in *Adamson v. Hartman*, 40 Ark. 61, and *Ayres v. Probasco*, 14 Kan. 189. Denied in *Swartz v. Ballou*, 47 Iowa, 194, 29 Am. Rep. 475, holding that "the decided weight of modern authority and reason is in favor of the rule. . . . in *Drury v. Foster*, 2 Wall. 24," which is, that parol authority is sufficient to authorize an alteration or addition to a sealed instrument; *Oribben v. Deal*, 21 Oreg. 218, 28 Am. St. Rep. 751, holding that parol authority is sufficient for inserting the grantee's name in a deed; and to same effect in *Lafferty v. Lafferty*, 42 W. Va. 789. Cited in notes on this point in 13 Am. Dec. 670; 14 Am. Rep. 439; 8 Am. St. Rep. 250; 23 Am. St. Rep. 751.

41 Cal. 88-93. **BROWN v. BROWN.**

Statement on Appeal.—If there is any evidence to support the judgment, it must be affirmed, no motion for new trial having been made, pp. 92, 93.

Cited in *Wilson v. Southern Pacific Co.*, 62 Cal. 171, holding on an appeal from refusal of new trial, that "if there was any evidence to warrant the verdict, we cannot review it on appeal"; *Lufkins v. Collins*, 2 Idaho, 238, holding that an instruction that there was no evidence to support plaintiff's claim was properly refused. Affirmed in *Burbank v. Rivers*, 20 Nev. 86.

41 Cal. 94-96. **TOMLINSON v. MONROE.**

Material Variance between allegation and proof of a contract is ground for nonsuit, p. 96.

Cited in *Owen v. Meade*, 104 Cal. 183, holding that a contract proved was not the one alleged; *Elmore v. Elmore*, 114 Cal. 519, 521, holding it error to give judgment on a cause of action "not set up in the complaint and not warranted by the averments of the complaint"; *McMahon v. Canadian Ry.*, 40 Or. 152, where plaintiff pleaded oral agreement but on trial admitted execution and validity of written contract

for same services, radically different from alleged oral one, nonsuit properly granted.

41 Cal. 97-100. **SMITH v. CUSHING.**

Defective Findings.—If no objections are made in the lower court, the presumption is that the court found all the facts for the party in whose favor judgment was ordered, p. 99.

Cited in *Warren v. Quill*, 9 Nev. 264, holding that if a finding is omitted, exception must be taken, and the point specified on which a finding is wanted; *More v. Lott*, 13 Nev. 380, holding findings that ought to have been made should be presumed.

Abandonment is the leaving without intent to return, p. 99.

Affirmed in *Beaver Brook Co. v. St. Vrain Co.*, 6 Colo. App. 136. Cited in note to 40 Am. Dec. 464, 467, on abandonment.

41 Cal. 100-103. **DAVENPORT v. TURPIN.**

On Whom Judgments are Binding.—Grantee of mortgagor, under deed recorded before foreclosure sale, who was not made a party to the suit, held to be a tenant in common with the purchaser at foreclosure sale, p. 103.

Cited in *Walker v. Goldsmith*, 14 Oreg. 148, holding that the grantee under an unrecorded deed was not bound by a decree quieting title against his grantor in a suit begun after execution of the deed and to which the grantee was not a party.

41 Cal. 103-109. **EVANS v. EVANS.**

Adultery.—If a husband enters a house of prostitution in the evening and comes out the next morning, it raises a strong presumption of his adultery, p. 107.

Cited in *Musgrave v. State*, 133 Ind. 309, a case of conspiracy to defraud, to the point that one is presumed to intend the consequences of his acts; *Musick v. Musick*, 88 Va. 15, holding that association by the husband with unchaste women was sufficient proof of adultery.

Admissions of defendant in a divorce case are evidence, but must be corroborated, p. 107.

Cited in note on confessions in 30 Am. Dec. 548, 549.

Some Corroboration of plaintiff's evidence is required by statute in a divorce suit, but the statute does not say how much, p. 108.

Cited in *Cooper v. Cooper*, 88 Cal. 48, holding there was some corroboration of plaintiff as to defendant's cruelty; *Venzke v. Venzke*, 94 Cal. 227, to same effect; *Smith v. Smith*, 119 Cal. 191, holding that plaintiff's evidence was corroborated by that of defendant; *Clopton v. Clopton*, 11 N. Dak. 219, in divorce suit where plaintiff testified as to

results produced on health by alleged cruelty, and testified to medical treatment for ailments caused by such cruelty, corroboration of attending physician as to such treatment is sufficient; *Andrews v. Andrews*, 120 Cal. 186, 187, saying that as to successive acts of cruelty, "it is not necessary that there should be direct testimony of other witnesses to every act sworn to by the plaintiff," and holding there was sufficient corroboration under section 130 of the Civil Code.

41 Cal. 109-111. **SEIGEL v. EISEN.**

Contributory Negligence.—Standing on the rear platform of a street car is not contributory negligence, as matter of law, p. 111.

Affirmed in *Cummings v. Worcester Co.*, 166 Mass. 223, as to leaning out of a street-car window; *Upham v. Detroit Co.*, 85 Mich. 17, as to riding on street-car platform; *Dahlberg v. Minneapolis Co.*, 32 Minn. 437, 438, 50 Am. Rep. 588, 589, as to placing hand on street-car window sill; *Solon v. Virginia Co.*, 13 Nev. 148, as to walking on a railway track; *Bailey v. Tacoma Co.*, 16 Wash. 62, as to sitting on front platform of an electric-car.

Proximate Cause of injury from negligence is for the jury, p. 111.

Cited in *Orcutt v. Pacific Coast Co.*, 85 Cal. 299, holding that contributory negligence of plaintiff in allowing horses to run loose near a railway track was too remote to be the proximate cause of their being run over by a train; and note to 16 Am. St. Rep. 251.

41 Cal. 111-116. **GROSS v. KIERSKI.**

Seller of Chattels, in his possession, is held by implication of law to warrant the title; and there is no breach until the buyer's possession is disturbed by reason of the title of the true owner, pp. 113-115.

Cited in *McLeod v. Barnum*, 131 Cal. 608, noted under *Peabody v. Phelps*, 9 Cal. 213; *Barnum v. Cochrane*, 143 Cal. 645, on point that purchaser cannot recover for breach of warranty of title while remaining in undisturbed possession; *Rockwell v. Young*, 60 Md. 569, holding that where the widow of a decedent sold his mules, taking a note in part payment, and the buyer paid the amount of the note to the decedent's administrator, this was a good defense to a suit by the widow on the note; *Kennard Co. v. Dornan*, 64 Mo. App. 25, holding that where it was a custom of trade that a carpet should not show spots caused in manufacture, the right of action on a warranty of quality ran from the time the spots appeared; *Hodges v. Wilkinson*, 111 N. C. 60, holding that after warranty of title on sale of a horse, the buyer need not delay suit until the horse is taken from him, but it is enough if he shows paramount title in another; *Hull v. Caldwell*, 3 S. Dak. 455, holding that the buyer of a buggy and harness could not sue on a warranty of title unless he showed actual damage from the breach; and notes on this point in 35 Am. Dec. 607; 39 Am. Dec. 500; 62 Am. Dec. 464.

41 Cal. 117-118. WEAVER v. HAYWARD.

Affidavit for Attachment need not state the facts of the indebtedness, already stated in the complaint, p. 118.

Affirmed in *Bank v. Boyd*, 86 Cal. 388; *Newell v. Whitwell*, 16 Mont. 259; *Crawford v. Roberts*, 8 Oreg. 326.

41 Cal. 119-122. CLARK v. GRIDLEY.

Partial Settlement of Partnership accounts is evidence in a suit for dissolution and final settlement, p. 122.

Affirmed in *Stretch v. Talmadge*, 65 Cal. 511. Cited in *Lay v. Emery*, 6 N. Dak. 524, quoting *Stretch v. Talmadge*, 65 Cal. 511.

41 Cal. 123-128. TEVIS v. HICKS.

Res Gestae.—Evidence of a grantor, as to what took place at the time of conveyance, held admissible in a later suit against the grantee, attacking the conveyance as being in fraud of creditors, p. 126.

Cited in *Deasey v. Thurman*, 1 Idaho, 777, holding that statements of owners of a pack-train, in derogation of their title, made two years prior to the suit, were not part of the res gestae; and note to 95 Am. Dec. 58.

Jury cannot determine the question as to what facts are admitted by the pleadings, but it is for the court, p. 127.

Cited in *Dean v. Grimes*, 72 Cal. 446, holding that whether pleadings in an insolvency case were defective was a question of law, and should not have been submitted to the jury; *Cook v. Merritt*, 15 Colo. 215, to the point that the jury cannot construe the pleadings.

Findings of the jury cannot be contrary to or inconsistent with the pleadings. "If a pleading does not correctly state the facts, application should be made to amend," p. 127.

Cited in *Simmons v. Hamilton*, 56 Cal. 496, 497, holding that where a court draws erroneous conclusions of law from its finding of facts, a new trial must be granted; *Ortega v. Cordero*, 88 Cal. 226, granting a new trial because findings of fact were inconsistent with the pleadings and outside of the issues; and *Fisk v. Cuthbert*, 2 Mont. 599, holding that defendant cannot on appeal argue inconsistently with his answer.

41 Cal. 133-136. PATTERSON v. SHARP.

Judgment-Roll.—The evidence need not be brought up on an appeal for reduction of amount of a judgment rendered on facts in a complaint not denied by the answer, p. 135.

Cited in *Heinlen v. Heilbron*, 71 Cal. 564, to the point that "the ap-

pellate court will take notice of errors appearing in the judgment-roll, even if not named in the specification of errors in the statement."

Tender of amount due and accrued interest stops further interest, p. 135.

Cited in *Easterbrook v. Farquarson*, 110 Cal. 316, holding that as tender could not be made of an undetermined sum, interest did not run until the amount was determined.

41 Cal. 136-138. MCABEE v. RANDALL.

Order Denying Motion for Judgment on the pleadings cannot be reviewed on appeal from the judgment, there being no statement or bill of exceptions, p. 137.

Cited in *Emeric v. Alvarado*, 64 Cal. 594, holding that an order appointing a guardian ad litem is not part of the judgment-roll; *Hermans v. Jacksonville, etc. Co.*, 40 Fla. 91, applying rule to affidavits used on hearing; *Graham v. Linehan*, 1 Idaho, 781, to the point that an appeal must be decided on the judgment-roll, where there is no statement or bill of exceptions; *Reinhart v. Company D*, 23 Nev. 372, holding that where the facts did not appear in the judgment-roll, and there was no statement, an order refusing to open default could not be disturbed.

Pleading.—Where the answer is treated as a counterclaim at the trial, it cannot be considered a cross-complaint for the first time on appeal, p. 138.

Cited in *Haskell v. Haskell*, 54 Cal. 264, holding that in a suit for divorce a count for extreme cruelty is not sustained by proof of excessive drinking, not amounting to habitual intemperance; *Erkins v. Ayer*, 58 Cal. 313, holding that where defendant in a foreclosure suit treated his pleading as an answer, he could not on appeal call it a cross-complaint; and *Shain v. Belvin*, 79 Cal. 264, holding that calling an answer a cross-complaint did not make it such.

41 Cal. 138-143; 10 Am. Rep. 269. LAVERONE v. MANGIANTI.

Owner of Ferocious Dog is liable for injury occasioned by it, p. 140.

Cited in *Kippen v. Ollasson*, 136 Cal. 641, sustaining instructions as to dog; *Clowdis v. Fresno Flume Co.*, 118 Cal. 320, 323, holding that the owner of a vicious bull was liable for his injuring a man on the road, while driven by the owner's servants. Affirmed in *Melsheimer v. Sullivan*, 1 Colo. App. 26, as to a dog; to same effect in *Conway v. Grant*, 88 Ga. 42; 30 Am. St. Rep. 146; *Vredenburg v. Behan*, 33 La. Ann. 639, as to a bear; and notes on this point in 2 Am. St. Rep. 458; 16 Am. St. Rep. 631; 35 Am. St. Rep. 879.

41 Cal. 147-202. STOCKTON RAILROAD COMPANY v. STOCKTON.

Statute will be sustained unless clearly unconstitutional, p. 162.

Cited in dissenting opinion in *Tucker v. Barnum*, 144 Cal. 271, noted under *Borland v. Hildreth*, 26 Cal. 161.

Unconstitutionality of a statute can be declared by the court only where the federal or state constitution has deprived the legislature of the power to enact it, or limited it to something else than the subject to which the legislature has applied it. It will not do to talk about the spirit of the constitution as imposing a limitation upon the legislative power, p. 162.

Cited in *University v. Bernard*, 57 Cal. 613, to the point that "an act should not be declared unconstitutional and void unless there is a clear repugnance between the act and the constitution; and where there is a reasonable doubt whether the act is repugnant to the constitution, its constitutionality should be affirmed"; also in *Gilchrist v. Schmidling*, 12 Kan. 271, holding that a city ordinance, opposed to an unexpressed spirit supposed to pervade the constitution, was not unconstitutional; *Southern Pacific Co. v. Orton*, 6 Saw. 186, 32 Fed. Rep. 473, holding that a statute allowing a railway to change its line of road was not in violation of the constitutional provision that corporations should not be created by special acts; and note on this point in 63 Am. Dec. 519.

What is a Public Use, as regards eminent domain, seems to have been left, in large measure, to the determination of the legislature, p. 168. When the legislature has determined a given purpose to be a public purpose, we must so consider it, unless we can see at first blush that it is not possible that it could be such, p. 175.

Cited in *Consolidated Co. v. Central Pacific Co.*, 51 Cal. 273, holding that lands of a railway company could not be condemned for use as a flume site by a mining company, because it was not a public use; *Lux v. Haggin*, 69 Cal. 304, holding it "safe to say" that supplying water for irrigation to "farming neighborhoods" was for a public use, and "the judgment of the legislature that it is such ought not, therefore, to be disturbed by the courts"; *In re Madera District*, 92 Cal. 310, 27 Am. St. Rep. 114, to the point that "if the subject matter of the legislation be of such nature that there is any doubt of its character, or if by any possibility the legislation may be for the welfare of the public, the will of the legislature must prevail over the doubts of the court"; *County v. Coburn*, 130 Cal. 634, affirming location by supervisors of public road; *State v. Cornel*, 53 Neb. 559, 68 Am. St. Rep. 631, applying rule to imposition of tax for an alleged public purpose; *Varner v. Martin*, 21 W. Va. 551, to the point that while the court will incline to hold a use public for which land is condemned, it will not hesitate in a proper case to declare a statute unconstitutional, as in the present case, where private property is attempted to be taken for a private road; and notes on this

point in 22 Am. Dec. 690, 691, 692, 695; 28 Am. Dec. 423; 31 Am. Dec. 372; 60 Am. Dec. 595.

"Railroads Concern the Public Interest, as matter of legal judgment," p. 178. "Railroads, though operated by private companies, are by mere legal conclusion for public use; . . . aid may be extended to the construction of such roads by means of the power of eminent domain, or of subscription to capital stock, and by donations made by cities and other political subdivisions of the state, under the authority of the legislature," p. 192.

Cited in *Leavenworth Co. v. Miller*, 7 Kan. 541, 12 Am. Rep. 465, holding that the weight of authority, and the more recent decisions, are in favor of the validity of statutes authorizing municipal aid to railways; *Harcourt v. Good*, 39 Tex. 472, holding that a tax to aid construction of a railway bridge was valid, and giving a long list of authorities; and note to 59 Am. Dec. 783.

41 Cal. 202-208. TREAT v. DE CELIS.

Power of Attorney held not to authorize sale of land, p. 208.

Cited in *Quay v. Presidio Co.*, 82 Cal. 6, holding that a power to exchange old certificates of stock for new ones "did not authorize a transfer of the property"; *Grant v. Ede*, 85 Cal. 421, 20 Am. St. Rep. 238, holding that a letter authorizing an agent to find a purchaser for land at a certain price did not give him power to bind the principal by a contract of sale; *Martin v. Ede*, 103 Cal. 160, holding that the agent in the last preceding case had only to find a purchaser in order to be entitled to his commission; *McFarland v. Lillard*, 2 Ind. App. 163, 50 Am. St. Rep. 236, holding that where a broker was authorized to find a buyer for land, his right to the stipulated commission was not defeated by the fact that the seller's wife changed her mind about selling; and note to 17 Am. Dec. 59.

Specific Performance.—Whether a probate court has jurisdiction, not decided, p. 208.

Referred to in note to 73 Am. Dec. 560, on probate and equity jurisdictions.

41 Cal. 211-220; 10 Am. Rep. 272. EX PARTE McLAUGHLIN.

Discharge of Jury, in a criminal case, for failure to agree on a verdict, is not an acquittal of defendant, pp. 213-219.

Distinguished in *People v. Cage*, 48 Cal. 326, 17 Am. Rep. 437, holding that discharge of a jury for failure to agree, by adjoining the court for the term, without calling in the jury, operated as an acquittal. Cited in *Dreyer v. People*, 188 Ill. 49, holding second trial after such discharge not barred; *People v. Smalling*, 94 Cal. 117, holding that where a jury was

discharged for failure to agree, the defendant could not, on a second trial, introduce the stenographer's record of such proceeding for the purpose of showing an abuse of discretion in discharging the jury; *People v. James*, 97 Cal. 401, holding that discharge of jury for failure to agree was no bar to subsequent conviction of defendant, notwithstanding that the court at the first trial instructed the jury to acquit and they ought to have done so. Distinguished in *Ex parte Maxwell*, 11 Nev. 436, holding that discharge of jury for failure to agree was equivalent to acquittal, because the record failed to show properly the reason for the discharge or an adjudication of the point. Cited in *State v. Shaffer*, 23 Oreg. 556, holding that defendant was not put twice in jeopardy by discharge of jury at the first trial; and notes on this point in 12 Am. Dec. 547; 61 Am. Dec. 95; 72 Am. Dec. 201; 25 Am. St. Rep. 527.

Habeas Corpus is not a proper proceeding for trying the question of whether the trial court erred in discharging a jury for failure to agree, for defendant has his remedy by appeal, p. 220.

Cited in *Ex parte Hartman*, 44 Cal. 35, holding that an order of the trial court, remanding defendant to await further action of the grand jury, must be reviewed on appeal, not on *habeas corpus*, the order being "regular on its face, and one which the court had power to make."

General Citation.—*Smith v. Crosby*, 86 Tex. 19.

41 Cal. 221-231. THOMPSON v. MCKAY.

Former Judgment.—Omission of the court to give plaintiff in ejectment any relief is an adjudication that he is not entitled to it, p. 227.

Cited in *Lamb v. Wahlenmaier*, 144 Cal. 95, applying rule to omission to give affirmative relief prayed for by defendant; *Hodge v. Shaw*, 85 Iowa, 143, 39 Am. St. Rep. 294, holding a former judgment for damages conclusive; *Nashua Railroad v. Boston Railroad*, 164 Mass. 226, 49 Am. St. Rep. 458, holding that where a decree for accounting fund for plaintiff on two issues and was silent on a third, it was a decree for defendant on the third issue; *Ankeny v. Fairview Co.*, 10 Oreg. 397, holding that failure of a court to issue a statutory order for abatement of a nuisance was equivalent to a refusal to issue it; *Rackley v. Fowlkes*, 89 Tex. 616, holding that in an action for rent on two issues, where the judgment was on one issue only for plaintiff, it was *prima facie* an adjudication that he was not entitled to recover on the other, unless he could show that the other issue was withdrawn or the court refused to pass on it; and notes to 85 Am. Dec. 209, and 44 Am. St. Rep. 570.

In Construing Doubtful Contract, court ascertains relation of parties to each other, and to subject matter, and construes it to give effect to intent, if it can be done without disregarding language of instrument, p. 228.

Cited in *Bank v. Bowers*, 141 Cal. 262, applying rule to construction of

guaranties; *Burke Land etc. Co. v. Wells etc. Co.*, 7 Idaho, 57, construing mortgage for purchase price.

Trust Deed held to convey the fee, and the grantee had the right, to transmit the legal title to a purchaser, in execution of the trust, p. 230.

Affirmed in *More v. Calkins*, 95 Cal. 438, 29 Am. St. Rep. 129, 130, saying: "Whether the conveyance is to be treated as a mortgage or as a deed of trust must depend upon its essential character, as shown by its terms, and not whether the grantee is a creditor whose debt is to be paid out of the proceeds to arise from the execution of the trust which is declared"; also in *Savings & Loan Society v. Burnett*, 106 Cal. 528, holding a conveyance to be a deed of trust, not a mortgage, and saying that "the decisions of this court upon such instruments have never been in flux, but, to the contrary, have been set and consistent since first they came before it." Cited in notes to 64 Am. Dec. 200; 19 Am. St. Rep. 274; 31 Am. St. Rep. 26; 63 Am. St. Rep. 473. Distinguished in *Brown v. Bryan*, 6 Idaho, 16, trust deed given to secure debt payable at specified time is a mortgage and cannot be foreclosed by notice, and sale under power in such trust deed.

Offer to Prove a fact, excluded by the court on objection of the other side, precludes the party objecting from claiming a failure of proof on the point, p. 230.

Affirmed in *Union Pacific Co. v. Harris*, 63 Fed. Rep. 804. Cited in *Missouri etc. Co. v. Elliott*, 102 Fed. 103, holding party so estopped.

Supplemental Answer must be filed in ejectment, if title acquired pending suit is relied on, p. 231.

Cited in *People's Bank v. Hodgdon*, 64 Cal. 98, holding that title acquired pending suit was not affected by the judgment, because not pleaded by supplemental answer.

41 Cal. 232-234. **LYNCH v. KELLY.**

Justice of the Peace.—His failure to make a formal entry of judgment in his docket, after verdict and before issuing execution, though irregular, does not invalidate the execution sale, p. 233.

Cited in *Montgomery v. Superior Court*, 68 Cal. 411, holding that an appeal from a justice's court was valid, though taken before entry of judgment by the justice, but after verdict; *Turner v. Harrison*, 43 Ark. 237, holding that failure of the justice to enter judgment after verdict did no harm; *Corthell v. Mead*, 19 Colo. 394, holding that a justice may be compelled to enter judgment, saying: "He has no discretion in the premises; it is his duty to enter judgment upon the verdict; he is to enter the judgment, not render it." Cited in *Porter v. Parker*, 4 Dak. Ter. 401, holding that rights of parties were determined by the verdict, and entry of it by the justice was enough; *Jones v. Carnahan*, 63 Ind. 234, holding that an execution prematurely issued by the clerk of a

circuit court was irregular but not void, and could be objected to only by a party to the execution; *Cross v. Knox*, 32 Kan. 733, holding that an order of sale by a district court, and proceedings of the sheriff under it, though irregular, were not void, but could be set aside on petition of the judgment debtor at any time prior to confirmation; *Swain v. Gilder*, 61 Miss. 672, holding that if a justice failed to perform the clerical duty of entering a judgment, "but dealt with the record as if it were completed, then the judgment, however irregular, informal or defective, will be upheld"; *Humboldt Co. v. Terry*, 11 Nev. 245, holding that a judgment entered irregularly by the clerk of a district court must be treated as a valid judgment; *McClain v. Davis*, 37 W. Va. 338, 341, in dissenting opinion, a majority of the court holding that a judgment entered by justices of the peace *nunc pro tunc*, two years after verdict, was irregular.

41 Cal. 234-237. **PEOPLE v. HUGHES.**

Variance between indictment and proof, though immaterial, causing an acquittal, precludes another trial; but if the variance is material, the acquittal is no bar to a later conviction, p. 236.

Cited in *People v. Terrill*, 132 Cal. 500, as to forgery prosecution, acquittal where held conclusive, although variance was immaterial; *People v. Leong Quong*, 60 Cal. 108, holding that where Chinese defendant was described by one name, the fact that he was also known by another did not constitute a variance; *People v. Tonielli*, 81 Cal. 280, holding a variance of one word in a letter as alleged and proved was immaterial; *People v. Arras*, 89 Cal. 226, holding a variance as to initials of a name immaterial; *Dill v. People*, 19 Colo. 473, 41 Am. St. Rep. 257, holding a plea of former acquittal bad, because evidence to support the second indictment was inadmissible on the first; *State v. Sullivan*, 9 Mont. 496, holding a variance as to name of person assaulted material, and therefore former acquittal could not be pleaded; *State v. Van Cleve*, 5 Wash. 643, where the trial court allowed the first name of the alleged owner of stolen property to be changed after the trial had begun, and this was held ground for reversal.

Ownership of property stolen is essential in an indictment for larceny, where the offense is otherwise not described with sufficient certainty, p. 237.

Affirmed in *People v. Wallace*, 94 Cal. 501.

41 Cal. 239-242. **HUSSEY v. CASTLE.**

Conveyance by Husband to Wife raises no presumption of fraud as against one who recovers judgment for a tort, three months later, against the husband, p. 241.

Cited in *Kane v. Desmond*, 63 Cal. 465, holding that the gift of a piano

by husband to wife was not void as to a subsequent creditor; *Wilhoit v. Lyons*, 98 Cal. 413, holding that an assignment for benefit of creditors, not recorded as prescribed by law, was good as against subsequent creditors; *Hill v. Meinhard*, 39 Fla. 117, holding good a conveyance by husband to wife as against a judgment recovered a year later; *Walsh v. Byrnes*, 39 Minn. 528, holding that "where voluntary conveyances are actually fraudulent, and the purpose or effect of the same is to prejudice subsequent creditors, such conveyances will also be void as to them; *Farr v. Swigart*, 13 Utah, 156, holding that in a suit against a constable, for levying on property of the wife under an execution against the husband, evidence of a gift from husband to wife, before the debt was incurred was inadmissible; and notes to 86 Am. Dec. 634, 642.

41 Cal. 242-247. RANDALL v. FALKNER.

If Defendant Appears and Answers, in an action of unlawful detainer he waives any defect in the summons, p. 245.

Cited in *Taylor v. Hill*, 115 Cal. 151, holding, in a suit to compel a sheriff to pay preferred claims out of proceeds of execution, that "by their voluntary appearance and answer the defendants submitted themselves to the jurisdiction of the court."

Unlawful Detainer.—Entry on public land, not open for pre-emption and in the occupation of another, is unlawful, though the entry was in good faith for the purpose of claiming title as soon as the land should be open for entry, p. 246.

Cited in *Phoenix Co. v. Lawrence*, 55 Cal. 146, holding that entry on a mining claim, in possession of another, was unlawful, for "a party cannot enter for the purpose of obtaining title or color of right. He must have it before he entered." Cited in note to 77 Am. Dec. 554.

Costs.—Fees of witnesses, subpoenaed but not called, allowed, p. 247.

Cited in *Cole v. Ducheneau*, 13 Utah, 46 holding such fees taxable, unless it appeared that the witnesses were unnecessarily numerous; and note to 88 Am. Dec. 181.

41 Cal. 247-253. QUINN v. WETHERBEE.

Relief in Equity, against a judgment at law, on the ground of mistake, cannot be granted where the mistake occurred through negligence of the attorney of the party who seeks relief, p. 252.

Cited in *Hollenbeak v. McCoy*, 127 Cal. 23, holding injunction to prevent enforcement of justice's judgment properly denied under facts stated; *Champion v. Woods*, 79 Cal. 22, 12 Am. St. Rep. 129, holding it negligence on the part of a wife to allow a decree of divorce in her favor to omit reference to property to which she was entitled, and the mistake could not be relieved in equity; *Davis v. Chalfant*, 81 Cal. 631, holding that where undertaking on appeal was not filed in time, through negli-

gence of an attorney, equity would not interfere to order a new trial; *State v. Jones*, 12 Mo. App. 94, holding that ignorance, stupidity, and silliness of the attorney for defendant in a criminal case was ground for reversal of the judgment; *Tederall v. Bouknight*, 25 S. C. 281, to the point that the purchaser of land at a probate sale was not affected by an error that did not appear on the face of the record; and note to 19 Am. Dec. 606.

41 Cal. 253-256. CHASE v. CHRISTIANSON.

Erroneous Decision on a question arising in a case, where the court has jurisdiction of the subject and the person, does not invalidate the judgment when questioned collaterally, pp. 255, 256.

Cited in *Hutchinson v. Inyo Co.*, 61 Cal. 121, to the point that "having jurisdiction, any error committed by the court in the exercise of its jurisdiction is not reviewable by certiorari"; *Schwartz v. Palm*, 65 Cal. 55 to the point that if a decree of foreclosure orders the sale of a greater or less estate than that described in the complaint and mortgage, it is erroneous and should be corrected on motion; *Hodgdon v. Southern Pacific Co.*, 75 Cal. 648, holding that the appointment of a guardian for a minor by a probate court could not be attacked by the minor in a suit by him to quiet title to his lands; *Meyer v. Sulzbacher*, 76 Ala. 127, holding where a decree, making a woman a sole trader, gave her more power than the statute authorized, the excess was properly treated as surplusage on collateral attack; *Gay v. Bowles*, 74 Mo. 424, holding that although a judgment in a tax suit was erroneous, it did not invalidate the title of the purchaser at execution sale; *Hagerman v. Sutton*, 91 Mo. 530, holding that an error in a foreclosure judgment could not be attacked in a later suit of ejectment for the land; *Babb v. Bruere*, 23 Mo. App. 607, holding that where a circuit court issued execution on transcript from an irregular judgment of a justice of the peace, the circuit court could recall the execution and make it and the judgment conform to the law; *Vantilburgh v. Black*, 2 Mont. 377, holding that an irregular decree in a lien case could not be collaterally attacked; *Mach v. Blanchard*, 15 S. Dak. 439, default judgment erroneously granting more relief than demanded is not void and cannot be collaterally attacked; *George v. Nowlan*, 38 Or. 541.

41 Cal. 256-262. SOUTHERN PACIFIC COMPANY v. REED.

Condemnation of Street for Railroad entitles the owner of an abutting lot to damages, notwithstanding that he has already received compensation for a former condemnation of the same street by another railroad, p. 261.

Distinguished in *Montgomery v. Santa Ana Co.*, 104 Cal. 196, 43 Am. St. Rep. 97, holding that the owner of a lot abutting on a street cannot maintain ejectment against a railroad company that uses the street un-

der a city ordinance permitting such use, because the use of the easement by the railroad does not exclude the plaintiff or the public from the street, and therefore there was no ouster; and disapproving the distinction made between street-cars and railways as to imposing an additional burden on the servitude. Cited in *Colorado Co. v. Mollandin*, 4 Colo. 161, holding that where a city ordinance allows a railway to cross a street, the company is not liable for injury thereby to the property and business of an abutting owner, so long as the company keeps within the bounds of its lawful authority and does nothing wantonly or negligently; *Canastota Co. v. Newington Co.*, 69 Conn. 184, holding that the proposed construction of an electric railway on a public road, the soil of which belongs to the adjacent owners, can be enjoined, where the line proposed deviates from the route prescribed by the charter of the company; *Kucheman v. C. & D. Co.*, 46 Iowa, 372, holding the owner of the fee in a street entitled to damages for use of the street by a railway; *Chicago K. & W. Co. v. Woodward*, 47 Kan. 194, holding that "the weight of authority is in support of the rule that the construction of a railroad along a highway imposes an additional burden and constitutes a taking within the constitution"; *Pierce v. Drew*, 136 Mass. 84, 49 Am. Rep. 15, in dissenting opinion, a majority of the court holding that the legislature may authorize the construction of a telegraph line on a highway, without compensation to owners of the fee; *Detroit Railway v. Mills*, 85 Mich. 669, in dissenting opinion, a majority of the court holding that a street railway does not impose an additional servitude on a street; *White v. Northwestern Co.*, 13 N. C. 616, 37 Am. St. Rep. 644, holding that "where the public have only an easement in the street, and the fee of the soil of the street is retained in the abutting owner, a steam railroad cannot, under the constitutional guaranty of private property, be lawfully constructed and operated thereon against his will and without compensation"; *Gulf Co. v. Fuller*, 63 Tex. 470, holding that a railroad company, authorized to lay track in a street must pay damages occasioned to the owner of an abutting lot by depreciation of his property; and note on this point in 16 Am. St. Rep. 612.

41 Cal. 263-278. PEOPLE v. KLUMPKE.

False Call in a deed must be rejected, p. 278.

Cited in *Dutch v. Boyd*, 81 Ind. 148, as to whether a description in a mortgage, by township, section, and range was sufficient, and the point not decided.

41 Cal. 278-290. GREGORY v. NELSON.

Judgment should be a simple sentence of the law upon the material ultimate facts, admitted by the pleadings or found by the court, p. 282.

Cited in *Rankin v. Newman*, 107 Cal. 610, holding that where plaintiff refused to receive an amount tendered to him by defendant, and

the record showed the amount was due, "the appropriate sentence of the law should have emanated from the court, the previous contumacy of the plaintiff notwithstanding," and judgment should have been rendered for the amount tendered; *Perkins v. Sierre Nevada Co.*, 10 Nev. 413, holding a judgment final in spite of a proviso therein, for the proviso was surplusage; *Humboldt Co. v. Terry*, 11 Nev. 243, holding that entry of judgment by the clerk was valid, though not strictly in the proper form.

Judgment, on a point entirely outside of any issues made or tendered by the pleadings, as a finding of fact, conclusion of law, or judgment of the court upon the subject matter embraced therein, is superfluous and nugatory, p. 284.

Cited in *Balfour etc. Co. v. Sawday*, 133 Cal. 231, as to default judgment in ejectment including property not embraced in complaint; *Benton v. Benton*, 122 Cal. 398, noted under *Burnett v. Stearns*, 33 Cal. 468; *Emeric v. Alvarado*, 64 Cal. 594, to the point that the supreme court, "on appeal from a judgment," considers only questions that arise on "the judgment-roll, and any bill of exceptions, statement on motion for new trial, and statement of the case on which the appellant relies"; *White v. Douglass*, 71 Cal. 119, to the point that where the answer admits an allegation of the complaint, a finding against the admission is outside the issues, and a judgment based on such finding is erroneous; *Cummings v. Cummings*, 75 Cal. 441, holding that a decree regarding distribution of property in a divorce suit was improper, because it was "neither consistent with the case made by the complaint nor embraced within the issues made by the answer"; *Reinhart v. Luggo*, 75 Cal. 640, holding that partition suits are governed by the same rule as ordinary actions, that a finding and judgment, "contrary to the facts admitted by the pleadings and outside of the issues made or tendered, are erroneous"; *Noonan v. Nunan*, 76 Cal. 49, holding in a suit for dissolution of partnership that "as the appellant neither asked for the judgment which it is now claimed should have been entered in the court below, nor alleged facts upon which such a judgment could properly have been entered, he cannot here demand a reversal of the judgment which responded to the issues actually made and submitted to the trial court"; *Ortega v. Cordero*, 88 Cal. 225, 228, holding that a finding, setting forth an agreement of a different date and consideration from that alleged in the complaint, was "entirely outside of the issues made by the pleadings"; *Rudel v. Los Angeles Co.*, 118 Cal. 287, a suit to restrain supervisors from diverting water in a canyon, holding that a finding outside of the issues could not be regarded, and the record did not show facts sufficient to create an estoppel in favor of the findings. Cited in *Brown v. Tucker*, 7 Colo. 39, holding that a judgment properly omitted any order as to disposition of attached property, because there was no reference to it in the pleadings; *Dutro v. Kennedy*, 9 Mont. 107, holding that as the pleadings in a mortgage foreclosure raised no is-

sue as to fixtures, the general law governed the question, and if the court had found otherwise, it would have been outside the issues; *Harris v. Lloyd*, 11 Mont. 405, 28 Am. St. Rep. 485, holding that findings of fact as to a partnership were not within the issues; *Gaston v. Drake*, 14 Nev. 183, 33 Am. Rep. 553, holding that the rule does not apply to a case where relief is denied because a contract is against public policy; *Harkins v. Cooley*, 5 S. Dak. 231, holding that the finding that a deed was a mortgage was outside of any issues.

Prior Occupant of a Mining Ditch is entitled to an injunction against a later holder of land over which the ditch passes, to prevent the latter from substituting a flume for the ditch for his own convenience, pp. 288, 290.

Cited in *Allen v. San Jose Co.*, 92 Cal. 140, enjoining a water company, owning an easement in a ditch through another's land, from substituting an iron pipe for the ditch, because it "would result in the creation of a new and different servitude"; *Ives v. Edison*, 124 Mich. 410, 411, 83 Am. St. Rep. 335, 336, enjoining under fact stated a change in flight of stairs over which plaintiff had an easement; *Geddis v. Parrish*, 1 Wash. 591, to the point that a later locator on public lands cannot obstruct the water rights of a prior occupant.

41 Cal. 290-298. **MONTGOMERY v. STURDIVANT.**

Habendum clause in a deed may create an estate for life, though the granting clause conveys a fee simple, pp. 296-298.

Cited in *Klumpke v. Baker*, 68 Cal. 561, holding that a fee simple title passed by a "grant" from husband to wife, and an after-acquired title by the husband "did not inure to the community, but passed by operation of law to his wife, by virtue of his former conveyance to her by grant"; *Anderson v. Yoakum*, 94 Cal. 228, 28 Am. St. Rep. 122, holding that although the habendum clause in a quitclaim deed professed to convey after-acquired title, it did not have that effect, because the grantor "had no interest whatever in the realty at the date of his deed to plaintiff, and it follows that no title, either present or future, vested in her through this conveyance"; *Barnett v. Barnett*, 104 Cal. 200, holding that "it was the intention of the grantor that the habendum should operate as a proviso or limitation to the granting clause, and control it to the extent of limiting the estate conveyed to the plaintiff to a life estate, with a remainder to the issue and heirs of his body"; *Rupert v. Penner*, 35 Neb. 601, holding that a habendum and granting clause construed together conveyed a life estate; *Hart v. Gardner*, 74 Miss. 158, saying: "The rule which required the habendum to yield to the granting clause, when repugnant intents are expressed in the two as to the estate to be conveyed, is applicable only where these intents are both the actual intents of the grantor, and not intents arising by implication of law from the use of the words to which the statute

has affixed a certain meaning. The distinction is between the actual intent of the grantor, expressed in terms of his own, selected to declare that intent, and an intent merely implied by law."

41 Cal. 298-305. McCULLOUGH v. CLARK.

Nonverification of Answer cannot be objected to for the first time on appeal, after trial on the merits, p. 302.

Cited in *Hearst v. Hart*, 128 Cal. 328, on point that plaintiff may in such case move for judgment on pleadings, or take default after striking out answer on motion; *People v. Reis*, 76 Cal. 276, holding that where the defendant to a petition for mandamus went to trial without objecting to the lack of verification of the petition, he could not raise the objection on appeal; *San Francisco v. Itsell*, 80 Cal. 61, holding that objection could not be raised on appeal to lack of verification of an answer; *San Luis Co. v. Estrada*, 117 Cal. 172, holding that plaintiff "will not be allowed to raise the point for the first time in this court that certain allegations of the complaint are not specifically denied."

Proceedings Supplementary to Execution are but a substitute for a creditor's bill at common law. Parties to the proceedings are estopped from again litigating the same matters in another form of action. The judgment debtor may appeal from the decision that a specific parcel of property should be applied to the satisfaction of the judgment, pp. 302, 303.

Cited in *Southern Cal. etc. Co. v. Superior Court*, 127 Cal. 421, noted under *Gilman v. Contra Costa Co.*, 8 Cal. 52; *New Mexico etc. Bank v. Brooks*, 9 N. Mex. 126, discussing nature of proceedings and holding jury trial not demandable therein; *Herrlich v. Kaufman*, 99 Cal. 275, 37 Am. St. Rep. 53, holding that the statutory procedure must be followed, and a creditor's bill cannot be filed unless it is shown "that remedies at law have been exhausted or would be unavailing, and with certain exceptions . . . a necessary averment in a creditor's bill is that an execution has been returned unsatisfied"; *Deering v. Richardson*, 109 Cal. 79, holding that an order applying money in bank to payment of a judgment was appealable; *Lyons v. Marcher*, 119 Cal. 383, holding that the court need not make written findings in supplementary proceedings; *Hexter v. Clifford*, 5 Colo. 170, to the point that the proceedings are a substitute for a creditor's bill; *Hoge v. Norton*, 22 Kan. 378, holding that the decision of a district court, dissolving an attachment, was conclusive in a suit on the attachment bond; *Barber v. Briseoe*, 9 Mont. 347, holding that an order refusing to set aside an order for examination of a judgment debtor was appealable; *Hayes v. First District Court*, 1 Mont. 226, holding that an order to pay money into court, on supplementary proceedings, is appealable, saying of the principal case that "this view may be obiter in the opinion, but as it is stated as a proposition too plain for argument, we have a positive expression of the

sideration, but varies the terms of the note, and is inadmissible as a defense to a suit on the note, p. 325.

Cited in dissenting opinion, *Ames v. S. P. Co.*, 141 Cal. 734, discussing modifications of railroad ticket; *Bradford Co. v. Joost*, 117 Cal. 209, 210, holding that in a suit to foreclose a chattel mortgage, where the answer alleged an agreement that there should be no personal judgment for a deficiency, it was not necessary to aver that the agreement was written, but if it was not written it would not avail as a defense.

41 Cal. 325-331. KENYON v. QUINN.

Execution.—Sale of Land passes to the buyer of the land the title that the judgment debtor had "at the time of the levy, and such as he acquired between the time of the levy and sale," p. 329.

Cited in *Frink v. Roe*, 70 Cal. 303, saying: "It is the sale and deed thereunder which passes the title of the execution debtor; . . . the interest or estate of the judgment debtor in and to the property at the date of the sale passes to the purchaser, although acquired after the levy of the execution."

Equitable Title must be pleaded, if relied on as a defense in ejectment, p. 330.

Cited in *Hicks v. Lovell*, 64 Cal. 18; 49 Am. Rep. 682, holding that where the vendor of land brought ejectment against the vendee for failure to pay the purchase price as agreed, and the defendant's answer included a cross-complaint in equity, plaintiff was entitled to recover, because defendant could not repudiate the contract and retain the land; *Arguello v. Bours*, 67 Cal. 450, holding that whether defendant relies on his equities as a defense or bases on them a claim for equitable relief, the facts must be set forth in the answer "as fully as it would be necessary to allege them on the stating part of a bill in equity, praying a decree for a conveyance of the legal title"; *Reed v. Roush*, 2 Mont. 590, holding that a prayer in the answer for costs is for equitable relief; and *Lamme v. Dodson*, 4 Mont. 590, to the point that equitable title must be pleaded.

41 Cal. 331-335. MORRIS v. DE CELIS.

Motion for New Trial should not be granted before the statement is engrossed and certified; and an order, refusing to set aside the order granting the new trial under such circumstances, must be reversed on appeal, p. 334.

Cited in *Whitney v. Superior Court*, 147 Cal. 540, where motion for new trial brought up ex parte by opposing counsel and was by court inadvertently denied without consideration of merits, court could on ex parte showing by affidavit vacate order and restore motion; *Baker v. Borello*, 131 Cal. 618, discussing and denying right of supreme court to amend record on appeal from order on motion for new trial,

pending the appeal; *Calderwood v. Peyser*, 42 Cal. 118, holding that an order striking from the files a statement on motion for new trial was erroneous and must be reversed on appeal; *De Gase v. Lynch*, 42 Cal. 367, holding that it was error to grant a new trial before the statement was engrossed; *Coombs v. Hibberd*, 43 Cal. 454, holding that after a motion for new trial had been denied, the trial court had no power to vacate the order of denial and grant a new trial; and to same effect in *Odd Fellows' Bank v. Deuprey*, 66 Cal. 170; *Carpenter v. Superior Court*, 75 Cal. 598, holding that a writ of certiorari lay where a probate court, after a verdict and judgment against the validity of a will, and denial of a motion for new trial, set the proceedings aside on motion; for the lower court "was not authorized to set aside its action for mere error. . . . The objection that the court has acted in an unauthorized mode goes to the power of the court, and hence its action may be reviewed on certiorari." Cited in *Stonesifer v. Kilburn*, 94 Cal. 42, holding that an order refusing to settle a bill of exceptions was appealable. Affirmed in *Thomas v. Sullivan*, 11 Nev. 283, and *Crosby v. North Bonanza Co.*, 23 Nev. 75.

41 Cal. 335-351. *GERDES v. MOODY*.

Equitable Defense of defective execution of a power of attorney, sustained in an action of ejectment, brought by vendor of land against his vendee, p. 348.

Cited in *Hicks v. Lovell*, 64 Cal. 20, 49 Am. Rep. 682, to the point that a vendee in possession, who has performed his part of the contract, has an equitable defense to an action of ejectment by the vendor.

Statute of Limitations does not run against the equitable claim of a vendee against his vendor, as to the title in the land, until after the vendor refuses to convey, p. 349.

Cited in *Wormouth v. Johnson*, 58 Cal. 624, holding that the statute did not run against the right of defendant in ejectment to assert a resulting trust arising from the fact that she furnished the purchase money as she had lived on the land since it was bought.

41 Cal. 351-356. *PEOPLE v. WHYLER*.

Tax for construction of a levee, levied on all the property in the district, is a tax, not an assessment, p. 354.

Affirmed, as to opening of a street, in *Williams v. Coreoran*, 46 Cal. 555; *Wilson v. Supervisors*, 47 Cal. 92, as to a levee; *Smith v. Farrelly*, 52 Cal. 81, as to a drawbridge.

Act Taxing Property of District for local improvement, which exempts personal property from its operation is void, p. 355.

Approved in *Northwestern etc. Ins. Co. v. Lewis etc. Co.*, 28 Mont.

496, holding last clause of Civil Code, section 681, relating to taxation of insurance companies void.

Clause in Tax Statute allowing supervisors to remit tax upon such property as they may deem just does not render whole statute void, p. 355.

Approved in *Northwestern etc. Ins. Co. v. Lewis etc. Co.*, 28 Mont. 501, upholding part of Civil Code, section 681, relating to taxation of insurance companies.

41 Cal. 360-363. **ROUSSEL v. KELLY.**

Unlawful Detainer.—Tender of rent due, with interest and costs, is no defense, p. 361.

Affirmed in *Ralph v. Lomer*, 3 Wash. 407.

41 Cal. 363-386. **WILSON v. FITCH.**

Colloquium is necessary in a complaint for libel, where the words used are not actionable per se, to explain the subject matter and to bring to light the true interpretation of the libelous words, p. 378.

Affirmed in *Clarke v. Fitch*, 41 Cal. 480, holding that "the want of a colloquium cannot be supplied by an innuendo."

Cited in *Cole v. Naustadter*, 22 Oreg. 199, holding that an innuendo did not make words in a letter libelous.

Mitigating Circumstances, provable in defense of libel, must be such as tend to rebut the presumption of malice or to reduce its degree, p. 380. Public rumors and general suspicion cannot be proved in mitigation, p. 384.

Cited in *Leonard v. McPherson*, 146 Cal. 621, upholding sufficiency of complaint for libel alleging publication by defendants of letter purporting to be written by plaintiff to wife of defendant charging her with boycotting plaintiff's business; *Hearne v. De Young*, 132 Cal. 362, holding inadmissible evidence that newspapers other than defendant's had published similar libels; and to same effect, *Palmer v. Matthews*, 162 N. Y. 103; *Lick v. Owen*, 47 Cal. 258, holding that testimony of mitigating circumstances cannot be in bar of the action, and an instruction to the jury that the presumption of malice was "fully rebutted" was erroneous, for the legal conclusion of malice cannot be rebutted, "and the court cannot assume as matter of law that the plaintiff is entitled to only nominal damages"; *Chamberlin v. Vance*, 51 Cal. 85, holding in an action for slander that evidence of rumors as to the truth of the slanderous charge was inadmissible; to same effect in *Preston v. Frey*, 91 Cal. 110; *Taylor v. Hearst*, 107 Cal. 269, 270, to the point that such proof is not sufficient to defeat the action or to prevent the plaintiff from recovering such damages as he has actually sustained by

reason of the publication, and holding that a "retraction published was properly pleaded and given in evidence, but it could operate only in mitigation of damages, and not as a full defense to the action"; *Republican Co. v. Miner*, 12 Colo. 87, 88, to the point that circumstances not mitigating are inadmissible; *Thompson v. Powning*, 15 Nev. 205, holding that circumstances were not mitigating; *People v. Glassman*, 12 Utah, 247, holding that evidence to rebut malice is admissible in defense of a criminal prosecution for libel; and note to 13 Am. Dec. 499, as to evidence in mitigation of damages for slander.

Defamatory publication is not privileged simply because it relates to a subject to public interest and was published from laudable motives; but the publisher should be allowed the fullest opportunity to show the circumstances under which the publication was made, the sources of his information, and the motives which induced the publication, pp. 382, 383.

Cited in *Swan v. Thompson*, 124 Cal. 197, holding certain evidence admissible on question of malice though not as to justification; *Edwards v. San Jose Society*, 99 Cal. 438, 37 Am. St. Rep. 75, holding that the statement, "It is also reported that Edwards is to have charge of the sack," was libelous in a newspaper comment on an election; *Gilman v. McClatchy*, 111 Cal. 614, holding that an article falsely charging rape was not privileged, though "published in the ordinary course of newspaper business without personal malevolence"; *Hearne v. DeYoung*, 119 Cal. 681, holding it error to refuse to allow a newspaper correspondent "to testify as to the sources of the information upon which the publication was based, and as to the precautions taken by him in verifying that information"; *Pokrok Co. v. Zizkoosky*, 42 Neb. 77, holding that a libel against the secretary of a cemetery association was not privileged; *Fenstermaker v. Tribune Co.*, 13 Utah, 536, holding a publication not privileged, though made in good faith as a matter of news; *Eviston v. Cramer*, 54 Wis. 226, holding it unnecessary to decide whether a publication was privileged; *Post Publishing Co. v. Hallam*, 59 Fed. Rep. 542, holding that a libel against a candidate for congress was not privileged, and saying: "The danger that honorable and worthy men may be driven from politics and public service, by allowing too great latitude in attacks upon their character, outweighs any benefit that might occasionally accrue to the public from charges of corruption that are true in fact but are incapable of legal proof." Cited in notes to 86 Am. Dec. 88, 90, and 15 Am. St. Rep. 359, on libels on candidates.

There is no accurate standard by which to compute the injury, and the jury must necessarily be left to the exercise of a wide discretion, to be restricted by the court only when the sum awarded is so large that the verdict shocks the moral sense and raises a presumption that it must have proceeded from passion or prejudice, p. 386.

Cited in *Dunn v. Hearst*, 139 Cal. 241, *Grayville v. De Young*, 140 Cal. 327, 330, and *Lowe v. Herald Co.*, 6 Utah, 180, sustaining verdicts in this regard; *Rhodes v. Naglee*, 66 Cal. 682, in dissenting opinion, a

majority of the court holding that a verdict of three thousand dollars for slander was excessive; *Harris v. Zanone*, 93 Cal. 72, holding a verdict of five thousand dollars for slander not excessive; *Lee v. Southern Pacific Co.*, 101 Cal. 121, holding a verdict of twenty-five thousand dollars for loss of a leg by an employee of a railway company, excessive; *Childers v. San Jose Co.*, 105 Cal. 289, 45 Am. St. Rep. 43, holding an instruction as to exemplary damages in a libel case erroneous, because it assumed that malice in fact had been proven, whereas there was evidence to the contrary and it was a question for the jury; *Gilman v. McClatchy*, 111 Cal. 616, and *Taylor v. Hearst*, 118 Cal. 367, 368, holding a verdict of five hundred dollars for libel not excessive; *Thirkfield v. Mountain View Assn.*, 12 Utah, 83, holding that damages in a case of trespass were not exorbitant; *Fenstermaker v. Tribune Co.*, 13 Utah, 540, holding an instruction erroneous for failure to charge that damages should be compensatory only; *Speck v. Gray*, 14 Wash. 592, holding that damages awarded for crim. con. were not excessive.

41 Cal. 387-393. **HILDEBRAND v. STEWART.**

State Lands.—Location under the statute of April 27, 1863, is invalid, if the land is already settled or occupied, and the affidavit of the applicant does not comply with the statute, p. 392.

Cited in *Woods v. Sawtelle*, 46 Cal. 391, holding that a defective application was not cured by the approval of the surveyor general; *Copp v. Harrington*, 47 Cal. 240, holding that the statute of March 24, 1870, curing defective applications, "does not supply the defects in the application, but declares that with all its defects it shall be held good and valid"; *Johnson v. Squires*, 55 Cal. 104, holding that as an applicant was not an "actual settler," the constitution forbade the sale of state lands to him; *Rowell v. Perkins*, 56 Cal. 223, holding a defective application cured by the statute of 1870; *McCoy v. Byrd*, 65 Cal. 93, holding an application void for its failure to specify whether other settlers were on the land; *Millidge v. Hyde*, 67 Cal. 7, holding an application void because the affidavit did not comply with section 3500 of the Political Code; *Cucamonga Co. v. Moir*, 83 Cal. 105, holding an affidavit void for failure to describe the land, and the defect was not cured by later statutes; *Shively v. Pennoyer*, 27 Oreg. 37, holding that a purchaser must show he is legally qualified.

41 Cal. 393-408. **HARRIS v. SAN FRANCISCO SUGAR COMPANY.**

Motion for New Trial is the mode for reviewing an issue of fact, in law or equity, p. 404.

Affirmed in *Thompson v. White*, 63 Cal. 509; *Pico v. Sepulveda*, 66 Cal. 337; *Allport v. Kelley*, 2 Mont. 344. Cited in *First Nat. Bank v. Irvine*, 2 Mont. 555, holding that the clerk's entry of refusal of new

trial did not relieve the appellant from his duty to file a bill of exceptions.

Findings of Referee, on a collateral matter, do not have the effect of a special verdict, and a motion for new trial is not necessary to review such findings, pp. 404, 405.

Cited in *Jones v. Clark*, 42 Cal. 196, holding that on a reference to take an accounting between partners, it was not necessary to move for a new trial in order to have some of the referee's findings changed; *Thompson v. Patterson*, 54 Cal. 546, holding that errors on the face of a referee's report and findings are part of the judgment-roll, and "it is only upon an appeal from the judgments that the court can consider errors apparent on a judgment-roll, or review the verdict or decision of a case if excepted to, or errors assigned on a statement on appeal"; *Faulkner v. Handy*, 103 Cal. 21, criticising *Thompson v. Patterson*, *supra*, and the principal case, as to the use of the word "report," and holding that on an appeal from the judgment the report of a referee is not part of the judgment-roll and cannot be referred to; *Murphy v. Patterson*, 24 Mont. 583, holding referee's findings on partnership dissolution matter merely advisory and not conclusive on the court.

Interlocutory Decree, confirming referee's report and ordering judgment for plaintiff, is not appealable, p. 407.

Cited in *Thompson v. White*, 63 Cal. 509, holding that courts of equity have power to make interlocutory decrees under the code; *Etchebarne v. Roeding*, 89 Cal. 521, holding that an order setting aside a former order, settling a referee's account, was not appealable; *Arnold v. Sinclair*, 11 Mont. 567; 28 Am. St. Rep. 494, holding that a judgment settling partnership affairs was final, and the fact that it appointed a receiver to execute it did not make it interlocutory; *Rhodes v. Williams*, 12 Nev. 26, holding a motion for new trial premature, because a decree dissolving a partnership was interlocutory only.

Stockholder held not entitled to undivided profits, or to a money dividend in lieu of a stock dividend, p. 408.

Cited in note to 99 Am. Dec. 762, on this point.

41 Cal. 409-410. **PEOPLE v. HOLLOWAY.**

Motion for New Trial, in a case of mandamus brought in the supreme court and referred to a district court for trial, should be made in the supreme court, p. 410.

Cited in *In re Philbrook*, 108 Cal. 15, holding that after denial of a petition for rehearing by the supreme court, in the matter of an attorney's disbarment, a motion for new trial did not lie; *People v. George*, 2 Idaho, 850, holding that after the supreme court had decided a mandamus case on issues of law, a motion for new trial did not lie, because a new trial is a re-examination of questions of fact.

41 Cal. 410-420. SCOTT v. UMBARGER.

Purchaser from a Trustee, of land fraudulently sold by the trustee, is not protected if he had knowledge of facts sufficient to put him on inquiry as to the fraud, not only at the time of purchasing but at any time before payment of the price and receipt of the deed, p. 419.

Cited in *Eversdon v. Mayhew*, 65 Cal. 167, to the point that if the purchaser "had notice, actual or constructive, at any moment of time before the payment of the money, he is not a bona fide purchaser"; *Davis v. Ward*, 109 Cal. 189, 50 Am. St. Rep. 31, holding that where the purchaser from a mortgager had paid only a part of the price before notice of defective title, "he was entitled to protection only to the extent that he was hurt"; *Murphy v. Clayton*, 113 Cal. 168, holding that the claim of the mother of a decedent to a resulting trust in his land should be preferred to the right of the administrator of the estate to sell the land to pay debts, there being no proof that creditors of the estate were induced to give credit by the fact that the land stood in the decedent's name.

41 Cal. 420-423. ENGLANDER v. ROGERS.

Tender of performance on his own part must be averred by the party claiming default of the other. To constitute a valid tender by vendee of balance of price, he "must have the money at hand, immediately under his control, and must then and there not only be ready and willing, but produce and offer to pay it," p. 422.

Cited in *Hicks v. Lovell*, 64 Cal. 20, 49 Am. Rep. 683, holding that "one who appeals to a court of equity to defend him against the legal title to land, of which he is in possession, must do equity by paying the price which he agreed to pay"; *Heine v. Treadwell*, 72 Cal. 220, holding that an averment in the answer was insufficient as to tender of purchase money by vendee; *Cleary v. Folger*, 84 Cal. 319, 18 Am. St. Rep. 190, holding that where both parties to a contract of sale of land had failed to perform, time being of the essence of the contract, it was at an end, and a forfeit deposited by vendee with vendor could be recovered by the former, less any damage accruing to the latter by the noncompletion of the purchase; *Dennis v. Strassburger*, 89 Cal. 589, holding, in a suit by vendee to recover his deposit, that he had failed to show the vendor in default, for conceding the title to be defective, the vendor had thirty days in which to perfect it, and the time had not expired; *Newton v. Hull*, 90 Cal. 492, 493, a suit to enforce a vendor's lien, disapproving *Cleary v. Folger*, 84 Cal. 319, and holding that although time was of the essence of the contract, the vendor was not bound to tender a deed except upon tender of payment by the vendee, and having tendered the deed after the payment was overdue, the vendor was entitled to recover on his lien, the vendee having refused to pay; *Anderson v. Strassburger*, 92 Cal. 41, holding

that a vendee had no right to recover his deposit, because he was allowed ten days to examine title, and he had no right to rescind until after he had given the vendor notice of a defect and the vendor had failed within a reasonable time to remedy it, and the vendee had offered to perform on his part; *Merrill v. Merrill*, 95 Cal. 337, holding a vendee entitled to recover what he had paid on account, without tendering the balance due, because the vendor had placed his deed in escrow and later withdrawn it and rescinded the contract, without demanding any further payment from the vendee; *Phelps v. Brown*, 95 Cal. 575, holding the vendee entitled to recover her deposit; for although she was in default, the vendor had rescinded the contract; also commenting on the previous decisions of the court on this question, and saying that where a vendee had been held not entitled to recover his deposit, "the decision went upon the ground that the vendee was not only not in default, but the contract was still in force." Cited in *Peckham v. Stewart*, 97 Cal. 150, 151, a suit by vendee to recover damages from vendor for his failure to give a perfect title, holding that a written offer by vendee to pay the price was a sufficient tender under section 1496 of the Civil Code, which had changed the common-law rule as to actual production of the money, which was adopted by the principal case; *Hansen v. Slaven*, 98 Cal. 382, holding that the buyer, under an agreement for sale of shares of stock upon call, was properly nonsuited in his action against the seller for failure to deliver, because the buyer did not offer to pay for the stock when he made the call, and the reply of the seller, that the stock was hypothecated and would be delivered as soon as redeemed, was not a refusal to deliver; *Naftzger v. Gregg*, 99 Cal. 86, 37 Am. St. Rep. 26, a case of estoppel by judgment, to the point that the covenants of vendor and vendee are mutual; *Bailey v. Lay*, 18 Colo. 418, holding that where it was agreed that the deed should be delivered upon payment of the first installment of price, the vendor need not deliver the deed until payment or offer to pay; *Stakke v. Chapman*, 13 S. Dak. 272, holding no valid tender established under facts stated; *Arnett v. Smith*, 11 N. Dak. 62, where covenants in contract for sale of land are mutual and dependent, vendor's obligation to convey being dependent upon cash payment and execution of notes and mortgage by vendee, tender necessary to rescission of contract by vendee; *Telfner v. Russ*, 162 U. S. 180, 181, holding that where the vendor of public lands was unable to perform his part of the agreement, on account of his failure to file his surveys in time, he had no right to recover the purchase price from the vendee.

41 Cal. 423-428. **MAHONEY v. BERGIN.**

Attorney held entitled to his fee, according to his agreement with the client, p. 427.

Cited in note 3 *McCrary*, 68, on champerty.

41 Cal. 429-431. **PEOPLE v. MCGUNGILL.**

Challenge for Implied Bias of juror must specify one of the statutory causes; and defendant is not prejudiced by the disallowance of such challenge if it does not affirmatively appear that defendant had exhausted his peremptory challenges at the time the full panel was accepted and sworn, p. 430.

Cited in *People v. Durrant*, 116 Cal. 196, to the point that "if the judge errs in disallowing a challenge for cause, and the defendant thereafter excuses the obnoxious juror under a peremptory challenge, and the jury is completed without the exhaustion by the defense of all its peremptory challenges, the error of the court will not be reviewed upon appeal, because no injury could have resulted to the defendant"; *Shields v. State*, 149 Ind. 400, to the point that the challenge must specify the ground; *State v. Fourchy*, 51 La. Ann. 244, noted under *People v. Gatewood*, 20 Cal. 146; *Territory v. Hart*, 7 Mont. 58, 497, holding that alienage of a juror was waived by failure to challenge on that ground; *Territory v. Campbell*, 9 Mont. 19, holding that refusal to allow questions to a juror as to bias was not a ground for exception, because it did not appear that he was sworn, or that peremptory challenges had been exhausted; *State v. Raymond*, 11 Nev. 107, 108, to the point that ground of challenge for implied bias must be specified: To same effect in *People v. Hopt*, 4 Utah, 250, and *Southern Pacific Co. v. Rauh*, 49 Fed. Rep. 701; *Territory v. O'Hare*, 1 N. Dak. 42, to the point that no advantage can be taken of the disallowance of a challenge for cause, when peremptory challenges had not been exhausted; *State v. Reddington*, 7 S. Dak. 375, holding that where peremptory challenges had not been exhausted, a ruling fixing the order in which the challenges should be exercised could not be complained of.

Defendant as a Witness.—If he offers himself, counsel for prosecution cannot comment on his refusal to answer questions on cross-examination. The fact that he offers himself does not change the rules as to the limit of cross-examination, and he cannot be made a witness against himself, p. 431.

Cited in *People v. Roselle*, 78 Cal. 93, holding that the effect of section 1323 of the Penal Code, as to testimony by defendant, is that he can be cross-examined only as to matters about which he was examined in chief; *People v. Crowley*, 100 Cal. 481, holding that it was proper to ask defendant on cross-examination if he had not been previously convicted of a felony; *People v. Sanders*, 114 Cal. 238, to the point that "defendant's failure to testify upon any particular point should not be commented on in argument"; Cited in *People v. Arrighini*, 122 Cal. 126, holding such cross-examination improper under the circumstances detailed; *Lockard v. Commonwealth*, 87 Ky. 207, holding that defendant waives his constitutional privilege by being a witness, and may be examined on any matter pertinent to the issue;

State v. Clinton, 67 Mo. 388, 29 Am. Rep. 509, holding that defendant may be treated like any other witness, and cross-examined as to any pertinent matter; State v. Harrington, 12 Nev. 129, 131, holding that the prosecution may comment on defendant's failure to answer questions on cross-examination; Hanoff v. State, 37 Ohio St. 188, in dissenting opinion, a majority of the court holding that the trial court properly compelled defendant to answer a question on cross-examination; Peck v. State, 86 Tenn. 266, holding that the testimony of defendant may be impeached like that of any other witness, but the court correctly instructed the jury not to allow the impeaching testimony to weaken the presumption of defendant's innocence; and note in 88 Am. Dec. 322, on discrediting a witness.

41 Cal. 435-439. PEOPLE v. HUNT.

Repeal of a repealing act, as to a county assessor, does not revive the original statute, p. 439.

Cited in Meek v. McClure, 49 Cal. 626, holding that a county assessor was properly elected under the existing law; and note to 94 Am. Dec. 220, as to repeal of criminal statutes.

41 Cal. 439-444. DOOLY v. NORTON.

Order Retaxing Costs is appealable if made after judgment; if made before, it may be reviewed on an appeal from the judgment, pp. 441, 442.

Cited in Calderwood v. Peyser, 42 Cal. 118, holding that an order striking from the files a statement on motion for new trial was appealable; Empire Co. v. Bonanza Co., 67 Cal. 410, 411, holding that an order made after judgment, refusing to retax costs, being appealable, it could not be reviewed on an appeal from the judgment; Stonesifer v. Kilburn, 94 Cal. 42, holding that an order refusing to settle a bill of exceptions was appealable; Schallert Co. v. Neal, 94 Cal. 194, 195, holding that an order allowing an attorney's fee, after judgment in a mechanic's lien case, was appealable, and could not be reviewed on an appeal from the judgment; In re Eaton, 7 N. Dak. 273, also discussing and denying right to costs on dismissal of disbarment proceedings; Reay v. Butler, 118 Cal. 114, holding that a bond, given on appeal from an order refusing to strike out a cost bill, was improperly made under section 942 of the Code of Civil Procedure, for the appeal was not from "an order directing the payment of money," but was "in effect the denial of a motion to modify a judgment"; Quitzow v. Perrin, 120 Cal. 260, holding that orders made after judgment, striking out a cost bill and retaxing costs, were proceedings "having relation to the original or final judgment and became part of it, and the error may be corrected on the appeal from the judgment"; Commissioners v. McIntosh, 30 Kan. 236, 239, holding that a motion to retax costs being

an appealable order, a decision on the motion was conclusive against further trial of the question in a later suit. Disapproved in *Orr v. Haskell*, 2 Mont. 351, holding an order refusing to retax costs not appealable, and saying of the principal case: "No new authorities are referred to. . . . and the cases which have been heard by that court are in conflict with its doctrines are not reconsidered and overruled." Cited in *Granite Mountain Co. v. Weinstein*, 7 Mont. 348, holding an order taxing costs after judgment to be appealable; *Reinhart v. Company D*, 23 Nev. 372, holding that no appeal lay from an order refusing to set aside a default; and note in 87 Am. Dec. 109, on appeal from taxation costs.

41 Cal. 444-448. **PURDY v. BULLARD.**

Rescinding Sale of Land.—Fraudulent representations of the vendee, as to property given by him as security for payment, are not ground for the vendor to rescind when it does not appear that the security is inadequate or that the vendor has been injured by the false representations, p. 447.

Cited in *Marriner v. Dennison*, 78 Cal. 213, an action for damages by vendee against vendor for breach of contract to convey, alleging fraud of vendor, holding that a demurrer should have been sustained, by the fraud; *Wainscott v. Occidental Assn.*, 98 Cal. 257, holding that plaintiff in a suit to recover damages for fraud of defendant in exchange of land had not alleged injury from the fraud.

Rescission must be of the whole contract. Vendor cannot rescind without offering to return money paid on account by the vendee, p. 448.

Cited in *Haynes v. White*, 55 Cal. 41, holding that vendee cannot rescind, and recover his purchase money, unless he surrenders the land; *Crossen v. Murphy*, 31 Oreg. 118, holding that in suit by the seller of goods to rescind the contract for fraud, the contract must be annulled as a whole, and cannot be treated as valid in part; and note to 4 Am. St. Rep. 704.

41 Cal. 449-452. **ARAM v. SCHALLENBERGER.**

Public Nuisance cannot be prevented or abated at suit of a private individual, unless he shows some special damage to him in addition to that received by the public, p. 450.

Cited in *Hogan v. Central Pacific Co.*, 71 Cal. 87, holding that the running of railway cars on a street caused to plaintiff no injury "different in character or kind from that which other land-owners fronting on the line of the street have suffered." To same effect in *San Jose Co. v. Brooks*, 74 Cal. 465, 467, as to obstructing a public road; *Hargro v. Hodgdon*, 89 Cal. 628, holding that an abutting owner on a

public alley could sue to abate a nuisance caused by a neighboring owner building a house in the alley, saying that so far as the house cuts off access from the plaintiff's premises to the public highway, "it becomes a private nuisance. . . . His complaint is not that it obstructs the street or road, but that it prevents him from reaching it." Affirmed in *Jacksonville Co. v. Thompson*, 34 Fla. 350, as to laying railway tracks in a street. Cited in note on this point in 31 Am. Dec. 132, 133, 134.

41 Cal. 452-455. PEOPLE v. JOHNSON.

Confession of defendant in a criminal case must be voluntary, p. 454.

Cited in *People v. Eckman*, 72 Cal. 583, holding that a statement made voluntarily by defendant was not a confession; and note in 6 Am. St. Rep. 246.

Subsequent Confession is presumed to have been made and influenced by the same hopes and fears as the first, p. 455.

Cited in *Coffee v. State*, 25 Fla. 511, 512, 23 Am. St. Rep. 532, 533, holding that if a confession is made under illegal influence, the same influence is presumed to continue through subsequent confessions, unless the contrary is clearly shown; and note in 6 Am. St. Rep. 249.

41 Cal. 455-458. KOHLER v. HAYES.

Conditional Sale.—The buyer cannot transfer the title until he has performed his part of the contract, pp. 457, 458.

Cited in *VanAllen v. Francis*, 123 Cal. 477, 479, noted under *Putnam v. Lamphier*, 36 Cal. 151; *Perkins v. Mettler*, 126 Cal. 105, 107, holding sale of stock merchandise a conditional one under facts stated; *Lippincott v. Rich*, 19 Utah, 149, holding sale conditional and discussing rights of parties thereto after condition broken; *Chase v. Whitmore*, 68 Cal. 547, holding that purchase of a note, after maturity, from one holding it as ballee, gave the buyer no title as against the real owner; *Palmer v. Howard*, 72 Cal. 205, 1 Am. St. Rep. 61, holding that the intention, in a sale of personal property, was "to transfer the ownership of the property, reserving a security for the price," making it in effect a mortgage, governed by the provisions of the code as to chattel mortgages; *Lowe v. Woods*, 100 Cal. 412, 38 Am. St. Rep. 304, holding that the buyer of a horse, under a conditional sale, had no power to create a lien on the animal in favor of a stable-keeper, under section 3051 of the Civil Code, for he was not the owner; *Vermont Co. v. Brow*, 109 Cal. 241, 50 Am. St. Rep. 40, holding that the buyer of goods under a conditional sale had no title that subjected them to levy and sale on execution for his debts; *Rodgers v. Bachman*, 109 Cal. 556, 557, holding that an agreement regarding sheep created a conditional sale of them, and it was the duty of the court to carry out the in-

tention of the parties; *Gilman Co. v. Norton*, 89 Iowa, 443, 48 Am. St. Rep. 403, holding that the unauthorized sale of chattels by an agent, who had power only to loan them, passed no title as against the real owner; *Sanders v. Keber*, 28 Ohio St. 640, holding that the seller of a mirror, on the installment plan, was entitled to it as against an innocent purchaser from the buyer's wife; *Singer Co. v. Graham*, 8 Oreg. 22, 34 Am. Rep. 575, holding that the sale of a sewing machine, by one who had bought it on the installment plan and not fully paid for it, passed no title; to same effect in *Russell v. Harkness*, 4 Utah, 206, as to sale of machinery; *Truman v. Hardin*, 5 Saw. 118, holding that where the seller of mules had replevied them for failure of the buyer to pay the price according to agreement, the assignee in bankruptcy of the buyer had no right to recover them; and notes on this point in 89 Am. Dec. 127, and 37 Am. Rep. 668.

41 Cal. 458-462. **PEOPLE v. McCORRY.**

Continuance of a murder case should have been granted, on defendant's motion, for absence of material witnesses, it being the first application for a continuance, p. 461.

Cited in *People v. Plyler*, 121 Cal. 165, noted under *People v. Dodge*, 28 Cal. 445; dissenting opinion in *Territory v. Harding*, 6 Mont. 339, a majority of the court holding that such continuance should not be granted if the prosecution would admit that the witnesses would testify as they had in their affidavits.

Plea of Guilty should be made by defendant himself in open court, and he may be allowed to withdraw it if entered inadvertently or ignorantly or in hope of mitigating his sentence, pp. 461, 462.

Cited in *People v. Scott*, 59 Cal. 342, holding that defendant should have been allowed to withdraw the plea, there being some doubt of his sanity at the time he made it; *People v. Villarino*, 66 Cal. 230, to the point that where a defendant without counsel pleads not guilty, he may apply before trial for leave to withdraw the plea and demur or move to dismiss; *Salina v. Cooper*, 45 Kan. 16, allowing a plea of guilty to be withdrawn; and *State v. Blake*, 5 Wyo. 120, holding that defendant had sufficiently assented to pleading guilty of a lower degree in the hope of mitigation of sentence.

41 Cal. 462-466. **CRANMER v. PORTER.**

Destruction of Deed after delivery does not revest title, p. 466.

Cited in *Slaughter v. Bernard*, 97 Wis. 190, noted under *Killey v. Wilson*, 33 Cal. 690.

Defendant in Ejectment where plaintiff relies on a paper title, may show the true title to be outstanding in a third person without connecting himself with it, p. 466.

Affirmed, as to an action to quiet title, in *McGrath v. Wallace*, 85 Cal. 627, 630. Distinguished in *Robrecht v. Reid*, 114 Cal. 361, holding that in ejectment by a mortgagee, who had bought in the mortgaged premises at foreclosure sale, the mortgagor could not set up an outstanding title in his assignee in bankruptcy, who had deeded the premises to him before the mortgage was made, and the deed had been declared void in a later suit by the mortgagor to quiet his title as against the mortgagee.

41 Cal. 467-469. **LORENZANA v. CAMARILLO.**

Abuse of Discretion by the trial court, in granting or refusing a new trial, for insufficiency of the evidence to justify the verdict, is the only ground for reversal of the order on appeal, p. 469.

Cited in *Braithwaite v. Aiken*, 2 N. Dak. 62, holding that granting a new trial was an abuse of discretion, saying: "The party recovering a judgment has valuable rights, which cannot be dissipated by the judicial breath"; *Series v. Series*, 35 Or. 295, noted under *Walton v. Maguire*, 17 Cal. 92.

41 Cal. 469-472. **VILLA v. PICO.**

Homestead is not exempt from execution sale, unless it is actually a homestead at the time of the sale, p. 472.

Affirmed in *Power v. Burd*, 18 Mont. 26.

41 Cal. 472-481. **CLARKE v. FITCH.**

Judicial Notice.—"Whatever the phrase 'squatter riot' may elsewhere mean, in its popular sense, it has a well understood meaning in this state, which is so general and notorious that we will take judicial notice of it," p. 477.

Cited in note to 89 Am. Dec. 692, on this point.

Libel.—The accusation that plaintiff "figured prominently in squatter riots" is not libelous per se, there being no colloquium to explain it nor anything in other parts of the alleged libel to show its meaning, p. 481.

Cited in *Thompson v. Powning*, 15 Nev. 212, holding that when the language of an article alleged to be libelous is susceptible of different constructions, it must be submitted to the jury.

41 Cal. 481-485. **SALMON v. VALLEJO.**

Covenant in Deed, that a rancho contains four square leagues, does not run with the land, p. 484.

Cited in note, on real and personal covenants, in 47 Am. Dec. 577.

41 Cal. 485-488. SANCHEZ v. NEARY.

Motion for Nonsuit should distinctly state the grounds, p. 487.

Affirmed in Coffey v. Greenfields, 62 Cal. 609; Loring v. Stuart, 79 Cal. 201. Cited in White v. Rio Grande etc., 22 Utah, 141, holding motion properly denied for such insufficiency; Lewis v. Mining Co., 22 Utah, 53, noted under Kiler v. Kimball, 10 Cal. 268. Distinguished in Daley v. Russ, 86 Cal. 117, saying that "the reason of the rule is to afford an opportunity to correct such defects as admit of correction. . . . The reason does not apply where the defects do not admit of correction." Affirmed in Wright v. Fire Ins. Co., 12 Mont. 477; also, Mattoon v. Fremont Co., 6 S. Dak. 198, as to a motion to direct verdict for defendant.

41 Cal. 489-494. WESTERN PACIFIC COMPANY v. TEVIS.

Right of Way over public lands, or any other right which is of less magnitude than the entire title, or the right to acquire the title by purchase, may be granted to a railway company by an act of Congress, p. 493.

Cited in Farley v. Spring Valley Co., 58 Cal. 143, holding that an irrigating company had right of way for its ditch over public lands pre-empted but not paid for; Southern Pacific Co. v. Burr, 86 Cal. 282, holding that a railway company has the right to bring ejectment for a right of way, as against a settler thereon, the right of way being more than a mere easement; Hamilton v. Spokane Co., 2 Idaho, 907, holding that a grant of right of way is distinct from a grant in aid of a railway, and is superior to inchoate rights of a pre-emptor; Wilkinson v. Northern Pacific Co., 5 Mont. 547, holding that a grant of right of way over public lands is absolute as against the rights of miners. Distinguished in Spokane etc. Co. v. Ziegler, 61 Fed. 394, denying right of way as against pre-emptor who was entitled to final receipt.

Claimant of public lands, as against a right of way of a railroad, is one having some interest in the land which is recognized by the laws of the United States, p. 494.

Cited in McLaughlin v. Menotti, 89 Cal. 364, 365, holding that under a federal statute providing that a railway land grant shall not "impair any pre-emption, homestead, swamp-land or other lawful claim . . . one who has simply entered upon a parcel of public land and improved it, without complying with the laws providing for the acquisition of the title, cannot be said to be possessed of a lawful claim."

41 Cal. 494-500. ARMSTRONG v. DAVIS.

Newly Discovered Evidence, if only cumulative, is not ground for new trial, p. 500.

Affirmed in Barton v. Laws, 4 Colo. App. 219; Hines v. Driver, 100

Ind 325. Cited in *Snell v. Cisler*, 1 Utah, 301, holding that evidence was not newly discovered.

Surprise, at proof of a fact put in issue by the pleadings, is not ground for a new trial, p. 499.

Cited in note on this point in 78 Am. Dec. 519.

41 Cal. 501-504. **SOUTH BEACH ASSOCIATION v. CHRISTY.**

Writ of Possession in ejectment does not lie against one in possession, adversely to plaintiff, at beginning of the action, and not made a party thereto, p. 504.

Cited in *Miller v. Blackett*, 47 Fed. Rep. 549, holding that a tenant in common in possession of land, not made a party to a suit in ejectment against his cotenant, is not affected by the judgment; and notes on this point in 39 Am. Dec. 313, 314, and 15 Am. St. Rep. 61.

41 Cal. 507-511. **PEOPLE v. DUNCAN.**

Franchise for a turnpike road, being a personal trust, not assignable without the consent of the granting power, does not pass to the assignee in bankruptcy of the grantee, p. 511.

Cited in *Gregory v. Blanchard*, 98 Cal. 313, holding that section 388 of the Civil Code, providing that the franchise of a corporation for a toll road may be sold on execution, does not authorize such sale when the franchise is held by an individual; *Atlantic & Pacific Co. v. St. Louis*, 66 Mo. 260, holding that sale of a franchise was valid, because the state was the grantor and had authorized the sale; *Montgomery v. Multnomah Co.*, 11 Oreg. 353, 356, holding it unnecessary to decide whether a ferry franchise could be assigned, but even if it could, only the state could object, in an appropriate proceeding; *Hackett v. Wilson*, 12 Oreg. 37, 40, being the same case and opinion as 11 Oreg. 353, 356, *supra*; *Hackett v. Multnomah Co.*, 12 Oreg. 127, conceding for the purposes of the case that a ferry franchise was not assignable, but holding an assignment valid because the granting power had consented; *Nixon v. Reid*, 8 S. Dak. 516, holding it unnecessary to decide whether a ferry license was assignable, because the granting power had consented to the assignment; *In re Scott*, 6 Saw. 235, 11 Fed. Rep. 134, to the point that a franchise of a toll bridge does not pass to the assignee in bankruptcy of the owner; and elaborate note, on transfer of franchise, in 35 Am. St. Rep. 396. Distinguished in *Carter v. Meuli*, 122 Cal. 369, noted under *Wood v. Turnpike Co.*, 24 Cal. 474.

41 Cal. 512-514. **MATHEWS v. KINSELL.**

Findings should be mere statements of the ultimate facts in controversy and the legal consequences from the facts admitted and proven; but they must be inconsistent with the judgment, or it will be allowed to stand, p. 514.

Cited in *Murphy v. Bennett*, 68 Cal. 530, to the point that "findings should be statements of the ultimate facts in controversy, and not of probative facts or mere conclusions of law," and holding that certain findings were of the ultimate facts, and not conclusions of law; *Smith v. Mohn*, 87 Cal. 497, holding that findings met and negated "all the ultimate facts affirmatively alleged in the answer"; *Perry v. Quackenbush*, 105 Cal. 306, holding that "if from a consideration of the probative facts this court should determine that they did not justify the finding of the ultimate fact, it would determine that the evidence was insufficient to justify the decision. This, it has been repeatedly held, cannot be done in this mode"; *Southern Pacific Co. v. Whitaker*, 109 Cal. 274, to the point that "findings of probative facts, where the ultimate facts necessarily resulted from them, have been held sufficient," and holding that even if an omitted finding had been made, "it must have been in favor of defendants . . . and the plaintiff was in no way prejudiced by the failure"; *McCarthy v. Brown*, 113 Cal. 17, holding that "to determine the sufficiency of a finding of fact, it is only necessary to ascertain what statement of that fact is required in the pleading"; also that the force of a finding, "as a fact, is not impaired by its having been placed under the heading of conclusions of law." Cited in *Chumasero v. Vial*, 3 Mont. 379, holding that an appeal from the judgment-roll, "the judgment will be allowed to stand unless there is an absolute inconsistency between the express findings and the judgment"; *Alder Gulch Co. v. Hayes*, 6 Mont. 32, holding that on an appeal from the judgment, the question whether the findings are supported by the evidence cannot be considered; and *In re Tsu Tse Mee*, 81 Fed. Rep. 564, approving the principal case, and holding that the findings of a commissioner in his order deporting a Chinese immigrant were sufficient.

41 Cal. 515-519. CAMPBELL v. JONES.

Verbal Promise of Judge, out of court, to extend time for filing statement on motion for new trial, is insufficient; the order must be in writing, and either entered in the minutes of the court in open session, or signed by the judge and filed with the papers in the case, within the statutory time, p. 518.

Cited in *Cooney v. Furlong*, 66 Cal. 522, holding that right to move for new trial was lost by failure to file a statement; *Shumway v. Leakey*, 73 Cal. 262, holding that a sheriff was not entitled to fees without an order of court, and "what the judge told the defendant on the street is not an order"; *First Nat. Bank v. Irvine*, 2 Mont. 556, holding that where an appeal is from the judgment and refusal of new trial, a statement filed within the statutory time from date of the latter order is sufficient; *Clark v. Strouse*, 11 Nev. 79, holding that an order extending time for filing statement must be filed with the papers or entered on the minutes within the statutory time. Distinguished in

Elliott v. Whitmore, 10 Utah, 257, holding that under the statute if an order extending the time for filing statement is granted within the statutory time, it need not be filed until later.

Form of Verdict.—Objections cannot be raised for the first time on appeal, p. 519.

Affirmed in *Ryan v. Fitzgerald*, 87 Cal. 347.

41 Cal. 519-521. **CHILD v. HUGG.**

Sale by Broker as Pledgee of mining stock to cover margins, without sufficient notice to pledgor, is valid if the pledgor ratifies the sale, p. 521.

Cited in *Hill v. Finigan*, 62 Cal. 439, holding that ratification by pledgor of sale by pledgee to himself was sufficient to validate the sale; to same effect in later decision in same case in 77 Cal. 274; 11 Am. St. Rep. 283; *Sharpe v. National Bank*, 87 Ala. 650, holding that where the pledgee bought the pledge at private sale, and the pledgor after receiving an account gave his note to the pledgor to cover the deficiency, this was a ratification, unless done in ignorance of material facts, in which case the pledgor might disaffirm within a reasonable time; notes to 49 Am. Dec. 737, and 79 Am. Dec. 502, 503, on pledgee's right to sell; and note to 75 Am. Dec. 315, on stockbrokers.

41 Cal. 521-524. **PECK v. LOVETT.**

Continuance cannot be refused on the ground that the other party is willing to admit that an absent witness will testify in a certain way, if the admission does not extend to all the matters that the party calling the witness expects to prove by him, p. 524.

Cited in *White etc. Co. v. Simpson*, 10 S. Dak. 449, holding continuance improperly denied under facts stated; note 74 Am. Dec. 148.

41 Cal. 525-532. **SINTON v. ASHBURY.**

Legislature may compel a municipal corporation to pay in cash or by taxation the fees of commissioners for street widening, being a claim which in good conscience it ought to pay, even though there be no legal liability to pay it, p. 531.

Affirmed in *Oreighton v. San Francisco*. 42 Cal. 452, holding that a special act of the legislature, authorizing a city to pay a contractor for street work was mandatory; In re *Market St.*, 49 Cal. 549, holding that commissioners for opening a street could not assess abutting owners for payment of the claim of a contractor on an abortive contract, for if the claim was one "affecting a public conscience," it "constituted a public burden, common to the state at large, or perhaps to the municipality"; *People v. Lynch*, 51 Cal. 35, 36, 21 Am. Rep. 693, saying that in the principal case "it seems to have been conceded by counsel that

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the legislature has power by special act to direct and control the disposition of the funds or property of a municipal corporation for a municipal purpose"; and holding, on page 34, with regard to a street assessment, that "an attempt by the state legislature to order an improvement within the limits of an incorporated city, and to levy an assessment to pay for it . . . is unconstitutional, because it is mandatory in its nature, and deprives the board of trustees, or legislative department of the city government, by whatever name it be known, of all choice or discretion in reference to the improvement"; *People v. Holladay*, 93 Cal. 248, 27 Am. St. Rep. 192, holding that a city "has the authority to maintain an action for the purpose of preserving the rights of the general public to the use of squares, or land claimed as such, within its limits, and that in such action it is authorized to put in issue the alleged rights of the people to such easement, and that the state itself is bound by the result of such litigation, if the same is not collusive"; *Conlin v. Board of Supervisors*, 114 Cal. 408, holding that under the present constitution the legislature can "make no appropriation of public moneys for which there is no enforceable claim, or upon a claim which exists merely by reason of some moral or equitable obligation which, in the mind of a generous or even a just individual, dealing with his own moneys, might prompt him to recognize as worthy of some reward." Cited in *Pearson v. State*, 56 Ark. 154, 35 Am. St. Rep. 94, holding that a statute relieving a county treasurer from liability for loss of county and school funds, by burglary from his safe, was valid; *Newman v. Emporia*, 32 Kan. 464, holding that although illegal street work had been ratified by a city ordinance, an abutting owner was entitled to have the collection of an assessment therefor enjoined, for it was void; *Board of Commrs. v. Snyder*, 45 Kan. 638, 639, 23 Am. St. Rep. 744, 745, holding a statute valid that authorized a town to vote bonds for reimbursement of citizens for money advanced by them to build a court house; *Wilcox v. Deer Lodge Co.*, 2 Mont. 578, holding that a statute authorizing the issue of county warrants, to reimburse citizens who had made a county road, was constitutional; *Wooster v. Plymouth*, 62 N. H. 214, holding that the legislature may provide that claims against a town for injuries from defects in highways shall be settled by referees without a jury trial; *Luehrman v. Taxing District*, 2 Lea, 442, holding that the legislature has the power to establish taxing districts and give them the rights of an incorporated city; and note in 80 Am. Dec. 733, on legislative power over municipal corporations.

Opening of Streets is clearly a municipal purpose, and whether the cost of such enterprises shall be borne by the contiguous property, or by all the property of the city, or a certain proportion by each, is a matter for legislative discretion, p. 532.

Cited in *Byrne v. Drain*, 127 Cal. 667, discussing effect of amendment

to section 6, article 11, of constitution on Los Angeles charter; *Simpson v. Kansas City*, 46 Kan. 448, holding that in assessing the cost of a street improvement, the whole street is one taxing district, and is not to be divided into blocks, each liable for the improvement in front thereof; *Davidson v. New Orleans*, 34 La. Ann. 176, holding that a drainage tax could not be enforced where the property was injured rather than benefited by the work.

41 Cal. 532-536. **BOHALL v. DILLER.**

Vendor Must Tender Deed before suit by him to rescind the contract of sale for failure of vendee to pay his last installment, where the agreement was that a conveyance should be executed on payment of the purchase price, p. 535.

Affirmed in *Kelly v. Mack*, 45 Cal. 304, a suit on a vendor's lien. Distinguished in *Newton v. Hull*, 90 Cal. 492, 493, saying that the principal case "does not decide that [vendor] will be in default unless he tender a deed on the very day the purchase money becomes due"; and holding in a suit by a vendor to enforce her lien that she need not tender a deed "except upon tender of payment of the purchase money." Cited in *Westerfeld v. New York etc. Co.*, 129 Cal. 84, noted under *Morrison v. Lods*, 39 Cal. 381; *Merherin v. Saunders*, 131 Cal. 691, but holding no tender of deed on execution sale necessary to bind purchaser who has received certificate of sale. Affirmed in *Underwood v. Tew*, 7 Wash. 301, an action by vendor on notes given by vendee for purchase price. Distinguished in *Loud v. Pomona Co.*, 153 U. S. 579, holding that the covenants in an agreement for sale of land were independent, and "the clearly expressed intention was that the payment of the purchase price of the lands should precede the performance of the . . . covenant to convey."

Damages are not recoverable when complaint does not allege they have been sustained, p. 535.

Cited in *Prince v. Lamb*, 128 Cal. 125, noted under *Pittsburgh etc. Co. v. Greenwood*, 39 Cal. 71; *Claffin Co. v. Simon*, 18 Utah, 162, noted under *Raun v. Reynolds*, 11 Cal. 14.

Vendor Cannot Rescind the contract of sale, for the vendee's non-performance, unless he restore to the vendee whatever he has paid on the contract, p. 535; and the rescission must be in toto, p. 536.

Cited in *Heilig v. Parlin*, 134 Cal. 102, holding vendee entitled to recover purchase money when vendor has rescinded; *Henderson v. Hicks*, 58 Cal. 373, holding that a vendor, having returned the consideration to the vendee, had the right to rescind. Distinguished in *Central Pacific Co. v. Mudd*, 59 Cal. 589, saying it was obvious that plaintiff in the principal case "was not entitled to recover both the possession and the balance of the purchase price"; also that the principal case must be

understood as holding that "if a vendor relies upon his right to rescind, based upon a breach of the contract by the vendee, he must show that he has in fact rescinded or sought to rescind, by restoring what he has received"; and holding that a vendee having failed to perform his part of an agreement, which stipulated that in such event his possession should terminate, the vendor had the right to bring ejectment. Cited in *Hicks v. Lovell*, 64 Cal. 18-20, 49 Am. Rep. 681, 682, holding that a vendor was entitled to recover in ejectment against a vendee who had refused to perform his part of the contract; to same effect in *Gates v. McLean*, 70 Cal. 49, saying that the vendee can retain possession only by paying the purchase money, in which case "it is considered that he is willing to receive such title as the vendor is able to give, and is content with the personal responsibility of the vendor upon his covenants"; *Wilson v. Sturgis*, 71 Cal. 229, holding a vendor not entitled to rescind, because he had not offered to return the consideration; *Cleary v. Folger*, 84 Cal. 319, 18 Am. St. Rep. 189, holding that where both parties to a contract of sale were in default, the contract was at an end, and the vendee was entitled to recover a forfeit he had deposited with the vendor, less the vendor's damages; *Loaiza v. Superior Court*, 85 Cal. 32, 20 Am. St. Rep. 208, holding that rescission by a vendee was in toto, for "the offer was to restore everything of value on the one side, and the demand that everything be restored on the other"; *Hammond v. Wallace*, 85 Cal. 532, 20 Am. St. Rep. 244, holding a nonsuit properly granted in an action by a vendor to set aside a judicial sale made by him as assignee in insolvency for fraud of the vendee in preventing competition in bidding at the auction, because plaintiff had made no effort to rescind, or to return what the vendee had paid. Distinguished in *Stratton v. California Land Co.*, 86 Cal. 361, holding that the vendor, having treated the contract as abandoned for nonperformance by the vendee, could bring an action to quiet title without returning the purchase money. Cited in *Drew v. Pedlar*, 87 Cal. 451, 22 Am. St. Rep. 264, holding that the vendee could recover what he had paid on account, after the rescinding of the contract, notwithstanding that the contract stipulated that such payments should be forfeited as liquidated damages in case of breach; *Kelley v. Owens*, 120 Cal. 509, holding that where vendor brought a bill in equity to rescind a contract of sale, for fraudulent misrepresentations of vendee as to shares of stock taken in payment, and later placed the shares in the hands of the clerk of court, but did not properly assign them until they had been sold for assessments and become worthless, this was not a compliance with the rule that the vendor must return to the vendee anything of value received from him. Affirmed in *Minah Co. v. Briscoe*, 47 Fed. Rep. 281, and *Crosen v. Murphy*, 31 Oreg. 118.

41 Cal. 536-544. **SAN JOSE v. TRIMBLE.**

Adverse Possession, for five years from taking effect of the act of

1863, will bar recovery under Mexican or Spanish titles not then confirmed; but the possession must have been continuous for the statutory period, and if interrupted, even by force or fraud, . . . the statute will begin to run only from the time of the re-entry, p. 543.

Cited in *Grimm v. Curley*, 43 Cal. 253, holding an alcalde grant barred by adverse possession under the act of 1863; *Hayes v. Martin*, 45 Cal. 563, holding that where decree of confirmation of a Mexican grant was rendered before the act of 1863, and defendant had entered adversely before that date, the running of the statute in his favor was not prevented by the fact that proceedings were pending for the approval of plaintiff's survey; *Unger v. Mooney*, 63 Cal. 596, to the point that adverse possession must be uninterrupted for the statutory period; *Norris v. Moody*, 84 Cal. 163, holding that if the decision in the principal case, that the statute began to run in favor of an adverse occupant before the issuance of a patent to the confirmee, was correct, the statute had run in the case at bar from the date of a final decree of confirmation, even under the act of 1863; but as the code had omitted the provisions of the act of 1863, the statute had certainly run under the code. Cited in *McGrath v. Wallace*, 85 Cal. 626, holding that an adverse possession had not been continuous, because it was interrupted by judgment and writ of possession in ejectment against a tenant of the adverse claimant; *Anzar v. Miller*, 90 Cal. 245, holding that the statute did not begin to run in the case of an imperfect Mexican grant, not presented to the land commission for confirmation, until after issue of a patent, because it could not run as long as the fee was in the United States; *Ohm v. San Francisco*, 92 Cal. 455, holding that a claim against the city, for possession of land therein under the "Scherrebeck title," was barred by sections 318 and 319 of the Code of Civil Procedure, and that "five years of adverse possession at any time since the passage of the act of 1863 . . . bars an action by the holder of an imperfect (unpatented) title of Spanish or Mexican origin"; *Altschul v. O'Neill*, 35 Or. 214, quoting *Hayes v. Martin*, 45 Cal. 559. Disapproved in *Valentine v. Sloss*, 103 Cal. 221, holding that a suit by confirmee of a patent on a Mexican grant, begun within five years after issuance of the patent, was not barred by the statute, and saying of the principal case: "The views first announced in that case were modified on rehearing, and were practically repudiated in *Gardiner v. Miller*, 47 Cal. 570, since which decision it has been uniformly held that the statute does not begin to run until the issuance of the patent." Affirmed as to continuity of adverse possession in *Townsend v. Edwards*, 25 Fla. 588. Approved by Field, J., as to effect of the act of 1863 on Mexican grants, in *Montgomery v. Bevans*, 1 Saw. 672; but on motion for new trial, on page 685 he holds section 6 of said act invalid so far as it applies to Mexican or Spanish titles perfected after its passage, saying that "as to titles thus perfected, the ordinary period of limitation must be allowed, from the date of their consummation, which exists with

reference to actions on complete title from other sources." Cited in *Union Mill Co. v. Dangberg*, 81 Fed. Rep. 91, holding that "an adverse use of water for the statutory period must be open, notorious, peaceable, continuous, and under claim or color of right; for if any act is done by other parties claiming the water that operates as an interruption; however slight, it prevents the acquisition of any adverse right"; and note to 99 Am. Dec. 282, on adverse possession.

41 Cal. 545-552. **WILSON v. CAPURO.**

Bankruptcy.—A creditor who has proved his debt cannot maintain an action on the same demand in the federal or state courts, p. 551.

Cited in *New Lamp Chimney Co. v. Ansonia Co.*, 91 U. S. 667, 13 Bank. Reg. 396, holding that as the bankrupt law provides that no discharge from debts shall be granted to a corporation, the payee of a note made by a bankrupt corporation, who had proved the claim and received a dividend, could sue for the unpaid balance in a state court; dissenting opinion in *Eyster v. Gaff*, 2 Colo. 243, a majority of the court holding that bankruptcy of a mortgagor was no bar to a suit of ejectment brought by the mortgagee against a third party, without consent of the bankruptcy court, for the assignee had never taken possession of the mortgaged premises, and the plaintiff in ejectment had filed no claim in bankruptcy; *Spilman v. Johnson*, 27 Gratt. 38, holding that where a judgment creditor elected to prove his debt in the bankruptcy court, this was a waiver of his right to institute any other proceedings in law or equity inconsistent with his claim in bankruptcy.

41 Cal. 552-556. **EMERSON v. SANSOME.**

Sheriff's Deed transfers what interest the execution debtor had at the date of levy, and does not estop the debtor from asserting a right subsequently acquired, p. 555.

Distinguished in *Frink v. Roe*, 70 Cal. 305, saying that in the principal case the subsequent rights of the debtor were acquired after the execution sale, and holding that "the legal effect of a sheriff's deed . . . is at least equal to that of a quitclaim deed of the same property executed by the debtor on the day of sale. . . . Upon a sale under execution the interest or estate of the judgment debtor in and to the property at the date of the sale passes to the purchaser, although acquired after the levy of the execution." Cited in *Robinson v. Thornton*, 102 Cal. 682, holding that in ejectment by purchaser at sheriff's sale, against the vendee of the execution debtor, the latter may show "not only that he has acquired a different interest or right of possession, but also that the judgment debtor himself had no interest in the lands at the time of the sale"; *Shirk v. Thomas*, 121 Ind. 153, 16 Am. St. Rep. 386, holding that a judgment creditor who buys the land at execution sale gets only the interest that the debtor had at the time the

judgment was entered; *Missouri Valley Co. v. Barwick*, 50 Kan. 61, holding, with regard to a sheriff's sale, that "when the confirmation occurs and the deed is issued; they relate back to the date of the sale, and entitle the purchaser to the crops which were then unripe and growing upon the premises"; *Northern Pacific Co. v. Smith*, 69 Fed. Rep. 581, holding that "judgment in an action for the recovery of real property is not a bar to a subsequent action brought or defense interposed by either of the parties to it, when that action or defense is founded on an after-acquired title"; notes in 54 Am. Dec. 546, on judgment in ejectment; and note to 84 Am. Dec. 573, on after-acquired title.

Entry on Homestead, under act of Congress of May 20, 1862, gives an interest in the lands and the absolute right of possession from the paramount proprietor which possession, if actually continued for the period of five consecutive years . . . will entitle him to a patent on proof of residence or cultivation during that period, p. 556.

Distinguished in *Reinhart v. Bradshaw*, 19 Nev. 258, 3 Am. St. Rep. 838, holding that a tenant in common, in possession of government land for himself and cotenants, cannot acquire a homestead therein, for under the decision in *Atherton v. Fowler*, 96 U. S. 513, the right of pre-emption cannot be exercised on land occupied by another, and the possession of one cotenant is for the benefit of all; and saying that if the principal case is opposed to this rule, it was "decided before the decision in *Atherton v. Fowler* established the contrary doctrine."

41 Cal. 557-561. CARPENTER v. SARGENT.

Swamp Lands.—The first payment, required by the act of 1863, must be made within thirty days after record in county surveyor's office of approval of survey or location by the surveyor general, p. 560.

Affirmed in *Keema v. Doherty*, 51 Cal. 6, 7. Cited in *Rowell v. Perkins*, 56 Cal. 223, holding that although an affidavit on an application to purchase state lands, under the act of 1868, was defective, the defect was cured by the act of 1870.

41 Cal. 562-565. LEWISTON TURNPIKE COMPANY v. SHASTA AND WEAVERVILLE WAGON ROAD COMPANY.

Special Damages to a private person from a public nuisance must be particularly stated, p. 565.

Cited in *Siskiyou etc. Co. v. Rostel*, 121 Cal. 513, holding complaint insufficient for abatement of obstruction in public street by a private person; *Parker v. Bond*, 5 Mont. 11, holding that special damages from an injunction cannot be proved unless alleged; *Fogg v. Nevada Ry.*, 20 Nev. 437, holding that demurrer to a suit by an individual to abate a public nuisance was properly sustained, because the complaint averred no special damages differing from the general damage to the public;

and in notes on special damages in 52 Am. Dec. 291 and 87 Am. Dec. 109.

41 Cal. 566-571. LAWRENCE v. NEFF.

Assignment for Benefit of Creditors.—A conveyance to several laborers, to secure payment of wages to them and their associates, is not such an assignment as is forbidden by the insolvency law, but is either an absolute sale with right to repurchase, or a mortgage, p. 570.

Cited in *Heath v. Wilson*, 139 Cal. 367, 368, noted under *Dana v. Stanford*, 10 Cal. 278; *Wood v. Franks*, 67 Cal. 34, holding that a chattel mortgage was not an "assignment" forbidden by the codes; and intimating that the parts of the opinion in the principal case, declaring that the instrument was not an assignment, "should be disregarded as mere dicta"; *Saunderson v. Broadwell*, 82 Cal. 134, holding that an absolute deed, given in consideration of a prior indebtedness, was not in fraud of creditors; *Sabichi v. Chase*, 108 Cal. 87, holding that a deed of trust to secure creditors was void under section 3457 of the Civil Code; *Lumbert v. Woodard*, 144 Ind. 341, 55 Am. St. Rep. 179, holding that a bill of sale of an electric plant, reserving a vendor's lien, was a chattel mortgage, not an assignment; *Marshall v. Livingston Bank*, 11 Mont. 361, holding that a bill of sale was an assignment under the statute, though called by the parties a chattel mortgage, for it was payment, not security; *Watterman v. Silberberg*, 67 Tex. 105, holding a conveyance to be a chattel mortgage, not an assignment; and to same effect in *Gage v. Chesebro*, 49 Wis. 491.

41 Cal. 571-582. WALSH v. HILL.

Possession of Land is not evidenced by a general inclosure including the land in controversy and other lands of other parties, p. 582.

Cited in *Davis v. Spring Valley*, 57 Cal. 546, holding that a tract of land fenced on three sides only, though a larger tract had formerly been fenced, was not in the "actual possession" of the party claiming it.

41 Cal. 583-587. FUQUAY v. STICKNEY.

Mechanic's Lien.—If the owner or claimant of an interest in land, knowing of the erection of a building thereon, fails to make the statutory objection, the liens of materialmen and laborers attach, p. 586.

Cited in *Birch v. Transit Co.*, 139 Cal. 500, construing Code of Civil Procedure, section 1192, and holding owner protected under facts stated; *West Coast Co. v. Newkirk*, 80 Cal. 279, holding that the owner of the fee was liable for lien of a materialman on a building erected by order of a lessee, because the owner did not give notice, under section 1192 of the Code of Civil Procedure, that he would not be responsible; *Hurlbert v. New Ulm Works*, 47 Minn. 85, not deciding the question; and note on this point in 61 Am. Dec. 700.

Trust Deed to secure a loan is not a mortgage but a deed conveying a fee, defeasible on the payment of the debt, p. 587.

Affirmed in Savings & Loan Society v. Burnett, 106 Cal. 528. Distinguished in *Brown v. Bryan*, 6 Idaho, 16, trust deed executed to secure given debt payable a specified time is a mortgage and cannot be foreclosed by notice and a sale under power of sale in such trust deed.

41 Cal. 598. WILL v. SINKWITZ.

Appeal—Reversal.—Trial court must follow directions of supreme court on remittitur, p. 593.

Cited in *Cowdrey v. Bank*, 139 Cal. 307, noted under *Argenti v. San Francisco*, 30 Cal. 467.

41 Cal. 595-610. SALMON v. WILSON.

Demurrer for Ambiguity of complaint is properly overruled where "enough appears in the complaint to render it easy of comprehension and free from reasonable doubt," p. 602.

Affirmed in Applegarth v. Dean, 68 Cal. 494; *Kramer v. Halsey*, 82 Cal. 213; *Ward v. Board of Commrs.*, 12 Mont. 31; *Campbell v. Taylor*, 3 Utah, 231; *Hawley etc. Co. v. Brownstone*, 123 Cal. 646, but holding order improperly overruling such demurrer reversible error; *Whitehead v. Sweet*, 126 Cal. 75 (quoted in *Jones v. Iverson*, 131 Cal. 104), and *Holladay Co. v. Kirker*, 20 Utah, 204, sustaining order overruling demurrer.

Consideration of Deed.—A deed by a father to his children, in consideration of love and affection, also naming a money consideration entirely disproportionate to the value of the land, held to be on its face a donation and not a sale, and a resort to parol evidence is unnecessary, p. 607.

Cited in *Ford v. Unity Society*, 120 Mo. 510, 41 Am. St. Rep. 718, holding that a deed from mother to daughter, for one dollar consideration, was really for love and affection; *Lake v. Bender*, 18 Nev. 385, holding evidence admissible to show that the real consideration for a deed was not the money expressed, but was other land to be exchanged; *Brown v. Whaley*, 58 Ohio St. 668, 65 Am. St. Rep. 797 (and note, 801,) noted under *Peck v. Vandenburg*, 30 Cal. 11, *Thorpe v. Sampson*, 84 Fed. Rep. 65, holding that a quitclaim deed from husband to wife was for love and affection.

41 Cal. 611-615. MARSHALL v. CALDWELL.

Specific Performance.—Vendee, upon finding that he has received less land than the contract called for, though entitled to rescind, may elect to have specific performance to the extent of the vendor's interest,

upon paying or tendering the proportionate part of the purchase money, pp. 614, 615.

Cited in dissenting opinion in *McCowen v. Pew*, 147 Cal. 310 majority on hearing in bank holding where specific performance is sought of contract to convey land with timber at buyer's option for use of railroad, to be exercised within one year, and vendor prior to exercise of option, cut timber, purchaser entitle to take land and remaining timber with compensation for timber removed; *Hicks v. Lovell*, 64 Cal. 20, 49 Am. Rep. 682, to the point that a vendee who elects to keep the land must tender the purchase money; *Swain v. Burnette*, 76 Cal. 301, holding that although the complaint in an action for specific performance of a contract for exchange of lands was loosely drawn, it stated a cause of action, for "it proceeds upon the principle that where the defendant is not able to perform the whole of his contract, he may, at the option of the plaintiff, be compelled to perform it as far as he can, with compensation for the deficiencies"; *Burks v. Davies*, 85 Cal. 113, 30 Am. St. Rep. 215, to the point that "it is a general rule in cases of failure of title, even where the vendor is not at fault, that the purchaser may rescind the contract and recover any money paid by him as part of the purchase price"; and *Colburn v. Northern Pacific Co.*, 13 Mont. 486, holding that upon failure of vendor's title, vendee may sue to recover the purchase money, and is not bound to wait until ousted, and then sue on the covenants of the deed.

41 Cal. 619-624. BRUNDAGE v. ADAMS.

Mining Partnership.—Persons subject to the provisions of the statute must be "copartners," p. 623.

Cited in *Harrigan v. Lynch*, 21 Mont. 42, noted under *Williams v. Gregory*, 9 Cal. 76, note 83 Am. Dec. 110.

41 Cal. 624-626. MARQUEZ v. FRISBIE.

Pre-emption cannot be made of public lands after they have been withdrawn from pre-emption by act of Congress, p. 626.

Affirmed in *Low v. Hutchins*, 41 Cal. 638.

41 Cal. 626-629. THOMPSON v. THORNTON.

Absence of counsel, caused by illness in his family, held to be ground for continuance, p. 629.

Cited in note on this point in 74 Am. Dec. 150. Distinguished in *State v. Vance*, 29 Wash. 451, upholding refusal of continuance on ground of illness of one of attorneys which prevented him from working as effectually as he otherwise could have done, where another attorney assisted at trial.

41 Cal. 630-632. WILSON v. SHACKLEFORD.

Forcible Entry and Unlawful Detainer.—Temporary absence of the actual occupant of premises is no bar to his bringing the action, under the section providing that there must be actual occupation by plaintiff within five days before defendant's entry, p. 632.

Affirmed in *Leroux v. Murdock*, 51 Cal. 543, and *Giddings v. 76 Co.*, 83 Cal. 99. Cited in *Eccles v. Union Pacific Co.*, 15 Utah, 20, without relevancy, to the point that after verdict in a case of forcible entry the court should on motion have trebled the damages.

41 Cal. 634-640. LOW v. HUTCHINGS.

Right of Pre-emption may be defeated by the government devoting the land to another purpose, "at any time before the price is actually paid or tendered," p. 638.

Cited in *Thrift v. Delaney*, 69 Cal. 194, to the point that "no estate vests in the pre-emptor until he has performed the conditions and has proved up and paid for the land"; holding that the same rule applies to a homestead claimant.

41 Cal. 640-644. PEOPLE v. EDWARDS.

Unqualified expression of opinion by a juror as to guilt or innocence of the accused is ground for challenge, p. 642.

Affirmed in *People v. Brotherton*, 43 Cal. 531. Approved in *State v. Morgan*, 23 Utah, 225, granting new trial where juror had beforehand prejudiced case but made false answers on voir dire. Cited in notes on this point in 36 Am. Dec. 524, and 53 Am. Dec. 101.

Bad Character of Deceased is admissible in a murder trial only on the question of self-defense, p. 644.

Affirmed in *Garner v. State*, 28 Fla. 137, 29 Am. St. Rep. 241; and *State v. Middleham*, 62 Iowa, 154.

41 Cal. 645-657. PEOPLE v. AH SAM.

Indictment with two counts does not charge two offenses, if the second count refers to the first in such manner as to show that it is the same, p. 648.

Cited in *State v. Malin*, 14 Nev. 291, holding that it is better to always use the words "said" and "aforesaid" in this connection.

Motion is an application for a rule or order, made viva voce to a court or judge. Making out and filing the application itself is not to make the motion. The attention of the court must be called to it. The court must be moved to grant the order, p. 650.

Affirmed in *Spencer v. Branham*, 109 Cal. 340. Cited in *Williams v. Hawley*, 144 Cal. 99, discussing sufficiency of record of grounds on mo-

tion for new trial. Distinguished in *Wallace v. Lewis*, 9 Mont. 403, saying that the principal case did not use the words "viva voce in their exact literal significance," and holding that "the motion itself is the application to the court." Disapproved in *Freelove v. Gould*, 3 Kan. App. 752, holding on stare decisis, that the filing of a motion within the statutory time was enough, and it need not be presented to the court until later.

Where an indictment charges unlawful possession of unfinished bills similar to those of a foreign banking corporation, the allegation of incorporation is unnecessary, but, if it were material, proof by reputation is sufficient, p. 654.

Cited in *People v. Barric*, 49 Cal. 344, holding that an averment that stolen property belonged to the "Quicksilver Mining Co. of New York" was sufficiently proved by evidence "that the company known by the name given in the indictment was a corporation de facto, doing business as such"; *People v. McDonnell*, 80 Cal. 288, 13 Am. St. Rep. 163, holding that an information charging counterfeiting of Bank of England notes need not aver that the bank was incorporated; *People v. Oldham*, 111 Cal. 651, holding that where stolen property was alleged to belong to a corporation organized under the laws of Colorado, proof of such organization was not necessary, but evidence of a de facto corporation was sufficient, if given with proper detail; *State v. McKiernan*, 17 Nev. 229, holding it unnecessary to charge that a bank was incorporated. *State v. Savage*, 36 Or. 215, holding proof of de facto existence sufficient in case of larceny from such corporation.

Guilty Possession of counterfeit bills is enough to constitute the crime, pp. 654-656.

Affirmed in *People v. McDonnell*, 80 Cal. 293, 13 Am. St. Rep. 167. Cited in *United States v. Williams*, 14 Fed. Rep. 554, holding that possession of a counterfeit bond, not signed and executed, was not an offense; and to same effect in *United States v. Sprague*, 11 Biss. 381; 48 Fed. Rep. 831.

41 Cal. 661-663. GANNON v. DOUGHERTY.

Counterclaim must exist in favor of the defendants at the time of the commencement of the action, p. 663.

Affirmed in *Wood v. Brush*, 72 Cal. 227; and *McGuire v. Edsall*, 14 Mont. 360.

41 Cal. 663-679; 10 Am. St. Rep. 279. MELEY v. COLLINS.

Estoppel by Delay.—Where a forged deed has been of record five years, delay of the owner of the land, having knowledge of the forgery, to attack it, does not estop her recovery of the land in ejectment from a vendee of the grantee in the forged deed, pp. 676-679.

Cited in *Simpson v. Biffe*, 63 Ark. 301, holding that where the grantor of land to a wife fraudulently inserted the husband's name as a grantee before recording the deed, without the wife's knowledge, she was not estopped, by her delay in attacking the forgery, from setting up the forgery as against a purchaser of the land at sheriff's sale on an execution against the husband. Distinguished in *Brown v. Wilson*, 21 Colo. 322, 52 Am. St. Rep. 236, holding that where title to mining property had been conclusively established by a judgment, one who might have attacked former transfers of the property for informalities was estopped by his delay, and the rule of the principal case did not apply. Cited in *Chandler v. White*, 84 Ill. 439, holding, as to forged trust deed, that the law does not require the owner of the title to attack the forgery within any particular period, but "he may bide his time, and trust to the strength of his title"; *Bausman v. Faue*, 45 Minn. 417, holding that although foreclosure proceedings were void for informality, not apparent upon the record, grantees of the mortgagor, who knew of the defect and failed to clear the record within a reasonable time, were estopped to question the validity of the foreclosure, as against buyers at the sale; *Hugill v. Kinney*, 9 Oreg. 251, 42 Am. Rep. 802, holding that where an advertisement offered a reward for information, and the reward was claimed by one entitled to it, but payment was refused by the advertiser on the ground that the advertisement was unauthorized by him, she was not estopped to set up the want of authority as a defense to an action to recover the reward, for his failure to publicly contradict the advertisement was not equivalent to "standing by and seeing the plaintiff act, knowing that he believed the advertisement genuine"; and note in 23 Am. St. Rep. 469, on registration of forged deeds.

41 Cal. 683-686. THOMPSON v. O'NEIL.

Where there is no statement on appeal, findings necessary to support the judgment are presumed, and to procure a reversal, the express findings must be absolutely inconsistent with the judgment, p. 685.

Affirmed in *Chumaseo v. Vial*, 3 Mont. 379; *Alder Gulch Co. v. Hayes*, 6 Mont. 32, 33; *McMillan v. Carter*, 6 Mont. 220, where the appeal was from the judgment and from refusal of new trial; and *Sperling v. Calfee*, 7 Mont. 527, as to an appeal from an order made on a referee's report in proceedings supplementary to execution. Distinguished in *Gay v. Havernale*, 27 Wash. 401, reversing decree against plaintiff on ground of laches which recited it is based on findings and evidence when issue of laches not raised by answer.

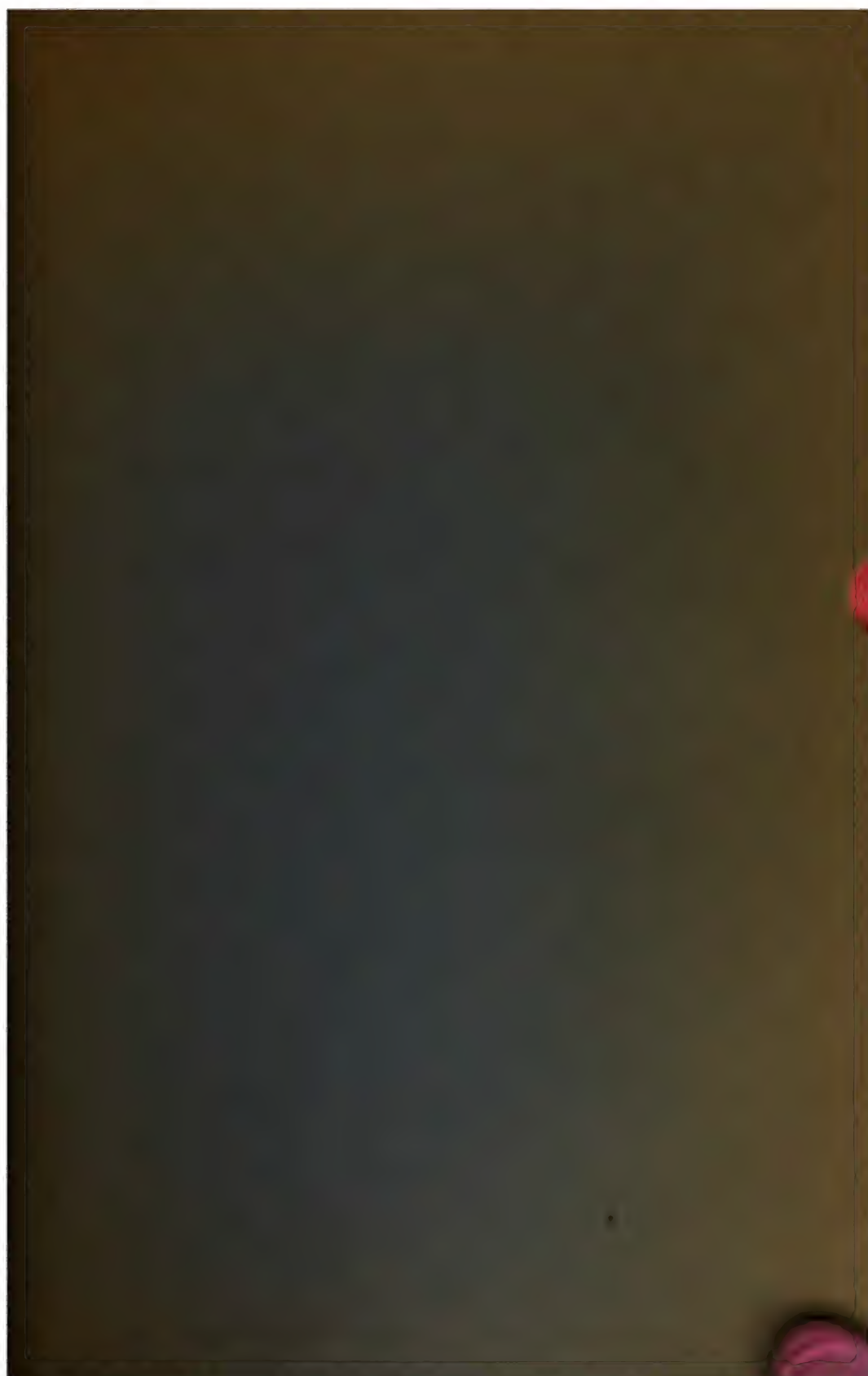
41 Cal. 686-693. VANCE v. PENA.

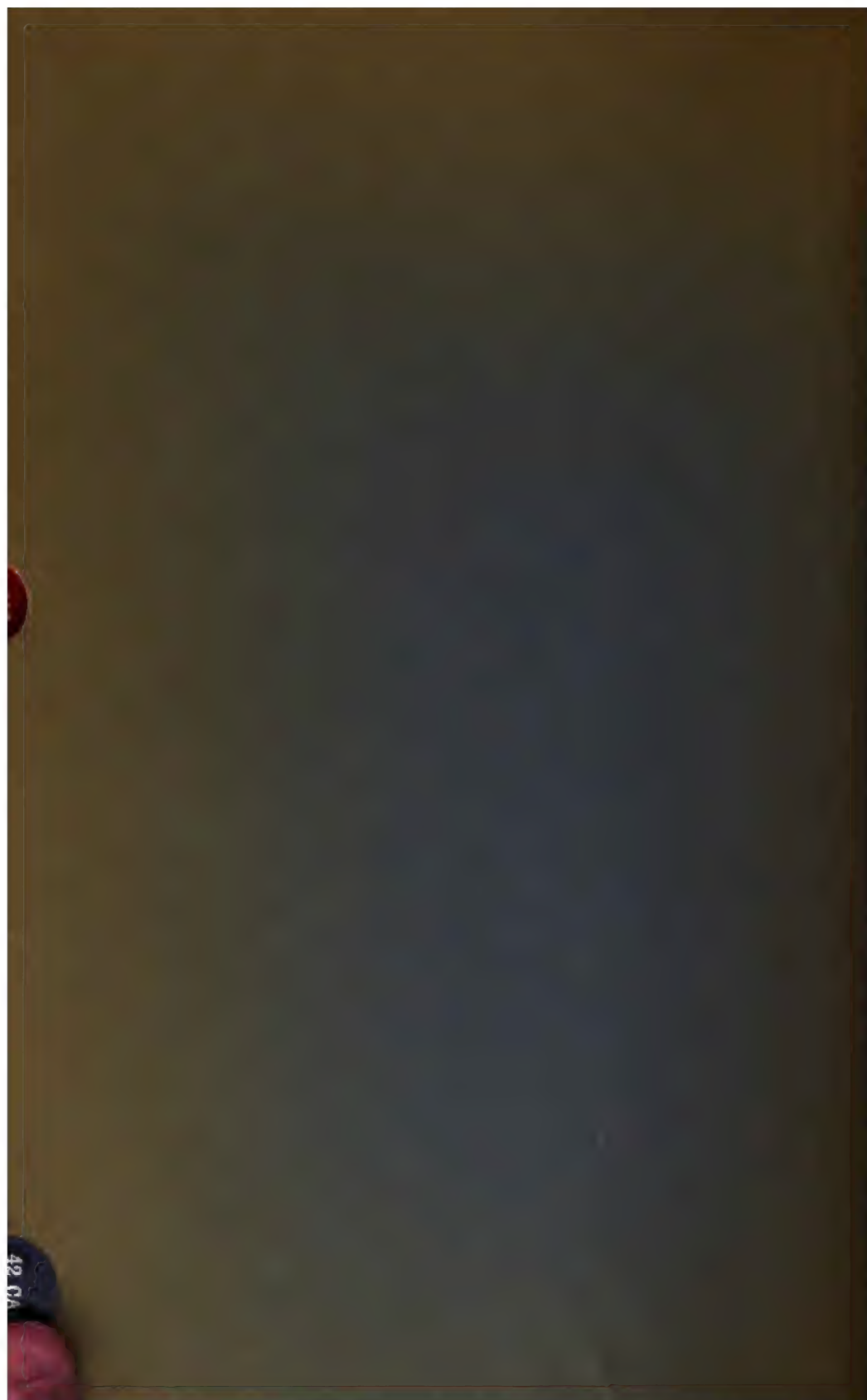
Reasonable Time.—Where the grantor in a deed covenanted to convey certain lands, or other lands in lieu thereof upon reasonable notice, a delay of eight years in performance is unreasonable, p. 693.

Cited in *Hannan v. McNickle*, 82 Cal. 125, holding that where a memorandum of sale of land stipulated that the price of nine hundred dollars should be paid in monthly installments, not naming the amounts, "if the purchase money did not become due at once, or at the end of two months, it became due in a reasonable time, . . . and we think that a period of nearly three years was more than a reasonable time for the payment of a sum like nine hundred dollars."









REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF CALIFORNIA.

CHARLES A. TUTTLE,
REPORTER.

VOLUME 42
WITH
NOTES ON CAL. REPORTS

SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY,
LAW PUBLISHERS AND LAW BOOKSELLERS.
1906.

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DURING THE YEAR 1871.

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HON. JOSEPH B. CROCKETT.....	
HON. WILLIAM T. WALLACE.....	
HON. JACKSON TEMPLE.....	

AFTER JANUARY 1, 1872.

HON. ROYAL T. SPRAGUE.....	CHIEF JUSTICE.
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HON. ADDISON C. NILES.....	
HON. AUGUSTUS L. RHODES.....	

JUSTICES QUALIFIED IN 1872.

HON. AUGUSTUS L. RHODES, reelected and qualified January 1, 1872.

HON. ADDISON C. NILES, *vice* TEMPLE, term expired, and qualified January 1, 1872.

HON. ISAAC S. BELCHER, *vice* SPRAGUE, deceased, qualified March 4, 1872.

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DISTRICT JUDGES, 1873.

FIRST DISTRICTPABLO DE LA GUERRA
SECOND DISTRICT.....CHARLES F. LOTT
THIRD DISTRICTSAMUEL BELL McKEE
FOURTH DISTRICT.....ROBERT F. MORRISON
FIFTH DISTRICT.....SAMUEL A. BOOKER
SIXTH DISTRICT.....LEWIS RAMAGE
SEVENTH DISTRICT.....W. C. WALLACE
EIGHTH DISTRICT.....JOHN P. HAYNES
NINTH DISTRICT.....A. M. ROSBOROUGH
TENTH DISTRICT.....P. W. KEYSER
ELEVENTH DISTRICT.....A. C. ADAMS
TWELFTH DISTRICTE. W. McKINSTRY
THIRTEENTH DISTRICTA. C. BRADFORD
FOURTEENTH DISTRICT.....T. B. REARDON
FIFTEENTH DISTRICT.....S. H. DWINELLE
SIXTEENTH DISTRICT.....THERON REED
SEVENTEENTH DISTRICTR. M. WIDNEY
EIGHTEENTH DISTRICTH. C. ROLFE
NINETEENTH DISTRICTE. D. WHEELER
TWENTIETH DISTRICTDAVID BELDEN

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OCTOBER TERM, 1871.



REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OCTOBER TERM, 1871

[No. 2,788.]

ANDREW GOODYEAR *v.* JOHN E. WILLISTON AND
ISAAC HOBBS.

SEIZURE BY SHERIFF, AT DIRECTION OF JUDGMENT CREDITOR, WHEN JOINT TRESPASS.—Where a Sheriff, under an execution against McGrane, and at the direction of the judgment creditor Williston, seized upon certain property, including wheat and barley, in possession of Goodyear, who had purchased in good faith and for value of McGrane after the crop was cut and stacked; and, at the same time, the Sheriff, having in his hands a mortgage given by McGrane to Williston upon the crop while growing, took possession of the wheat and barley also under such mortgage, and placed all the property seized in possession of Casey, as his keeper, as agent of Williston: *held*, that these facts established a joint taking by the Sheriff and judgment creditor, which, if wrongful, would sustain an action against them jointly as trespassers.

MORTGAGE ON GROWING CROP.—The intent of the provision relating to mortgages of growing crops, in section seventeen of the Statute of Frauds (Stats. 1856, p. 87), was to protect the lien of such a mortgage, without any delivery of possession, until the crop was so far harvested as

Statement of Facts.

to be capable of manual delivery and transportation; but the continuance of such lien afterwards, as against a subsequent purchaser in good faith, depends upon actual delivery of the crop to the mortgagee, and his retention of the possession thereof.

PURCHASE IN STACKS OF GRAIN MORTGAGED WHILE GROWING.—Where a mortgage was given upon growing crops of wheat and barley, as provided in section seventeen of the Statute of Frauds (Stats. 1856, p. 87), and after they were cut and put into stacks and shocks the mortgagor sold and delivered them to a purchaser in good faith, and for value; held, that the lien of the mortgage, without possession in the mortgagee, extended only to a severance of the crops from the land, and that the purchaser took them relieved of the mortgage lien.

APPEAL from the District Court of the Seventh Judicial District, County of Solano.

This was an action to recover possession of eighty tons of hay, sixty tons of wheat, some in stacks and shocks, and the balance thrashed and sacked; seventy-five tons of barley, in stacks and shocks; and certain plows, farming tools, and hogs—in all claimed to be worth two thousand dollars; or their value, in case a delivery could not be had; also, damages in the sum of five hundred dollars, for alleged unlawful seizure and detention thereof.

It appears from the findings of the Court below, that in November, 1869, the plaintiff, Goodyear, being the owner of a tract of land in Solano County, made a contract with Thomas McGrane, wherein the latter agreed to enter upon said tract, cultivate as much of it as he could, and cut hay on the balance, Goodyear furnishing the necessary money and advances; that by the terms of said contract, upon the completion of the harvesting of the crops, one fourth was to be reserved and given to Goodyear as the value of the land for the season; and the balance was to be taken and disposed of by Goodyear, who, after deducting from the proceeds the amount of the advances made, and indebtedness due him, was to pay the remainder over to McGrane; that, pursuant to the contract, McGrane entered upon the

Argument for Appellants.

tract, and planted wheat and barley, which he cut in July, 1870; and, prior to August tenth, he had it all in stacks and shocks, and was engaged in baling hay; that on said day, by a bill of sale, he sold all said wheat, barley, and hay, and all the other personal property, to Goodyear, who took possession of the same, and was in possession at the time the defendants seized it.

In April, 1870, McGrane made a promissory note to the defendant Williston for one thousand five hundred dollars and upwards, and, to secure the same, executed to him a mortgage upon his growing crops of wheat and barley, which was recorded; that on August fifteenth McGrane confessed a judgment in a Justice's Court in favor of Williston and one Brownlee; and the defendant Hobbs, as Sheriff of Solano County, about three weeks after the wheat and barley were cut and stacked, seized all the property mentioned, under an execution upon such judgment, and under said mortgage, and placed the same in possession of one Casey, as his keeper, and also as agent of Williston.

The judgment for plaintiff was against both defendants, for a return of the property or its value assessed at two thousand dollars. Both defendants appealed.

Goodwin & Gregory and J. McKenna, for Appellants.

To maintain a joint action against two parties, for the recovery of personal property, they must have joint possession of such property, and the whole thereof, at the commencement of the suit. But Casey was only Williston's agent to receive possession of the wheat and barley. Williston did not take or receive possession of the hay, farming implements, and other property, either himself or by an agent. Therefore the Court erred in rendering judgment against Williston for all the property. There was a misjoinder of the parties defendant.

The contract between McGrane and Goodyear was a lease.

Argument for Respondent.

McGrane was the owner of the produce, and could dispose of it by sale, mortgage, or it was attachable by his creditors. (*Butterfield v. Baker*, 5 Pick. 522; *Munsil v. Carew*, 2 Cush. 50; *Symonds v. Hall*, 37 Me. 356; *Turner v. Bachelder*, 17 Me. 257; *Walls v. Preston*, 25 Cal. 63.)

Williston was not required to take possession of the wheat and barley under his mortgage until they were harvested. (Statute of Frauds, Sec. 17; *Quirique v. Dennis*, 24 Cal. 154.) Mere severance from the leasehold is but one step in the harvest. "Harvested" is a comprehensive word, and expresses all the acts necessary to the acquisition and use of the matured grain, by the sower thereof, until the end and completion. It expresses the state in which the crop is put in the market—in which it can be handled, delivered, transported—and the mortgagee is not required to take possession of a crop until it is reduced to this state. (*Bours v. Webster*, 6 Cal. 660; *Davis v. McFarlane*, 37 Cal. 634; *Whipple v. Foot*, 2 Johns. 418; *Robbins v. Oldham*, 1 Duval, 28.)

Wm. S. Wells and L. B. Miener, for Respondent.

There was an entry by the Sheriff in a double capacity—official, under the execution, and as an agent, representing Williston as holder of the mortgage; both defendants are joint trespassers, and there was no misjoinder. (*Lewis v. Johns*, 34 Cal. 629; *Nichols v. Michall*, 23 N. Y. 264; *Symonds v. Hall*, 32 Me. 354.)

Under the contract the entire property was in Goodyear, independent of the sale. (*Bernal v. Hovious*, 17 Cal. 546.) The defendant Williston failed to take possession of the property at the time required by law, and thereby lost the benefit of his mortgage. The case is not to be determined by defining the word "harvest;" for the statute plainly enacts that the mortgage lien shall cease as against subsequent purchasers unless possession of such crops, when harvested, be delivered to the mortgagee, as in other cases of mortgage

of personal property. The meaning of the statute is that such crops shall be delivered to the mortgagees upon severance from the freehold; for they then become personal property. (*Chaffin v. Doub*, 14 Cal. 384; *Brown on Frands*, sec. 254; *Whitmarsh v. Walker*, 1 Metcalf, 818; 3 *Parsons on Contracts*, 81.)

By the Court, SPRAGUE, J.:

This is an appeal from the judgment, upon the judgment roll alone, by the defendants, who contend that the findings do not sustain the judgment. It is claimed that the findings show that the defendants were not jointly interested in the personal property sought to be recovered by plaintiff, and that they did not take joint possession of such property, or any portion thereof; hence no joint judgment could be properly entered against them. The findings show that defendant Hobbs, as Sheriff of Solano County, by virtue of an execution in his hands in favor of Williston and Brownlee, and against McGrane, on or about the 15th day of August, 1870, "under the direction of said Williston, entered upon and attached the property described in the complaint; * * * that at the time of the entry of the Sheriff on said tract he had the mortgage in his possession, and with said attachment [execution], and under said mortgage, he attempted to and did take possession of all said wheat and barley, and the other property described in the complaint, and left the same in the possession of one Casey, as his keeper and also as agent of said defendant Williston, and then took the property in the complaint described, and detained and still detains the same from the plaintiff." These facts establish a joint taking and detention by the defendants, which, if wrongful, clearly sustain a judgment against them jointly, as trespassers, whether Williston assumed to act as mortgagee of a portion of the property, or as joint judg-

Opinion of the Court — Sprague, J.

ment creditor with Brownlee. The defendant Hobbs was clearly a trespasser, upon the facts as found; as no portion of the property was at the time subject to execution as the property of McGrane; and Williston, in directing the levy, was a joint trespasser with him as to all the property except the wheat and barley. As to the wheat and barley, it is claimed that Williston was justified in taking possession thereof, under his mortgage ~~on~~ the growing crop, of April 29th, 1870. The validity of this claim involves the construction of the seventeenth section of the Act of May 19th, 1850, "concerning fraudulent conveyances and contracts," as amended April 9th, 1856, which section, as amended, reads as follows:

"Sec. 17. No mortgage of personal property hereafter made shall be valid against any other person than the parties thereto, unless possession of the mortgaged property be delivered to and retained by the mortgagee; *provided*, that a mortgage upon growing crops, executed, acknowledged, and recorded like mortgages upon real estate, shall be valid as against third parties without such delivery of possession; but the lien of such mortgage shall cease as against subsequent purchasers unless possession of such crops, when harvested, be delivered to the mortgagee, as required in other cases of mortgage of personal property." (Stats. 1856, p. 87.)

It appears from the findings that McGrane, the mortgagor, who had sown and cultivated the grain, on or about the 20th day of July, 1870, cut the same, and afterwards, and prior to the tenth day of August thereafter, had it in stacks and shocks; that afterwards, on said 10th day of August, 1870, said McGrane, by bill of sale, duly executed, bargained and sold to plaintiff all said wheat and barley, and delivered the possession thereof to him, who thereupon took and retained possession of the same, and was in possession thereof at the time the defendants entered and took possession, and

that such sale to plaintiff was made in good faith and for a valuable consideration.

The question here presented is whether, under this statute, the lien of the mortgagee, Williston, as against the purchaser, Goodyear, had ceased to exist on or prior to the fifteenth day of August, when he claims to have taken possession of the wheat and barley by virtue of his mortgage. From a careful reading of the seventeenth section it seems obvious that the intent of the Legislature was to protect the lien of a mortgagee of growing crops by a recordation of his mortgage, without an actual and continued change of possession from the mortgagor to the mortgagee of the lands upon which the crop is growing, until such crop is matured and so far harvested as to be severed from the land and placed in a condition capable of manual delivery and transportation; and when this condition of the crop is attained, to make a continuance of the mortgage lien as against subsequent purchasers in good faith, dependent upon the then actual delivery of the crop to the mortgagee, and his retention of the possession thereof. This condition of the crop was attained prior to the 10th day of August, 1870, on which day the plaintiff purchased and took the actual possession of it from the mortgagor. The mortgagee does not claim to have taken, or attempted to take, possession, until the plaintiff had been in the actual possession for five days; and I am satisfied the learned Judge of the Court below was correct in his view that the plaintiff, as purchaser of the grain in the stack and shock, took the same relieved of the defendant Williston's mortgage lien.

With these views it becomes unnecessary to notice the questions discussed by counsel arising upon the original lease or cropping contract between plaintiff and McGrane.

Judgment affirmed.

Opinion of Crockett, J., specially concurring.

By CROCKETT, J., concurring specially, RHODES, C. J., concurring:

I concur in the judgment, on the ground that under the contract of November, 1869, between Goodyear and McGrane, the title of the growing crop, as it was grown, vested in Goodyear, who was entitled to retain one fourth to his own use, with an absolute power of sale and disposition as to the remainder, retaining out of the proceeds his advances and all indebtedness due to him from McGrane, and accounting to the latter for the remainder of the proceeds. Under this contract McGrane never had any *title* to the growing crop, but only an interest in the proceeds.

I concur with Mr. Justice SPRAGUE as to the joint liability of the defendants, but express no opinion on the other point discussed in his opinion.

[No. 2982.]

THE PEOPLE OF THE STATE OF CALIFORNIA v.
AH YING.

CONSTRUCTION OF STATUTE—LEGAL SESSION OF COURT.—Under the Act of March 1st, 1864, a District Judge may adjourn a general term of his Court in one county over an intervening term in another county. The term so adjourned is a continuation of the regular term.

TERM.—The Act of April 20th, 1863, concerning Courts of justice and judicial officers, was intended to prevent the loss of a term; and it does not apply after the Judge has once appeared and commenced to hold Court.

PRESENT INSANITY—DUTY OF COURT.—No plea of present insanity is required. If, at any time during the proceedings in a criminal trial, a doubt arises as to the sanity of the defendant, it is the duty of the Court, of its own motion, to suspend further proceedings in the case until the question of sanity has been determined.

TERM—RIGHT AND POWER OF COUNSEL.—Counsel for the defendant cannot waive an inquiry as to the question of the sanity of the defendant, nor can he compel the Court to enter upon such an inquiry, where no ground for such doubt exists.

Opinion of the Court — Temple, J.

APPEAL from the District Court of the Ninth Judicial District, County of Shasta.

The facts are stated in the opinion of the Court.

E. Garter, for Appellant.

The trial was irregularly continued, because it was continued to a day not in a term of the Court. For this reason the Court had no jurisdiction at the time of the trial; and the judgment is, therefore, void. (*Norwood v. Kenfield*, 34 Cal. 321; Constitution of Cal. Art. III, Sec. 12; Genl. Laws, Chap. 3, Secs. 23, 24.)

The action of the Court in allowing evidence as to the present sanity of the defendant to be given on the trial, and the submission of such evidence to the jury, was error for which the verdict should be set aside. (Crim. Practice Act, Sec. 583, et seq.; 1 Whart. Cr. Law, 42; *People v. Farrell*, 31 Cal. 576.)

Attorney General Hamilton, for Respondent.

The continuance was not error. (Stats. 1863-4, pp. 118, 133; *Thomas v. Forgerty*, 19 Cal. 644.) The plea of present insanity was withdrawn, and that question was not before the jury.

By the Court, TEMPLE, J.:

The defendant was indicted for murder, and the case was called for trial at the regular March Term of the District Court in and for Shasta County, when, neither party being ready for trial, the case was set for trial on the seventeenth day of April following, to which time the Court was adjourned, by an order upon its minutes.

The April Term of the Court in Trinity County, which is within the same district, intervened between the March Term in Shasta and the seventeenth day of April, to which

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the Court was adjourned. It does not appear affirmatively whether the Court was actually in session in Trinity County on the seventeenth day of April or not. On that day the Judge did not appear to hold Court at Shasta, but the Clerk and Sheriff, under instructions from the Judge, adjourned the Court from day to day for one week, at the end of which time the Judge appeared and held Court, and the defendant was tried, against his objections, and a conviction had. It is claimed that the Court was not then legally in session, and the verdict and judgment, therefore, void.

The Act concerning the District Courts of this State, passed March 1st, 1864, authorizes the Court, by an order entered upon its minutes, to *adjourn* to a day certain, although a term for another county in the same district may intervene, provided such special term do not interfere with any general term in the district. This, I think, contemplates an adjournment of the general term over the intervening term in another county. It is not properly a special term, but a continuation of the regular term. Section seventy-three of the Act concerning Courts of justice of this State and judicial officers, passed April 20th, 1863 (Stats. 1863, p. 333), was intended, as has been held, to prevent the loss of a term, if the Judge did not appear on the day appointed to hold Court. After the Judge has once appeared and commenced to hold Court this section has no application. If it authorized the adjournment from day to day by the Sheriff, in the present case, it would authorize a similar proceeding at any time in the term when the Judge failed to appear and hold Court. I think the point well taken.

On the trial, at the request of the attorney for the defendant, and against the objections of the District Attorney, the Court allowed evidence to be given as to the present sanity of the defendant, and instructed the jury that if they were satisfied, from the evidence, that the defendant was (then)

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insane, they would so find. There is no plea of present insanity required. If at any time a doubt arose as to the sanity of the defendant, it was the duty of the Court, of its own motion, to suspend the trial or further proceedings in the case, at whatever stage the doubt arose, until the question of sanity was determined. Common humanity requires that one should not be tried for his life while insane, and counsel for the defendant cannot waive such inquiry when the doubt exists; nor can he, by interposing such a plea, compel the Court to enter upon such inquiry where no ground for such doubt exists.

The fact that evidence upon the subject was allowed to go to the jury, and that they were instructed to find a verdict that the defendant was then insane if they were satisfied from the evidence that he was so, implies a doubt on the part of the Court as to his sanity. Under the provisions of the Criminal Practice Act the trial should have been suspended until that question was settled.

Judgment reversed and new trial ordered.

SPRAGUE, J., concurring specially:

I concur in the judgment of reversal, upon the ground last discussed by Mr. Justice TEMPLE.

[No. 2,765.]

C. T. JACOBUS v. THE COUNCIL OF THE CITY OF OAKLAND.

CONSTRUCTION OF STATUTE—STREETS IN OAKLAND.—The Legislature did not intend by the Act of January 31st, 1870, relative to the opening of streets in Oakland, to authorise the City Council to proceed to open, extend, straighten, or widen any street, except in cases where the Coun-

Statement of Facts.

all were satisfied that the benefits to lands affected thereby, and to be assessed therefor, would exceed the damages to private property necessarily occasioned, and the expenses of the proceeding and work.

ISSUE.—The Legislature did intend that the aggregate damages to private property, including the value of land taken for the street, and the expenses of the Commissioners, should be paid for in money by assessment upon the several parcels of land benefited by the proposed improvement, in proportion to the benefits to accrue to each.

ISSUE.—**DUTY OF COMMISSIONERS.**—It is the duty of Commissioners appointed under that Act to ascertain and report the damages to the owner of each specific parcel of land affected by the proposed work, which should include the value of lands taken for the street.

APPEAL from the County Court of the County of Alameda.

Under the special Act of the Legislature, referred to in the opinion of the Court, a petition was presented to the Council of Oakland, asking that Eighth street be opened, straightened, and widened, from Adaline to Wood street, to the width of eighty feet. In compliance with the petition, the city engineer was ordered to prepare a map of the proposed improvement. Upon receiving the report of the engineer, with the map prepared by him, the Council gave notice, by advertisement in a daily newspaper, of the intended improvements, and thereafter appointed three Commissioners to examine the charges necessary to be made in the premises to be affected, and to assess damages. The Commissioners reported, among other things, an award in favor of the relator for one hundred and fifty dollars, as the value of the land to be taken from him, by reason of the opening of the street, after deducting the amount of benefits which would accrue to him in the increased value of other land not taken. On application to the County Court a temporary injunction was granted, and the proceedings of the Council were brought up for review on certiorari. After hearing the matter, the Court dissolved the injunction, and confirmed the proceedings of the Council. The relator appealed.

C. A. Tuttle and S. F. Gilcrest, for Appellant.

H. H. Havens, for Respondent.

By the Court, SPRAGUE, J.:

This is an appeal from the judgment of the County Court, on review upon certiorari of the proceedings of the Council of the City of Oakland, in the matter of extending and opening Eighth street, in said city, under and by virtue of an Act of the Legislature entitled "An Act to authorize the Council of the City of Oakland to lay out, open, and improve streets in said city," approved January 31st, 1870. (Stats. 1869-70, p. 38.)

It is alleged by the applicant for the writ that the Commissioners elected by the City Council to assess the damages and benefits to be caused by the opening and extension of said street did not perform their duties in that behalf according to law, but exceeded the authority conferred upon them [in this], "that they did not first ascertain the amount of damages sustained by affiant and others for property taken for said street, as by law they were required to do, but estimated and charged them for all the benefits resulting from said improvement to their remaining lands, and offset the same against the value of the land so taken, and allowed them only the difference as damages."

The return of the Council to the writ abundantly demonstrates that the principle upon which the Commissioners proceeded in making their award of damages and benefits, in reference to each particular lot by them adjudged to be affected by the improvement, was to award damages only when, in their judgment, the damages, including the value of that portion of the lot or parcel of land taken for the street, exceeded the benefits resulting from the improvement to the residue of such lot or tract, and then only for the excess of such damages over the benefits, and to award benefit only to the extent of the excess of benefit over dam-

ages, including the value of the parcel of the tract taken, if any was taken; and if the damages and benefits were, in their judgment, equal, no award of damages or benefits was by them returned as to that particular lot or tract of land.

It seems to be admitted by counsel for the city that such was the principle upon which the Commissioners proceeded in making their award of damages and benefits, and in arriving at a basis for their assessments upon the parcels of land by them thus adjudged benefited, to meet the aggregate damages thus adjudged to other parcels, and the expenses of the Commissioners; and this mode of procedure is claimed by counsel for the city to be a strict compliance with the statute under which the proceedings were had.

On the other hand, it is insisted by counsel for appellant that this mode of procedure adopted by the Commissioners, to ascertain the damages and benefits caused by the proposed improvement, is not authorized by the statute, but is in direct conflict therewith.

Although the terms of the section of the law which prescribes the duties of the Commissioners are somewhat ambiguous, yet upon a careful examination of the whole Act, it is clear to my mind that the principle adopted by the Commissioners, in ascertaining the damages and benefits resulting to the specific parcels of land by them adjudged to be affected by the improvement, was erroneous, and not authorized by the letter or spirit of the law; and necessarily, having established a basis of assessment not authorized by the statute, the specific assessments to property benefited to cover the amount of damages and costs are erroneous and illegal.

The Act is entitled "An Act to authorize the Council of the City of Oakland to lay out, open, and improve streets in said city." The first section of the Act in effect provides that, before the City Council shall proceed under the Act

to lay out, open, straighten, or widen any street or highway, they shall examine into the matter and determine, by a vote of a majority of all the members elected to said Council, *that the benefits to arise from the proposed improvement, in whole or in part, will exceed the damages and expenses to be caused thereby*, and that the convenience of the public will thereby be promoted. The second and third sections of the Act specify certain proceedings preliminary to the election by the City Council of three Commissioners. The fourth section provides for the election by the City Council of three Commissioners, of specified qualifications, "to assess the damages and benefits to be caused" by the contemplated improvement; requires said Commissioners to give public notice of the time and place when and where they will proceed to examine the property to be effected by such improvement, and then, at such time and place, the section defines the duties of the Commissioners, as follows: "They shall proceed to examine the land and improvements to be affected by the proposed improvement, and *shall first ascertain the amount of damages* to be sustained, the names of the owners of the property to be damaged, *and the amount to be paid to each of such owners therefor*. They shall then assess upon the property to be benefited by such improvement a sum sufficient to pay the whole amount of such damages, and the fees and expenses of the said Commissioners, and shall apportion the same among the owners of the several parcels of property to be thus benefited, in proportion to the amount of benefits to accrue to each." The section then provides that the Commissioners shall take all pertinent testimony that may be offered, and call such witnesses as they may deem necessary, and require them to make report to the City Council of the "assessments and awards so made by them, with the names and amounts of the persons damaged or benefited, as aforesaid."

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It is apparent that the Legislature, by this Act, did not intend to authorize the City Council to proceed to open, extend, straighten, or widen any street, except in cases where the Council were satisfied that the benefits to lands affected thereby, and to be assessed therefor, would exceed the damages to private property necessarily occasioned, and the expenses of the proceedings and work; and that the Legislature did intend that the aggregate damages to private property, including the value of land taken for the street and the expenses of the Commissioners, should be paid for in money, by assessment upon the several parcels of land benefited by the proposed improvement, in proportion to the benefits to accrue to each; and this is entirely defeated by the action of the Commissioners, as evidenced by their report. Whereas, had they performed their duties strictly as defined in the fourth section, they would have ascertained and reported the damages to the owner of each specific parcel of land affected by the proposed work, which should include the value of lands taken for the street. Without reference to benefits resulting to adjoining lands of the owner, and to the aggregate of damages thus ascertained, they should have added the expenses of the Commissioners, and then ascertained and reported the benefits resulting to each specific parcel of land affected by the improvement and not taken for the street, upon which they would have assessed, in the aggregate, the aggregate of damages and expenses, as first ascertained specifically upon each parcel benefited, in proportion to the amount of benefits to accrue to each; and, necessarily, if the aggregate of benefits exceeded the aggregate of damages and expenses thus ascertained, the assessment to each specific parcel benefited could not exceed or equal such benefit, but must be a per cent thereon, less than one hundred. The owner of land taken for the street would then receive, in money, the value of the land taken for public use; and if he owned adjoining or other lands

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benefited by the improvement, he would be required to pay, by an assessment upon such benefits, his proportionate share of the aggregate damages and expenses of such improvement, without reference to any compensation due him for lands taken; and the owner of other lands benefited, no portion of whose lands had been taken for the street, would be assessed upon his benefits in precisely the same ratio of benefits, to meet the aggregate damages and costs.

By this method the costs of the improvement would be apportioned to the parties benefited, upon terms of proximate equality, and each party whose lands were taken for the street would receive compensation therefor.

If this view of the statute be correct, the action of the Commissioners, evidenced by their report, is not sustained by the law governing such action, but is in conflict therewith, and should have been set aside.

The judgment of the County Court must, therefore, be reversed, and cause remanded.

So ordered.

[No. 2,317.]

**FRANCIS BORNHEIMER v. ELIAS J. BALDWIN,
THOMAS MAHONEY, F. METZGER, AND D. E.
DICKINSON.**

APPEAL FROM JUDGMENT, IF TOO LATE, NOT SAVED BY APPEAL FROM NEW TRIAL ORDER.—An appeal from a final judgment must be taken within one year from its rendition. The pendency of an appeal from an order denying a new trial in the same case will not operate to prolong the time for an appeal from the judgment.

FAILURE TO PERFECT AN APPEAL WILL NOT DEFEAT A SECOND APPEAL OTHERWISE WELL BROUGHT.—Where an appeal from an order denying a new trial was not perfected, and afterwards, but within sixty days from the order, a second appeal was taken and perfected: *held*, that the failure to perfect the first did not defeat the second appeal.

DECLARATIONS OF WIFE, ACTING AS AGENT, WHEN NOT PART OF RES GESTAE, Hearsay Evidence.—In an action by Bornheimer against Baldwin, for

Argument for Appellants.

an undivided interest in land, alleged to have been purchased on joint account and partly with money borrowed by Mrs. Bornheimer and handed to her by Baldwin: *held*, that the statements of Mrs. Bornheimer to a third person, to the effect that she was borrowing money, to pay Baldwin, were hearsay, and their admission against defendants' objections (though called out by questions of the Court) was error.

ON APPEAL FOR EXCLUSION OF TESTIMONY THE RECORD SHOULD SHOW WHAT THE TESTIMONY WAS.—The exclusion of testimony in the Court below cannot be held error on an appeal, when the record fails to give such a statement of the excluded testimony as will enable the appellate Court to see whether it was admissible, or that appellant was injured by its exclusion.

BAD FAITH IN ENTRY CANNOT BE SET UP BY ONE TENANT IN COMMON AGAINST ANOTHER.—In an action of ejectment by one tenant in common against another, the latter cannot invoke the maxim, *Ex dolo malo non oritur actio*, nor defend upon the ground that he and plaintiff entered upon the premises wrongfully in the first instance.

TENANT IN COMMON CANNOT ASSAIL THE COMMON TITLE.—A tenant in common, entering and remaining in possession as such, cannot, as against his cotenant, assail the common title, or call its validity in question.

APPEAL from the District Court of the Twelfth Judicial District, City and County of San Francisco.

This was an action of ejectment for an undivided half of a tract of land in the City and County of San Francisco, bounded by Grove, Webster, and Haight streets, and a line seventy-one and a half feet east of Fillmore street, excepting therefrom block two hundred and ninety-nine. The case was tried before a jury, and resulted in a verdict and judgment for plaintiff. A motion for new trial having been denied, defendants appealed from the judgment and order. The dates and facts bearing upon the points decided are stated in the opinion.

Sharp & Lloyd, for Appellants.

There was error in the admission of Sherman's testimony as to Mrs. Bornheimer's declarations about what she wanted money for. Such declarations were no part of the *res gestæ*, they were mere hearsay. (1 Phil. on Ev. 152, Cowen &

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Hill's notes.) The fact in controversy was, whether Bornheimer had paid certain money to Baldwin. On this question there was a direct conflict between Mrs. Bornheimer and Mr. Baldwin, and this evidence was therefore important, not only for its direct effect in the case, but for its effect upon the jury, in considering Baldwin's credibility.

The plaintiff pretended that there was a contract between him and defendant Baldwin to jump the land for joint benefit, and wrongfully take it from another person. Defendant Baldwin denied any such contract; but the Court below instructed the jury that if they found such a contract, and an entry thereunder and an ouster, they should find for plaintiff. Such a contract, if one had been made, would be void, as illegal and against public policy. When parties to such a contract come into Court to ask its enforcement it will refuse its aid. (*Russell v. Wheeler*, 17 Mass. 287; *Shiffner v. Gordon*, 12 East, 304; *Belden v. Pilken*, 2 Caines, 149; *Doolin v. Ward*, 8 Johns. 194; Add. on Cont. 149; *Valentine v. Stewart*, 15 Cal. 185; *Swain v. Cherpening*, 20 Cal. 185.)

E. A. Lawrence, for Respondent.

The appeal from the judgment was not taken until nearly a year and seven months after the rendition of the judgment; and it should, therefore, be dismissed, the proper exceptions having been filed.

There were two notices of appeal from the order refusing a new trial. Both notices are from the same order, and the first one is the only one that can be noticed. The plaintiff had accepted that one by refusing to require the sureties to justify; and no notice was given to him that such appeal would be abandoned, or reason stated why the second one was taken.

The proceeding on appeal is an independent proceeding, like a motion for a new trial, and when once put in motion must be prosecuted or abandoned. It cannot be disre-

Argument for Appellant in reply.

garded, when it suits the convenience of counsel to do so. (*Leroy v. Rasette*, 32 Cal. 171; Prac. Act, Sec. 337; *Hastings v. Halleck*, 10 Cal. 31.

The question put by the Court to the witness Sherman was rendered necessary, in the mind of the Court, on account of the previous testimony, which was not objected to, and defendant did not move to strike out. The court has a right, when testimony is left in doubt by the examination of either counsel, of its own motion, to put such questions to the witness as will remove the doubt, so that the jury will not be misled or imposed upon, by considering that as testified to which was not testified to by the witness. And such questions are not the subject of exception on either side, unless there has been a gross abuse of discretion, to the prejudice of the party excepting. The question was really put for the benefit of the excepting party, and the answer was really for his advantage, and not to his prejudice.

The objection to the exclusion of Mrs. Bornheimer's testimony in the Police Court is not available, because the offer was not specific. It does not appear what she said, but simply that she had said something inconsistent with her testimony here. Whether that something was material, or was said to the defendant, or when it was said, or where it was said, or how it had any relevancy to this case, is not disclosed by the record. (*Roberts v. Unger*, 30 Cal. 676.)

Sharp & Lloyd, for Appellant, in reply.

The motions to dismiss the appeals are disposed of by the decisions in *Hanscom v. Tower*, 17 Cal. 518, and *Walden v. Murdock*, 23 Cal. 541; and the cases of *Marziou v. Roach*, 8 Cal. 522; *Carpentier v. Williamson*, 25 Cal. 167; and *Wagenheim v. Cook*, 35 Cal. 216.

By the Court, WALLACE, J.:

A judgment for the plaintiff was rendered in the Court below on the 7th day of May, 1868; and on the 30th day of November, 1869, an order was entered denying the motion of the defendant for a new trial. On the 2d day of December, 1869, the defendant filed and served a notice of appeal from the judgment and order; and on the fourth day of the same month he filed an undertaking as upon appeal from the judgment only, but did not, within the prescribed time, file an undertaking upon appeal from the order. On the 20th day of December, 1869, the defendant filed and served another notice of appeal, in all respects, except its date, the same as the first one; and on the same day filed an undertaking upon appeal, in due form of law, from both judgment and order.

The respondent moves to dismiss the appeal from the judgment, because it was not taken within one year after its rendition. It is insisted, for the appellant, that the motion must be denied, because of the appeal pending from the order. The cases of *Hanscom v. Tower*, 17 Cal. 518, and *Walden v. Murdock*, 23 Cal. 540, are cited in support of this position. They have, however, no applicability to the question in hand. There was no motion made in either of them to dismiss an appeal from the final judgment; indeed, in *Hanscom v. Tower*, no appeal from the judgment had been attempted. The point of practice decided in each of them was, that through the instrumentality of an appeal from the order denying a new trial, this Court would review the error appearing on the judgment roll.

The statute regulating appeals from final judgments as such, requires them to be brought, if at all, within one year. This limitation is peremptory. Neither the pendency of an appeal from an order denying a new trial, nor any other cir-

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cumstance, can operate to prolong it; and the motion of the respondent in that respect must, therefore, prevail.

The respondent also objects to the review by this Court of the order denying the new trial, because of the failure to perfect the first appeal taken from the order. There is nothing in this objection. The second appeal was taken and perfected within the time required by the statute, and it has not provided that a failure to perfect the first appeal should be held to defeat a second otherwise well brought. In this respect lies a distinction overlooked by counsel in argument, the distinction between a failure to perfect an appeal taken, as here, and a failure to file a statement or affidavits in support of a motion for a new trial after notice of intention given, as in *Leroy v. Rasette*, 32 Cal. 171; for there the statute provides, in terms, that "if no affidavit or statement be filed within five days after the notice * * * the right to move for a new trial shall be deemed *waived*."

The principal issue determined on the trial, which was had before a jury, arose upon an allegation of the plaintiff that he was a tenant in common with the defendant Baldwin of certain lands in the possession of the latter. This alleged tenancy in common was denied by the defendant. The general features of the case, as presented by the plaintiff, were that he and the defendant Baldwin made an agreement to enter upon and hold these lands as tenants in common, and for their equal benefit—each to contribute his share towards the expenses of the common occupation; that the agreement was carried into execution, and the premises taken into possession; that he contributed towards the expenses thereof—having advanced the defendant, at one time and another, several hundred dollars in all for that purpose—the general business, including the furnishing of the money, being mostly, if not altogether, transacted upon his part by his wife, who testified as witness on the trial to several interviews between herself and Baldwin—some before but

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most of them after occupation began—in all of which the latter, as she stated, admitted the tenancy in common, etc. It of course becomes of great importance, in view of the general circumstances of the case, to establish that these advances in money had in truth been made to the defendant Baldwin, by or on behalf of the plaintiff, in pursuance of the alleged agreement, and as his share of the expenses of holding the possession of the premises. In the course of her cross-examination, Mrs. Bornheimer had stated that a portion of the money she had so advanced to Baldwin she had borrowed from Sherman, a son-in-law of hers, in several sums, at different times, amounting to some one hundred and sixty-five dollars. Sherman, subsequently testifying for the plaintiff, was asked the following question by the Court: "State whether or no, at any time while Mrs. Bornheimer was occupying block two hundred and ninety-nine, she borrowed any money from you, at the same time making a statement as to what use she intended it for?" To this question the defendants' counsel made objection, as being incompetent, and because the evidence it sought to elicit would be hearsay.

The objection was overruled, and the witness answered, in substance, that she had told him that she was borrowing money to pay Baldwin, when she applied to witness for it.

The question, the answer, and the ruling of the Court upon this point appear clearly enough in the record, and there can be little doubt that the Court erred in overruling the objection of the defendants. Sherman's testimony as to what his mother-in-law said to him is, in its nature, hearsay, and is, therefore, inadmissible, unless falling within some one of the exceptions to the general rule on that subject. That Mrs. Bornheimer lived at the time on block two hundred and ninety-nine, as assumed by the Court in

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the question put, is of no significance, for that block is no part of the property in controversy; but if it had been in controversy, the question would have nevertheless been inadmissible. That the declaration made by her to him, and of which he was permitted to testify, was made in connection with the borrowing of money by her from him, is of no more significance upon the point. Her declarations so made were not part of the *res gestæ* — they did not tend to elucidate or explain any fact or thing done, or assumed to have been done, in the case.

The *res* here — the thing done or claimed to have been done — was the furnishing of the money to Baldwin, and its receipt by him from Bornheimer; where Mrs. Bornheimer obtained it, or how, and consequently what she said when she got it, was, under the circumstances of the case, of no consequence whatever, and should have been excluded.

The offer by the defendants to prove what Mrs. Bornheimer testified to in the Police Court was properly excluded — at least, there is no such statement of the facts desired to be proven as would enable this Court to see that they were, in themselves, admissible, or that the defendant was injured by the exclusion of the testimony offered.

If the case of the plaintiff be otherwise established, the defendant cannot defeat it by the application of the maxim, *Ex dolo malo non oritur actio*, nor set up in his defense that both he and the plaintiff entered upon the premises wrongfully in the first instance. Upon well-settled principles he cannot be permitted, if entering and remaining in possession as a tenant in common, to assail the common title or call its validity in question.

The appeal from the judgment is dismissed; the order denying a new trial is reversed and cause remanded.

Mr. Chief Justice RHODES did not participate in the foregoing decision.

Points decided.

[No. 2,986.]

APPEAL OF S. O. HOUGHTON.

RULES FOR CONSTRUING STATUTES AS TO APPEALS.—If a statute is capable of being so construed as to maintain the right of appeal without violating the well-established rules for construing statutes, it will be so construed.

RULE AS TO MEANING OF WORDS.—In construing statutes, words are to be taken in their usual and popular sense, unless they have a well understood technical meaning; and, if practicable, effect shall be given to all the words and provisions of the statute.

CONSTRUCTION OF ACTS OF 1868 AND 1870 RELATIVE TO STREETS IN SAN FRANCISCO.—The Acts of 1868 and 1870, to modify the grades of streets in San Francisco, in declaring that the judgment of the County Court on the second report of the Commissioners shall be "final and conclusive," means that there shall be no appeal from the judgment, and that it shall not be reviewed by the County Court, except by motion for a new trial.

SAME—CONSTITUTION CONSTRUED—NATURE OF PROCEEDING.—The proceeding under the Acts of 1868 and 1870, modifying grades of streets in San Francisco, is a special one, and not a case at law involving the legality of an assessment, in the sense of Article VI, section four, of the Constitution. If it were a case at law, it would not be competent for the Legislature to confer jurisdiction of it upon the County Court, because the Constitution, in express terms, confers upon the District Court original jurisdiction in that class of cases; and such jurisdiction is exclusive, unless there be something in the instrument evincing a contrary intent.

REMEDY FOR DAMAGES.—The only remedy for property owners who have suffered damage under the Acts of 1868 and 1870, relative to modifying grades of streets in San Francisco, is by application to the Legislature for relief.

By WALLACE, J.:

APPEAL, THE CREATURE OF STATUTORY ENACTMENT.—Independently of rules adopted by the Supreme Court, an appeal as a mere procedure is defined by statute. It is essentially the creature of the statute, and may be accorded or withheld, restrained, enlarged, or wholly abrogated, by legislative enactment.

BENEFIT OF APPEAL NOT SECURED BY THE CONSTITUTION—SUPREME COURT RULES.—The Constitution has not undertaken to define or secure the benefit of an appeal to any person against the legislative control. It has left that subject wholly to the Legislature, or, in default of legislative enactment, to the Supreme Court, through rules adopted for that purpose.

JURISDICTION OF SUPREME COURT OVER APPEALS.—The appellate jurisdiction of the Supreme Court exists, and is capable of effective assertion, inde-

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pends on legislative aid, as to the procedure through which an appeal is to be exerted.

APPEAL MUST BE AUTHORIZED BY STATUTE OR RULE.—No appeal in cases of a particular class or character can be entertained by the Supreme Court, unless authorized by a statute, or a rule of Court, even though such cases be in themselves within the appellate jurisdiction of the Court, as defined by the Constitution.

GENERAL JURISDICTION OF SUPREME COURT.—Except cases arising in the Probate Court, and criminal cases amounting to felony, no case is, by the terms of the Constitution, subject to review by the Supreme Court, in the exercise of its appellate power, unless it be a case in equity, or a case at law of a defined character.

SPECIAL CASES NOT CASES AT LAW.—Special cases are special proceedings characteristically differing from ordinary suits at the common law. They do not proceed according to the course of the common law, but give new rights and afford new remedies. Such cases are not cases at law within the appellate jurisdiction of the Supreme Court, as defined by the Constitution, even though they involve questions of value.

QUERY AS TO LEGISLATIVE POWER IN REFERENCE TO THE JURISDICTION OF SUPREME COURT.—Whether it would be competent for the Legislature to add to the class of cases over which the Constitution has declared that the appellate power of the Supreme Court is to be exercised, another and distinct class not enumerated as such in the Constitution?

By TEMPLE, J.:

JUDGMENT CONCLUSIVE AS TO ASSESSMENT.—The proceeding under the Acts of 1868 and 1870 was a proceeding in the exercise of the sovereign power of taxation, and the action of the Court was final and conclusive as an assessment.

NOT A CASE AT LAW.—Such proceeding is not a case at law of which the Constitution has vested the Supreme Court with appellate jurisdiction, in terms.

CASES DISAPPROVED.—Knowles v. Yeaton, 31 Cal. 82; Conant v. Conant, 5 Cal. 252.

By RHODES, C. J.:

SPECIAL CASES NOT INCLUDED IN CASES AS USED IN CONSTITUTION.—Special cases are not included within the meaning of the word "cases," as it is used in that portion of the Constitution which defines the jurisdiction of the Supreme Court.

JURISDICTION OF SUPREME COURT DERIVED FROM CONSTITUTION.—The jurisdiction of the Supreme Court is derived from the Constitution alone, and the Legislature can neither enlarge nor restrict it. When a special case is devised, the question whether the Supreme Court has jurisdiction in the matter must be determined by an interpretation of the provisions of the Constitution, and not by reference to the statute.

Statement of Facts.

APPELLATE JURISDICTION OF SPECIAL CASES.—The Supreme Court has appellate jurisdiction of special cases such as that under the Acts of 1868 and 1870, relative to modifying grades of streets in San Francisco, notwithstanding the Legislature may have intended to cut off such appeal.

CASES APPROVED.—*Knowles v. Yeates* and *Conant v. Conant*, *supra*.

By SPRAGUE, J.:

CASE INVOLVING THE LEGALITY OF ASSESSMENT.—The proceeding under the Acts of 1868 and 1870 presents a case involving the legality of an assessment, and under the Constitution, and section three hundred and fifty-nine of the Practice Act, and appeal lies from the judgment of the County Court.

CONSTRUCTION OF WORDS "FINAL AND CONCLUSIVE," IN STATUTE.—The words "final and conclusive," in the Act of 1870, apply to the County Court only, and do not prohibit an appeal to the Supreme Court.

APPEAL from the County Court of the City and County of San Francisco.

This was a proceeding under the provisions of an Act of the Legislature, entitled "An act to authorize the Board of Supervisors of the City and County of San Francisco to modify the grades of certain streets," approved March 30th, 1868 (Stats. 1867-8, p. 594), and an Act amendatory thereof, approved February 1st, 1870 (Stats. 1869-70, p. 41). After the grading had been done, the Commissioners appointed by the Board of Supervisors heard the evidence of the parties interested, and submitted their report to the County Court, fixing the amount of benefits and damages resulting to property by reason of the change of grade. Under the Acts mentioned, the expenses of the work and all damages in consequence of it were to be paid out of the fund created by the assessed benefits. Upon application of parties complaining of the report, it was set aside, and the whole matter was by the County Court recommitted to the Commissioners, with certain instructions. They proceeded to make another investigation, and presented a second report. Objections to this report were filed by a large number of persons, including the appellant, Houghton, whose property had been reported benefited in the sum of nine thousand

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six hundred dollars, and no damages allowed him. The Court overruled the objections and confirmed the report. This appeal is taken from the order refusing to set aside the second report, and from the judgment confirming it.

The other facts are stated in the several opinions of the Justices.

The respondent moved to dismiss the appeal.

McAllister & Bergin, for Appellant.

It is a cardinal rule in the construction of statutes, that every intendment is to be made against the taking away of the right of appeal or review. (*Lawton v. Commissioners*, 2 Cain's Rep. 179; *Rex v. Commissioners*, 2 Keble, 43; *Rex v. Morley*, 2 Burr, 1042.) In the case last cited the language of the Act of Parliament in question was:

"That no other Court whatsoever shall intermeddle with any cause or causes of appeal; but they shall be finally determined in the Quarter Sessions only." Yet the Court of King's Bench ruled that "the jurisdiction of this Court is not taken away unless there be express words to take it away — this is a point settled."

In *Richards v. Hodges*, 1 Mod. 45, Chief Justice KELLYNGE ruled that "you cannot oust the jurisdiction of this Court without particular words in Acts of Parliament."

In view of this settled rule we might stop here; for it cannot be pretended that the statute in terms takes away the right of appeal. If we correctly understand the position advanced in support of the motion, it is this: that the words, "such judgment of said County Court as to the premises shall be final and conclusive," do away with the right of appeal. But the answer is, that this language refers altogether to the County Court, and not to this Court. The Legislature had provided, in the preceding part of the statute, that upon filing of the report of the Commissioners notice should be given, and all parties interested allowed

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twenty days within which to object to confirmation of the report, and the County Court was empowered to hear and determine the objections, with power to recommit the matter to the Commissioners. The right of objection was reserved as to the second or amended report that the Commissioners might make; but here the Legislature determined that the right of reëxamination should end in the County Court, and accordingly the language of the statute is, not that there shall not be any right of appeal from the action of the County Court, but that "such judgment of said County Court as to the premises shall be final and conclusive." The right of appeal or review in this Court is not once alluded to in the entire Act. Had there been any reference to this Court, or to the right of review in a superior Court, contained in the Act, there might be some force in the argument; but, in absence of all such allusion or reference, a construction that would under such language take away the right of appeal is alike strained and unnatural. The judgment in the County Court, rendered upon the second or amended report, is made final and conclusive in that Court; the County Court cannot change or alter it; but there is not a word in the statute, that in terms or by fair implication, does away with the right of review in this Court. Indeed, the next succeeding sentence of this very section unmistakably shows that such was not the intention of the Legislature. The language is:

"And upon the final judgment of said County Court as to the premises, all assessments made and set forth in said report shall, from and after such final judgment, be a lien upon the respective parcels of land. * * * " The Court will observe the entire absence from this most important sentence of all words of reference to show that the final judgment of the County Court mentioned in the preceding sentence was the one that was to become a lien upon the lands. The language of the Legislature is not "and upon

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such final judgment," or "and upon said final judgment of said County Court as to the premises, all assessments made and set forth in said report shall, from and after such final judgment, be a lien upon the respective parcels of land." The absence of any such connecting word or phrase is the more significant when we see that immediately succeeding in the same sentence, where it is intended to make the same identical judgment a lien on the lands in the district, such connecting word is carefully inserted, "from and after such final judgment," the amount of the assessments shall be a lien upon the land charged therewith in the district. Had it been the intention to make the judgment of the County Court, mentioned in the preceding sentence of the section, the one that was to operate as a lien on the lands within the district, the inference is irresistible that the apt expression for that purpose would have been used.

It is scarcely necessary to cite authorities in support of the proposition that the intention of the Legislature must be gathered from the language employed in the statute, and that in endeavoring to ascertain the intention of the law makers effect must be accorded to every word used in the statute. (*Bourland v. Hildreth*, 26 Cal. 230.)

We submit, then, that there is nothing in the statute doing away with the right of appeal.

Section three hundred and fifty-nine of the Practice Act provides that an appeal may be taken from the County Court to this Court, "in an action wherein the legality of any tax, imposts, assessment, toll, or municipal fine is in question; and in any special case within the appellate jurisdiction of the Supreme Court, over which the Legislature may require the County Court to exercise jurisdiction."

It would seem scarcely necessary to make an argument in support of the right of appeal in the presence of such language as this. Is it in regard to the amount involved? Judgment for nine thousand six hundred dollars has been

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rendered against Houghton, and in this regard there can be no doubt of the right of appeal.

Is it in respect to the legality of a tax or assessment? The statutes under which the whole proceedings were had conclusively show that they were taken under one or the other. It is unquestionably in exercise of the power to assess that the judgments were entered against the lands of the respective parties. Argument cannot make this clearer. Is not the legality of these assessments here directly involved? Is not their legality affirmed on the one hand and denied on the other? Most unquestionably. Could their legality be any more directly involved? Were an action instituted for the direct purpose of impeaching their legality, would the question be any more directly involved? Assuredly not. The very substratum of our appeal, the entire gravamen of our complaint, is, that these assessments are illegal. We challenge now, as we have done always, the legality of these assessments. Clearly the case comes directly within the language of the statute. (As to what is an assessment, see *Taylor v. Palmer*, 81 Cal. 253; *Baudry v. Valdez*, 32 Cal. 279; *Hendricks v. Crowley*, 31 Cal. 471.)

In any action that may hereafter be brought upon the judgment rendered upon this assessment, the only defense that can possibly be made will be, not the legality of the assessment itself, but the jurisdiction of the Court that rendered the judgment, or that of payment. It follows, therefore, that the legality of the assessment is necessarily and directly involved in the present proceedings. (*Mecham v. McKay*, 37 Cal. 164; *Collins v. Butler*, 14 Cal. 228; *Barnum v. Reynolds*, 38 Cal. 646; *Sullivan v. Triumfo M. Co.*, 39 Cal. 465; *Bernal v. Lynch*, 36 Cal. 143; *People v. Doe G.*, 36 Cal. 222.) But take a more comprehensive view of the nature of these proceedings, and the provisions of the

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Constitution upon the subject. These proceedings, in effect, amount to an order upon all the property owners within the designated section of the city to show cause, if any they can, in the County Court, why an assessment of thousands of dollars should not be imposed upon them. They appear. They challenge the legality of the action of the Court, and the validity of the attempted assessment. They are overruled, and appeal to this Court. Is not this precisely the thing, the right to review the legality of which in this Court it was the manifest intention of the Constitution to insure to them? What is the meaning of the phrase "in all cases," as it occurs in section four of Article VI of the State Constitution? The Constitution of the United States contains, substantially, the same expression: "The judicial power shall extend to all cases in law and equity." (Const. Art. III, Sec. 2.) In *Osborn v. U. S. Bank*, 9 Wheat. 819, the Court, in speaking upon this point, says: "This clause enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case; and the Constitution declares that the judicial power shall extend to all cases arising under the Constitution, laws, and treaties of the United States." (2 Story Const. Secs. 1646-1858.) In *Weston v. City Council of Charleston*, 2 Pat. 449, the Court held an application for a writ of prohibition to be a case; and in *Ex Parte Mulligan*, 4 Wall. 113, the Court held an application for a writ of habeas corpus to be a case. A case is a legal controversy prosecuted according to the forms of law. Thus insolvency proceedings are deemed cases. (*People v. Shephard*, 28 Cal. 117.) So with contested elections. (*Knowles v. Yates*, 31 Cal. 82; see, also, *Lake Merced Water*

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Co. v. Cowles, 31 Cal. 215; *Day v. Jones*, 31 Cal. 263; *Winter v. Fitzpatrick*, 35 Cal. 273; *Morley v. Elkins*, 37 Cal. 456; *Will v. Sinkwitz*, 39 Cal. 573; *Briggs v. McCullough*, 36 Cal. 549; *The Beale Street Case*, 39 Cal. 498.) So, likewise, in cases of condemnation. (*Sacramento, Placer, and Nevada R. R. v. Harlan*, 24 Cal. 289; *San Francisco and San Jose R. R. v. Mahoney*, 29 Cal. 115; *Gilmer v. Lime Point*, 18 Cal. 229; *s. c.* 19 *ib.* 47; *Contra Costa R. R. Co. v. Moss*, 23 Cal. 325.)

We here beg to call the attention of the Court to the fact that neither the general railroad law, nor the Act authorizing condemnation of Lime Point, gave any express right of appeal, nor was such right expressly conferred in the Act authorizing water companies to condemn private land, yet in all of those cases this Court has affirmed the right of appeal. (Stats. 1859, p. 26; Stats. 1861, pp. 619-622; Stats. 1858, p. 219; Stats. 1853, p. 172; *Heyneman v. Blake*, 19 Cal. 580; *Spring Valley Water Works v. San Francisco*, 23 Cal. 434.)

But to proceed with the argument. The case at bar is, therefore, a case—it is a legal controversy, prosecuted according to the forms of law. Is it a case at law? Most unquestionably; all cases are such that do not fall within the domain of equity or admiralty. Does it not involve the requisite amount to come within the jurisdiction of this Court in that particular? Judgment for nine thousand six hundred dollars has been rendered against the lands of Houghton. But were it otherwise, this is a case in which the jurisdiction of this Court does not depend upon the question of amount—it is a case involving the legality of a tax, an assessment. (*People v. Mier*, 24 Cal. 61, 66, 71, 72; *Bell v. Crippen*, 28 Cal. 328; *Mahlsted v. Blanc*, 34 Cal. 579.)

This case, therefore, comes within the letter of the Constitution, and that instrument emphatically declares that

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this Court shall have appellate jurisdiction. This jurisdiction it is not in the power of the Legislature to take away — legislation may prescribe the mode of its exercise, but cannot take it away. (*Haight v. Gay*, 8 Cal. 300.) Nor does the fact that the proceedings are somewhat special in their character affect the jurisdiction of the Court. If the constitutional elements essential to the appellate jurisdiction of this Court exist, it is not material whether the proceedings be special or otherwise. If the sum involved be of the requisite amount, if the proceeding partake of the character of a suit in equity, or if it involve the legality of a tax, impost, assessment, toll, or municipal fine, it matters not what the nature or character of the proceedings in other respects may be, this Court, in the language of the Constitution, "shall have appellate jurisdiction." The purpose of that instrument was, in all cases in which questions of the grave and important character usually arising where the amount is large, the suit is of an equitable nature, or the legality of any tax, impost, assessment, toll, or municipal fine is involved, to reserve to the parties the right of appeal to this Court, regardless of the mere form in which the case might be presented. (*Knowles v. Yeates*, 31 Cal. 82.)

"The primary meaning of the word 'case,' according to lexicographers, is, 'cause.' When applied to legal proceedings it imports a state of facts which furnishes occasion for the exercise of the jurisdiction of a Court of justice. In this, its generic sense, the word includes all cases, special or otherwise." (*Kundolff v. Thalheimer*, 2 Kern. 596; *Benson v. Cromwell*, 26 Barb. 221; *Ricks v. Reed*, 19 Cal. 572-574; *McNeil v. Borland*, 23 Cal. 148; *Arnold v. Rees*, 18 N. Y. 58.) The qualifying expression, "at law," is used in contradistinction to equity, and should not be so construed as to limit the jurisdiction of this Court to actions purely *inter partes*. Such a construction would be inadmissible, because, opposed to the received practical construction, would

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do violence to the letter and spirit of the text of the Constitution, and strip this Court of all its usefulness. (*People v. Mier*, 24 Cal. 66.)

In regard to the material cases cited in support of the motion, we beg to make but a few remarks. As to the New York cases: The Constitution, of 1846, of New York is entirely unlike ours in its distribution of judicial power. The first section of the sixth article of that Constitution creates a court for the trial of impeachments; the second provides for the creation of the Court of Appeals, but does not define its jurisdiction; the third, that there shall be a Supreme Court, having general jurisdiction in law and equity; the fourth, for the creation of Supreme Court districts; the fifth, that the Legislature shall have the same power to alter and regulate jurisdiction and proceedings in law and equity, as they have heretofore possessed; the fourteenth, among other things, that the Legislature may confer equity jurisdiction upon the County Judge; and the twenty-first section declares that the Legislature may authorize the judgments, decrees, and decisions of any local inferior Court of record of original jurisdiction, established in a city, to be removed for review directly into the Court of Appeals. (American Constitutions, 144, 145—Constitution of New York.) These are its material provisions upon the subject of the jurisdiction of the judiciary, and the Court will at once see that the entire matter is left in the power of the Legislature to define and regulate. Unlike our Constitution, that of New York made no specific enumeration of the jurisdiction of its Courts, and, of course, the right of appeal there depended not upon the Constitution, but upon the statute expressly conferring it. Such was the Constitution of New York in force at the time the cases cited were decided.

Bearing this in mind, let us consider those cases.

In *McAllister v. The Albion Plank Road Company*, 6 Seld. 354, the statute authorized the original application to

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be made to the County Court, and allowed an appeal from its judgment to the Supreme Court, and declared that the judgment of the Court upon the appeal "shall be final and conclusive in the matter." Upon this case we remark that there was no constitutional right of appeal, and the statute expressly providing for our appeal, and declaring the judgment rendered upon that appeal "final and conclusive of the matter," clearly showed the intention of the Legislature not to allow of any further appeal. In our Act of the Legislature the word appeal does not once occur, and there is nothing from which to infer an intention on the part of the Legislature to take it away if it existed.

In the *New York Central R. R. Co. v. Marvin*, 1 Kern. 278, the statute authorized an appeal from the appraisal of the Commissioners to the special or general term of the Supreme Court, and empowered the Court, in its discretion, to recommit the matter to the Commissioners, but the second report of the Commissioners was declared "final and conclusive." The Court was not allowed to alter or interfere with the second report—the statute made it final and conclusive. Under the laws of New York an appeal would lie from the judgment of the general term, but not from the special term of the Supreme Court, to the Court of Appeals; and as the party might, at his election, appeal from the first appraisal to the special or general term of the Supreme Court, the Court of Appeals held that it was evidence of the intention not to allow an appeal to that Court at all, inasmuch as none was expressly provided for—that should it uphold the right of appeal from the general term, it would still be in the power of the party by appealing to the special term, from which no further appeal would lie in any case to cut off the right of appeal to the Court of Appeals, and therefore the right of such appeal at all was inadmissible. How widely different from the statute in the case at bar, where no provision is

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in terms made for an appeal, and where there is nothing from which to show any intent to take the right away.

The Court of Appeals further dwell upon the fact that the statute indicated an entire system for ascertaining the value of the lands taken. In the statute here in question there is no such system. In *Mahoney v. The San Francisco and San Jose R. R. Co.*, 29 Cal. 115, this last argument was urged upon the Court against the right of review, and this very case, and others cited in support of it, but the Court overruled it, and maintained the right of review. The same observations apply to the other New York cases cited. The same remarks apply to the Constitution of the United States that have been made in regard to that of New York. Appellate jurisdiction is conferred upon the Supreme Court of the United States, "both as to law and fact, with such exceptions and under such regulations as the Congress shall make." (Const. U. S., Art. III, Sec. 2, Subd. 2.)

The Act of Congress involved in the *U. S. v. Nourse*, 6 Pet. 493, allowed no appeal, nor had the Supreme Court any appellate jurisdiction in absence of such express allowance. Hence the case is not in point. (*U. S. v. Circuit Judges*, 3 Wall. 676, 677, 678.)

In conclusion, we insist that the law does not favor repeal by implication. By implication alone are we sought to be deprived of the right of appeal. By implication alone is the jurisdiction of this Court sought to be abridged. This is inadmissible; yet were the implication as strong as the rule requires, we submit that under the Constitution we cannot be divested of our right of appeal, nor can the appellate jurisdiction of this Court be abridged. (*Crosley v. Patch*, 18 Cal. 442.)

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James H. Hardy, Jos. M. Nougues, and R. D. Sawyer, for Respondent.

The judgment of the County Court in the premises is final and conclusive, and no appeal is allowed therefrom by law. It is not questioned that this is a special case, or special proceeding; or that the County Court had jurisdiction of the entire matters contained in the Acts of the Legislature. The appeal is from the orders and the judgment of the Court, "made and entered in the said proceedings." Being a special case or proceeding (Stats. 1869-70, p. 42; *Saunders v. Haynes*, 13 Cal. 152; *Hicks v. Reed*, 19 Cal. 574, and cases there cited), it is a "special creation of the statute," and within the legitimate scope and power of the Legislature to vest the County Court with jurisdiction, absolute and final, and independent of review by the Supreme Court.

The language of the statute is, "such judgment of said County Court as to the premises shall be final and conclusive." The proper interpretation to be given to the words "final judgment" is, that it is such a judgment as at once puts an end to the proceeding.

In the case of *McAllister et al., Commissioners v. The Albion Plank Road Company*, 10 N. Y. (6 Seld. 353), the language used in the statute under which the proceedings originated and culminated was, "and such judgment shall be final and conclusive." The Court of Appeals, on motion to dismiss the appeal on the ground that the order of the Supreme Court was not appealable, say:

"We are of the opinion that it was the intention of the Legislature that the decision of the Supreme Court upon appeal from the County Court, under the plank road Acts, should be an end of the controversy, and that no appeal will lie to this Court therefrom. The Act of 1847 declares that such decision shall be final in the matter, and the Act of

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1851 that it shall be final and conclusiva. It is not perceived how any effect can be given to these expressions unless it be to take away and prevent any further appeal or review. They certainly add nothing to the force or validity of the decision, which would be just as binding and operative, in all respects, without as with them, and it will hardly do, after they have been inserted in the original Act and repeated in the amendment, to treat them as redundant and meaning nothing."

In the case of *New York Central Railroad Company v. Marvin*, 11 N. Y. (1 Kern. 277), an appeal was taken from a judgment of the Supreme Court affirming the report of Commissioners. The Act of the Legislature in reference to the subject matter of the proceeding provided that the judgment of the Supreme Court should be "final and conclusive." The Court of Appeals granted the motion to dismiss, and stated that "the whole proceeding is a special creation of the statute, and seems designed to form a complete system of itself, entirely independent of the general provision of the statute authorizing appeals to this Court."

In the case at bar, "the proceeding is a special creation of statute;" there is no general law authorizing the proceeding, and it undoubtedly was "designed to form a complete system of itself;" and, there being no appeal provided for, no machinery by which it can be brought to the Supreme Court, "it is entirely independent of the general provision of the statute authorizing appeals." (*In the Matter of Extending Canal and Widening Walker Streets*, 12 N. Y., 2 Kern. 406; *King et al. v. Mayor of New York*, 36 N. Y., 9 Tif. 182; *New York Central Railroad Company v. Marvin*, 1 Kern. 276.)

If the general provisions of the Practice Act apply, why have not the parties appellant the right to move for a new

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trial in the County Court. Under what view of the law are they debarred from this right? And if they have failed to exercise it, how can they hope for remedy by appeal?

We submit that the proceeding in question is not governed by any of the requirements or provisions of the Practice Act, but that it is a special statutory proceeding; and, in the absence of express legislative enactment, the statute regulating appeals has no application. (*The Bowery Extension Case*, 2 Abb. Pr. 368, 370; opinion of PEABODY, J.) In the matter of contempts, the action of the Court cannot be reviewed. (*Cohen v. Jones*, 5 Cal. 494.) And if, in contested election cases, the statute did not specially authorize appeals, it would be questionable if this Court would consider them.

This is not a case at law involving the legality of a tax or assessment.

The Practice Act, section one, provides: "That there shall be in this State but one form of civil actions for the enforcement or protection of private rights and the redress or prevention of private wrongs." "Sec. 2. In such action the party complaining shall be known as the plaintiff, and the adverse party as the defendant." The word "case" means an action, or suit at law, or in equity. (Burrill's Law Dictionary, 185; Bouvier's Law Dictionary, 243; 1 Wheat. 352; 3 Story on Const. 507; 9 Wheat. 819; 9 Peters, 223.) Does it need argument or illustration to prove that this special proceeding is not an action, or suit at law, or in equity? We imagine not. Is it in the form recognized in the prosecution of suits at law or in equity? Who has filed the complaint? No one; because there has been no complaint filed. No summons or process was issued under the seal of the Court, or hand of the Clerk of the county. Who, may we be permitted to inquire, was the party plaintiff, or known as the party plaintiff? and what persons stood in the relation of parties defendant? There is not in the

whole proceeding any of the essential prerequisites of an action at law or in equity. It is special proceeding. (*Parsons v. Tuolumne Water Co.*, 5 Cal. 43; *Hicks v. Reed*, 19 Cal. 574; *McNiel v. Borland*, 23 Cal. 147.) Before the legality of a tax or assessment can be involved, there must be a case at law; or when equitable relief is asked, a case in equity. (*Bell v. Crippen*, 28 Cal. 327.) In what manner can be said the legality of a tax, etc., is involved in this proceeding at this time, and in reference particularly to the respective positions of parties appellant? No complaint is made as to the judgment rendered against the appellant's property. The illegality of an assessment, or tax, must be founded upon want of constitutional power to create, and nonfulfillment of the requirements of the provisions of the statute authorizing the levy; and in either contingency, the party seeking to evade payment must plead, and show to the Court in what the illegality of the tax consists.

By the Court, CROCKETT, J.:

The motion to dismiss the appeal in this case must be controlled in its decision by a solution of the following questions:

First — Does the special Act of February 1st, 1870 (Stats. 1869-70, p. 41), by necessary implication, or reasonable intendment, prohibit an appeal in this case?

Second — If not, does section three hundred and fifty-nine of the code authorize an appeal in this class of cases?

If the first question shall be answered in the affirmative, it may be necessary to consider the further question, whether the Constitution has conferred upon this Court appellate jurisdiction in cases of this character, in which event the Legislature would not have the power to take it away, or to prohibit us from exercising it.

In considering the first question it is our duty so to inter-

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pret the Act of February 1st, 1870, if practicable, as to uphold the right of appeal; for it is not lightly to be assumed that the Legislature intended to deny a right of appeal in a case involving so large an amount and affecting the interests of so many persons. If, therefore, the statute is capable of being so construed as to maintain the right of appeal without violating the well established rules for construing statutes, I should deem it to be my duty to give it that construction.

On the other hand, if the Legislature has clearly expressed its intention that there shall be no appeal in this case, the Courts have no right to defeat this manifest intention by torturing or disregarding the language of the statute. One of the rules for construing statutes is, that the words are to be taken in their usual and popular sense, unless they have a well understood technical meaning; and another rule is, that, if practicable, effect shall be given to all the words and provisions of the statute.

It is not to be presumed that the Legislature employed language which was intended to be meaningless, and to perform no useful office. Section thirteen of the Act under consideration, after providing for a publication of notice of the filing of the report of the Commissioners, provides that within twenty days after the publication of the notice, any person interested may file in the County Court objections to the report; and if no such objections are filed within that period, the report "shall be final and conclusive on all parties interested; and all assessments made and set forth in said report shall be a lien upon the respective parcels of land and property in said district upon which said assessments are charged by said report."

If the proceedings had stopped here, and no objections to the report had been filed within the twenty days, it is clear that all parties would have been concluded, and the report could not have been reviewed, either by the County Court

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or on appeal. The meaning of the words "final and conclusive," as here employed, is unmistakable. But this section further provides that if objections are filed within the twenty days, the County Court shall proceed to hear them, and may either set aside or modify the report, or may recommit it to the Commissioners with instructions, in which latter event a new, or amended report, shall be made; on the coming in of which "the same right of objection by any party interested shall exist, as to said second, or amended report, as hereinbefore provided as to said first report."

But the power of the County Court over the second report is limited to the rendering of "a judgment as to said report, or as to any of the matters therein contained, and such judgment of said County Court, as to the premises, shall be final and conclusive; and upon the final judgment of said County Court, as to the premises, all assessments made and set forth in said report shall, from and after said final judgment, be a lien upon the respective lands and property in the district upon which said assessments are charged by said report."

On the hearing of the objections to the second report the County Court could either confirm it or set it aside entirely, and perhaps might modify it, but had no power to recommit it with instructions for another report. This is perfectly obvious, from the fact that whilst the power to recommit the first report is expressly given, the statute is not only silent in this respect as to the second report, but limits the power of the Court to the rendering of "a judgment as to said report, or as to any of the matters therein contained." If the second report had been set aside by the judgment of the Court, the proceedings for the assessment must have been commenced *de novo*. Nor could there have been any appeal from the judgment. The objecting parties could not have appealed from a judgment in their favor relieving them entirely from the assessment, and the city and county has no interest in the question of the assessments. The judgment,

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in the language of the statute, would have been "final and conclusive." But the Court confirmed the second report, and the appellant, Houghton, one of the objectors, has appealed. It is urged on his behalf, that when the Act of February 1st, 1870, declares that the judgment of the County Court on the second report shall be "final and conclusive," it was not thereby intended that it should be absolutely final and conclusive for all purposes, so as to prohibit an appeal, but only that it should be the final action of the County Court in the matter; that it should conclude and terminate the proceedings before that tribunal so completely that it could take no further step in them, not even for the purpose of hearing and deciding an application for a new trial of the objections to the report. But I think it could not have been the intention of the Legislature to deny to the County Court the power to hear and decide a motion for a new trial. If the objectors had discovered, for the first time, after the trial, that the Commissioners had been bribed, and had made a fraudulent report, or new and material evidence, showing the report to be clearly erroneous, or if the objectors and their counsel had been prevented by inevitable accident from attending the trial and offering evidence in support of the objections, I cannot attribute to the Legislature the intention to prohibit them by statute from setting up these facts on a motion for a new trial. In my opinion, the provision as to the final and conclusive effect of the judgment has no reference whatever to a motion for a new trial, and I have no doubt whatever that it was competent for the County Court to hear and decide a motion of that character, and if the motion was granted to retry the cause. What, then, does the statute mean when it declares that the judgment of the County Court on the second report shall be "*final and conclusive*?" It is apparent that if these words had been wholly omitted the judgment would have been "*final*" in that Court. It would

have ended the proceeding before that tribunal, which had no power to recommit the report with a view to further action in the matter. When it rendered a judgment on the second report its power was exhausted, except to grant a new trial, which the statute was not intended to prohibit. The judgment, therefore, was "*final*" in that Court, even though the Act had not so pronounced it. But the statute provides that it shall not only be final but "*conclusive*." On whom, and for what purposes? In that Court, being a final judgment, it was "*conclusive*," *proprio vigore*, on the Court and the parties, so long as it remained in force; and it would have been a work of supererogation for the Legislature to declare that a judgment should be final and conclusive in that Court, when it would have been equally so without the declaration. To give to these words so limited an effect would be to impute to the Legislature the folly of incorporating into the statute a meaningless phrase, without force or effect, and accomplishing nothing. This would be to disregard one of the most thoroughly established rules for construing statutes. It is our duty to give effect, if practicable, to every portion of the statute; and we cannot presume that, in declaring the final and conclusive effect of the judgment, the Legislature intended to announce only what would have been equally apparent without that clause. We must seek for some other and more effective meaning in the phrase "*final and conclusive*," and none other has been suggested or occurs to me than that the judgment shall be final and conclusive for all purposes whatsoever, and shall end the litigation. This, in effect, is to deny an appeal from the judgment, and to make it absolutely conclusive on the parties. It is not our province to discuss the wisdom and policy of such legislation. This belongs solely to the legislative department, whose enactments it is our duty to expound, in accordance with the expressed will of the Legislature. In support of this construction of the statute I refer to the

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following adjudged cases, which, though founded on statutes perhaps not strictly analogous to ours, nevertheless strongly support the views here expressed. (*McAllister et al., Commissioners, v. Albion Plank Road Company*, 10 N. Y., 6 Seld. 353; *King et al. v. Mayor of New York*, 36 N. Y., 9 Tif. 182; *New York Central Railroad Company v. Marvin*, 11 N. Y., 1 Kern. 277; *Matter of extending Canal and Widening Walker Streets*, 12 N. Y., 2 Kern. 406; *Matter of Widening Wall Street*, 17 Barb. 617.)

But it is claimed by the appellant that, if the statute be construed as prohibiting an appeal, it is, *pro tanto*, unconstitutional, inasmuch as the Constitution confers upon this Court appellate jurisdiction in this class of cases. The Constitution, Art. VI section four, confers upon this Court appellate jurisdiction "in all cases in equity; also, in all cases at law which involve the title or possession of real estate, or the legality of any tax, impost, assessment, toll, or municipal fine." Section six confers upon the District Courts *original* jurisdiction in all these cases, in precisely the same language; and section eight confers upon the County Courts *original* jurisdiction, "of all such special cases and proceedings as are not otherwise provided for." The argument is that this is a "case at law," which involves the legality of an assessment, in the true sense of Article VI, section four, of the Constitution, and not a "special proceeding," in the proper sense of section eight. But it is too plain to admit of debate that this is not a "case at law," within the meaning of section four, and that it is a "special proceeding," within section eight, of which the County Court has original jurisdiction. From an early period in the history of the State down to the present time proceedings for the opening, grading, extension, paving, and alteration of streets, and the assessment of damages caused thereby, have been treated by the Legislature and the Courts as "special proceedings," and not as "cases at law." This Court, in numerous de-

cisions, has acquiesced in and directly affirmed this view of these cases; and the doctrine has become too firmly established to be open to discussion at this late day. This, therefore, must be deemed a "special proceeding," of which the County Court could properly take jurisdiction, and not a "case at law," involving the legality of an assessment, of which the Constitution confers upon this Court appellate jurisdiction. But if it were otherwise, and if this were to be deemed a case at law, involving the legality of an assessment, I do not perceive how it would benefit the appellant in respect to the damages which he claims. For, if this be a case of that character, it was not competent for the Legislature to confer jurisdiction of it upon the County Court, inasmuch as the Constitution, in express terms, confers upon the District Courts original jurisdiction in that class of cases; and it is well settled that the jurisdiction in such cases is exclusive, unless there be something in the instrument evincing a contrary intent. If the appellant had succeeded in convincing us that this is a case at law, involving the legality of an assessment, we would have been constrained to hold that the Act conferring jurisdiction on the County Court was unconstitutional and void, and the whole machinery for enforcing the assessment would have fallen with the Act.

If the appellant and other property owners have suffered the grievous damage of which they complain, from reducing the grade of Second street, it has doubtless resulted from faulty legislation; but in the present condition of the case, their only resource would appear to be an appeal to the Legislature for the appropriate relief.

Appeal dismissed.

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late jurisdiction of the Court, as defined by the Constitution. Should we even assume, therefore, that the case at bar is included within the expression of section three hundred and fifty-nine of the Practice Act; that it involves the "*legality of an assessment*;" or that it is "*a special case within the appellate jurisdiction of the Supreme Court*;" and so, in the one way or the other, the subject of an appeal to this Court, if respect were had only to section three hundred and fifty-nine itself; yet, as we hold, that that section of the Practice Act has become inoperative as to the judgment of the County Court now in question (because of the provisions of the Acts of 1868 and 1870 *specially* applicable to that judgment, and declaring it conclusive), it follows that the appeal taken can derive no support from section three hundred and fifty-nine; and there is no other *statute* brought to our attention, which is supposed or claimed to give an appeal in the case at bar.

If, then, it be true that an appeal in the case at bar must exist, if at all, by reason of section three hundred and fifty-nine, and if that section has, *as to this case*, been itself repealed, or rendered inoperative by the statutes of 1868 and 1870, it results that the appeal must fall with the statute, upon which alone it rested for support. Irrespective, however, of the question of procedure involved, I come now to inquire whether or not the case under consideration be, in itself, one which is subject to the appellate power of this Court, were an appeal or writ of error provided for that purpose. If we are to look to the Constitution alone as being the source of the appellate jurisdiction of the Court, we find that it extends that jurisdiction to *all cases in equity*; *not to all cases at law*, but to *such of them only* as involve the title or possession of real estate, or the legality of a tax, toll, impost, assessment, or municipal fine, or in which the value of the property in controversy exceeds a named sum of money, etc. (Const., Art. VI, Sec. 4.) It will be seen, upon examination of the Constitution,

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that the cases to which the appellate power extends are carefully defined, and that (with the exception of cases arising in the Probate Court, and criminal cases amounting to felony), no case is, by its terms, subject to review here in the exercise of our appellate power, unless it be a *case in equity*, or a *case at law* of a *defined character*.

It is argued by the appellant that the case is a "case at law," one involving the legality of an assessment, and, therefore, within the jurisdiction of this Court to hear and determine. But even if it can be said to involve the legality of an assessment, I think it clear that it is not a case at law within the intent of the Constitution. It is said that it is a legal controversy, prosecuted according to the forms of law, and that, therefore, it is a case at law; but though it be such controversy, and so prosecuted, it does not follow that it is a case at law in the sense of not being a *special case*. A special case may be said to be a legal controversy, prosecuted according to the forms of law, and yet the Constitution itself has distinctly provided that the jurisdiction in *special* cases shall be in the County Court, unless otherwise provided for. A special case can no more be said to be a case at law, in a constitutional sense, merely because it is a legal controversy prosecuted according to the forms of law, than it could be said to be a case in equity, because its solution might involve a consideration of the principles of equity, or the judicial proceedings provided for its determination were similar in form to those usually observed in Courts of equity.

But the case at bar *does not* belong to either one of the two grand divisions of civil cases mentioned in the Constitution as subject to be reviewed here, in the exercise of appellate power, but *does* unmistakably belong to another and well defined class of cases which are accustomed to be principally designated and distinguished from the others by the fact that they are "not cases for which the Courts of general jurisdiction had always supplied a remedy." (*Parson v. Tuol-*

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umne County Water Company, 5 Cal. 43.). Special cases are special proceedings characteristically differing from ordinary suits at the common law (*Jackson v. Day*, 15 Cal. 91); special proceedings do not proceed according to the course of the common law; they give new rights and afford new remedies (*Saunders v. Haynes*, 18 Cal. 145), etc. This distinction between "*cases at law*" and "*special cases*" was already established and enforced by this Court when, in 1862, the Constitution was amended, and "*cases at law*" and "*special cases*" again provided for; "the County Courts shall have original jurisdiction * * * of all such special cases and proceedings as are not otherwise provided for" (Art. VI, Sec. 8), is the language of the constitutional amendment of 1862. I can attribute to this expression no other meaning than that which, as we have already seen, had been theretofore fixed to the term "*special cases*" in this Court before the amendment of 1862 was adopted; and it results that "*special cases*," that is, cases which grow out of special proceedings authorized by statute creating rights not theretofore existing, and providing remedies not accustomed to be administered by Courts of law or equity as such, are not cases at law within the appellate jurisdiction of this Court, as defined by the Constitution, even though they may involve questions or values which, *if involved in a case at law*, would constitute it one to be reviewed here on appeal or writ of error.

The case at bar not being a case in equity nor a case at law, within the constitutional designation, is not within the appellate jurisdiction of this Court as defined by the Constitution. Had the Acts of 1868 and 1870, out of which this controversy has arisen, provided that an appeal from the judgment in question might be taken to this Court, a question would then have arisen as to whether or not it is competent for the Legislature to add to the class of cases over which the Constitution has declared that our appellate power

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is to be exercised, another and distinct class not enumerated as such in the Constitution, but omitted, it may be, *ex industria*, therefrom. But as the case here does not present that question, I am not to be understood as expressing any opinion upon that point.

I am of opinion that the appeal must be dismissed.

TEMPLE, J., concurring specially.

I am inclined to agree with Mr. Justice CROCKETT in his construction of the statute under which the proceedings were had in this case. The proceeding is merely to levy an assessment to provide certain revenues for the Government. In such matters it is not usual to permit an appeal to the Courts while the proceedings are *in fieri*. The right to supervise the officers whose duty it is to make the assessment would, more naturally, perhaps have fallen to the Board of Supervisors, as in the case of other assessments. It is, however, a proceeding of the same nature as though it had been had in the Board of Supervisors. It is a proceeding in the exercise of the sovereign power of taxation. As I have said, these matters are usually conducted outside of the Courts, and the regularity of the acts of the officers is usually tested in collecting or resisting the collection of taxes. The mere fact that the County Court was allowed to act as a supervising Board, does not, therefore, in my opinion, raise the presumption that it was intended that there should be an appeal. It is final and conclusive as an assessment, and is the end of that proceeding. It then becomes an assessment and the lien immediately attaches to the land.

I agree with the Chief Justice that this is not a "case at law," and, therefore, it is not a case of which the Constitution has vested this Court with appellate jurisdiction in terms.

Opinion of Temple, J., specially concurring.

In *Knowles v. Yeates*, 31 Cal. 82, this Court held that the Constitution gives the Court appellate jurisdiction in special cases. They rely, to some extent, upon *Conant v. Conant*, 10 Cal. 252. I have never been satisfied with the reasoning in *Knowles v. Yeates*, and although the Court have often entertained jurisdiction in similar cases, where the question has not been raised, I do not understand that it has been expressly affirmed, except in *Day v. Jones*, 31 Cal. 261, decided at the same term.

The case of *Conant v. Conant* was an action of divorce, in which no rights of property were involved. It was contended that the Supreme Court had no jurisdiction, because it did not fall within any of the classes mentioned in section four, Article VI, of the Constitution, as it then stood. It conferred upon the Supreme Court appellate jurisdiction "in all cases where the matter in dispute exceeds two hundred dollars," and where the legality of any tax, toll, etc., was in question. The Court say, in effect, that this was not intended to define, and, therefore, to restrict the jurisdiction of the Court, but merely to limit that jurisdiction in cases capable of pecuniary computation. No such construction can possibly be given to the language of the Constitution as amended. That section now reads as follows: "The Supreme Court shall have appellate jurisdiction in all cases in equity; also, in all cases at law which involve the title or possession of real estate, or the legality of any tax, impost, assessment, toll, or municipal fine, or in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars; also, in all cases arising in the Probate Courts; and also, in all criminal cases amounting to felony, on questions of law alone. The Court shall also have power to issue writs of mandamus, certiorari, prohibition, and habeas corpus, and also all writs necessary or proper to the complete exercise of its appellate jurisdiction. Each of the Justices shall have power to issue

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writs of habeas corpus to any part of the State, upon petition on behalf of any person held in actual custody, and may make such writs returnable before himself, or the Supreme Court, or before any District Court, or any County Court, in the State, or before any Judge of said Courts."

The qualifying clause cannot possibly apply to "cases in equity," nor to cases arising in Probate Courts. If the doctrine of *Knowles v. Yeates* be correct, these provisions in the Constitution are perfectly meaningless. Cases in equity were certainly not mentioned for the purpose of limiting the jurisdiction of this Court to such cases as involved an amount greater than three hundred dollars. The rules by which this section of the Constitution must be construed are familiar and obvious. In the absence of circumstances which indicate a different rule of construction, the enumeration of the cases to which the appellate jurisdiction of the Court extends excludes others. In *Knowles v. Yeates* the Court did not by "rational conjecture" or otherwise, in my opinion, supply the presumed intention of the framers of that instrument, but they have stricken out words which have an obvious meaning, and which, in an important matter, affect the character of the instrument.

The very able Judge who wrote the opinion in *Knowles v. Yeates* evidently felt that the case of *Conant v. Conant* was not altogether in point, for he has fortified his position by a lengthy and eloquent argument, but from the reasoning of which I differ *toto celo*. A provision of the Constitution, which I think clear beyond the possibility of doubt, is set aside, partly because it was thought that a free people, in forming a Government for their protection and to secure to themselves the blessings of liberty, must have intended to provide an appeal in cases of grave concern to the Court of highest authority. An appeal to this Court, of course, affords

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a great degree of protection to the citizen, but certainly the framers of the Constitution have shown that they did not consider such right essential to secure the liberties or property of citizens. There is no appeal in criminal cases not amounting to felony, and yet the citizen may be fined to the extent of thousands of dollars, and kept for years in jail under a conviction for a misdemeanor.

If it be admitted that the Constitution fails to express the full meaning of the people in adopting it, and we are left to "rational conjecture" to supply what has been omitted, it does not seem to me reasonable to suppose that it was intended that an appeal to this Court should be allowed in all special proceedings. In a matter like the present proceeding the whole history of the Government is opposed to the idea that an appeal is allowed. It is a mere executive proceeding to levy a tax. In such proceedings the exigencies of the Government do not permit the delays which would be inevitable if the case could drag its slow length through the Courts. It is a mere administrative proceeding, in which the action of the officers may be reviewed on certiorari, if they exceed their powers. This has been the universal practice in the exercise of the sovereign power of taxation. The powers of the officers must be strictly pursued, or the assessment cannot be collected, and the regularity of these proceedings may ordinarily be questioned collaterally. Now, as the practice of the Government has been that these matters should not be subject to judicial revision, while *in fieri*, there is a strong presumption that no appeal was intended to be allowed, nor is the presumption changed because, on this occasion, the County Court is made to perform the office of a Board of Equalization. If the action of the officers, whose duty it is to make the assessment to raise the taxes by which the Government is supported, could be revised by the Courts in the first instance, as to the correctness of the manner in which valuations were made, and many other things usually

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trusted entirely to their discretion, and the case be subject to the law's delay on appeal from the lowest to the highest Court, the Government would share the fate of many other suitors, and perish, while its case is kept in Court poised on nice points and legal subtleties.

RHODES, C. J., dissenting:

The question presented is, whether an appeal lies to this Court from the judgment of the County Court confirming the report of the Commissioners. The appellate jurisdiction of the Court extends to all "cases" in equity, also to all "cases" at law which involve the title or possession of real estate, or the legality of any tax, etc. The former Constitution conferred upon the Supreme Court appellate jurisdiction in all "cases" where the matter in dispute exceeded two hundred dollars, and when the legality of any tax, etc., was in question. By that Constitution (Art. VI, Sec. 9) original civil jurisdiction was granted to the County Court in such "special cases" as the Legislature might prescribe. The present Constitution (Art. VI, Sec. 8) grants to the County Court original jurisdiction of all such "special cases and proceedings" as are not otherwise provided for; but neither the former nor the present Constitution expressly grants to the Supreme Court jurisdiction of "special cases." Are "special cases" included within the meaning of "cases," as that term is employed in defining the jurisdiction of this Court? I am of the opinion that they are not. If they are, jurisdiction of no special case could be entertained by the County Courts, because as soon as a special case is created by statute, jurisdiction would at once vest in the District Courts, by force of the term "cases," which is employed in the section defining the jurisdiction of the District Courts. "Special cases" would thus be provided for by the Constitution, and none would be left for the

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County Courts. "Special cases," it is held in *Parsons v. Tuolumne*, 5 Cal. 43, "must be confined to such new cases as are the creation of statutes, and the proceedings under which, are unknown to the general framework of Courts of law and equity," and that the term "special cases" was not meant to include any class of cases for which the Courts of general jurisdiction had always supplied a remedy. (*Dorsey v. Barry*, 24 Cal. 449; *Saunders v. Haynes*, 13 Cal. 145.)

The Supreme Court, from an early day, has entertained jurisdiction of special cases. In some of them, the statute under which the proceedings were had provided for an appeal, and in others no mention of an appeal was made. In *Koppikus v. State Capitol Commissioners*, 16 Cal. 248; *Gilmer v. Lime Point*, 18 Cal. 229; *s. c.*, 19 Cal. 47; *Contra Costa Railroad Company v. Moss*, 23 Cal. 323; *Sacramento P. and N. R. R. Co. v. Harlan*, 24 Cal. 334; *Stanford v. Worn*, 27 Cal. 171; *S. F. and S. J. R. R. Co. v. Mahoney*, 29 Cal. 112; *S. F. A., and S. R. R. Co. v. Caldwell*, 31 Cal. 36; *C. P. R. R. Co. v. Pearson*, 35 Cal. 24 — the statutes under which the proceedings in those cases were had not allowing an appeal; and in *S. V. R. R. Co. v. Moffatt*, 6 Cal. 74; *Hyne-man v. Blake*, 19 Cal. 580; *Spring Valley Water Works*, 17 Cal. 132; *s. c.*, 22 Cal. 434; *The Kearny Street Cases*, 32 Cal., and many other cases of a similar character, the statute granted an appeal. In *Knowles v. Yeates*, 31 Cal. 82, which was a contested election case, and which arose under the present Constitution, the jurisdiction of the Court was challenged, but it was held that the Court had jurisdiction — that jurisdiction was conferred by the Constitution, though words of express grant were not formed in that instrument. Much reliance was placed on *Conant v. Conant*, 10 Cal. 252, which was an action for a divorce. The reasoning in the latter case sustained the appellate jurisdiction, which had been entertained from the organization of the Court, in suits for divorce, suits to prevent threatened injuries, suits to deter-

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mine the right to honorary offices, and writs of *quo warranto*, and other actions in which the matter in dispute was not susceptible of a pecuniary measurement, or in which the legality of a tax, toll, impost, or municipal fine was not in question; although such cases did not fall within the classification of actions mentioned in the section conferring appellate jurisdiction, but came within the *general grant* of appellate jurisdiction. The classification of the subject matter of jurisdiction is more complete in the present than in the former Constitution; but it admits of serious doubt whether the words, literally interpreted, will comprehend all cases of the character of those above mentioned, without resorting to a more liberal interpretation of the general words granting appellate jurisdiction — the interpretation adopted in *Conant v. Conant* and *Knowles v. Yeates*.

The position cannot be maintained that the Court has or has not jurisdiction of special cases accordingly as the Legislature in providing for them has or has not allowed an appeal. The jurisdiction of the Court is derived from the Constitution alone, and the Legislature can neither enlarge nor restrict it. When a special case is devised, the question whether this Court has appellate jurisdiction in the matter must be determined by an interpretation of the provisions of the Constitution. In view of the numerous instances in which the Court under both the former and the present Constitution, has entertained jurisdiction of special cases, and of the interpretation of the Constitution adopted in *Conant v. Conant* and in *Knowles v. Yeates*, and the reasoning upon which that interpretation is based, I am of the opinion that the Supreme Court has appellate jurisdiction in "special cases."

It therefore becomes unnecessary, in this case, to determine the meaning and effect of the words "final and conclusive," as applied by the thirteenth section of the Act to the judgment of the County Court. If the purpose was to

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cut off all appeals to this Court, it failed of accomplishment for the want of competent power in the Legislature.

The motion to dismiss the appeal should, in my opinion, be denied.

SPRAGUE, J., dissenting:

The proceedings authorized by the statute of March 30th, 1868, entitled "An Act to authorize the Board of Supervisors of the City and County of San Francisco to modify the grades of certain streets," and the Act of February 1st, 1870, amendatory and supplemental thereto, are special proceedings, dependent for validity entirely upon these statutes in every step of their progress.

The powers and duties of the Board of Supervisors, the Commissioners appointed by such Board, and the Superintendent of Public Streets and Highways, as also the jurisdiction and powers of the County Court in the premises, are confined to and controlled by these special statutes.

This appeal is from the judgment of the County Court affirming the report of the Commissioners appointed by the Board of Supervisors to assess the benefits and damages to each separate lot of land within the limits of the district as defined by the statute, and the only questions as yet presented arise upon a preliminary motion to dismiss the appeal.

Without entering into a discussion of the provisions of the statute, which would be out of place in the decision of this preliminary motion, I deem it sufficient to state that some of the objections filed by the appellant to the second report of the Commissioners did present to the County Court questions involving the validity of the assessment of benefit to his property, as made by such Commissioners. By section eleven of the Act as amended, it is made the duty of the Commissioners to "first ascertain and determine the amount of damages resulting to any property injured or affected by

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said work over and above all benefits, and * * * then proceed to assess the whole amount thereof, together with the amount due for all of said work, and also the costs and expenses of all proceedings had under this Act and the Act of which this is amendatory, including the fees of said Commissioners and of the counsel and clerk employed by said Commissioners, upon the lands and premises benefited by said change of grade, and which lie within the district aforesaid, as near as may be in proportion to the benefit which shall have accrued to such lot."

From the above extract, it will be observed that the Commissioners are first required to "ascertain and determine the amount of damages resulting to any property injured or affected by said work over and above all benefits." This involves an assessment of benefits and damages to each separate lot or parcel of land affected by the modification of grade contemplated by the statute, and to the aggregate excess of damages over benefits, thus ascertained, is to be added the cost and expense of all proceedings had under the Act, including the fees of the Commissioners and of the counsel and clerk employed by the Commissioners, and the aggregate of these several items is the amount which the Commissioners are required to assess upon the lands and premises benefited by said change of grade within the district, as near as may be, in proportion to the benefit which shall have accrued to each lot. Any error, therefore, or departure from the requirements of the statute in determining the aggregate amount to be assessed upon the property benefited, must, of necessity, involve the validity of the assessment upon any specific lot as its proportionate share of the aggregate amount to be assessed. Indeed, every act and duty required of the Commissioners, up to and including their final report, is a step involving the validity of their final assessment of benefits to each separate lot, and any lot owner whose interest is affected by any intermediate or final

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step of the Commissioners, may challenge the legality of their assessment upon the ground of error or non-compliance with the statute in any step of their proceedings, and such challenge would necessarily involve the legality of the final assessment upon each lot as its proportionate share of expenses.

The Legislature, then, having conferred upon the County Court jurisdiction of these special statutory proceedings, and devolved upon it a supervisory control of the acts of the Commissioners in making and returning an assessment, the legality of which is challenged in that Court; and the Constitution of this State having in express terms conferred upon this Court appellate jurisdiction in all cases involving the "legality of any tax, impost, assessment or municipal fine," it would seem that section three hundred and fifty-nine of the Practice Act fully authorized this appeal.

It is, however, claimed that the special statute under which these proceedings were had do not provide for an appeal — on the contrary, in effect, prohibit an appeal from the final judgment of the County Court in the premises. But if the Constitution of the State expressly confers appellate jurisdiction upon this Court of the subject matter involved in the judgment of the County Court, no Act of the Legislature can oust such jurisdiction; and it would require the most direct and unmistakable language in an Act of the Legislature to justify this Court in attributing to that department an intent to divest this Court of jurisdiction in any case or proceeding within its constitutional grant of jurisdiction. The language relied upon as in effect prohibitory of an appeal in the present case, is found in the thirteenth section of the amendatory Act, and, with its context, is as follows: "Within twenty days after the publication of said last mentioned notice, any interested party or parties dissatisfied with the report of said Commissioners, or any part thereof, may file with the Clerk of the County Court of said city and county written objec-

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tions to said report, or any part thereof, setting forth his or their grounds of objections. If no such objections are so filed within said period of twenty days, the report of said Commissioners shall be final and conclusive on all parties interested; and all assessments made and set forth in said report shall be a lien upon the respective parcels of land and property in said district upon which said assessments are charged by said report. But in case any such objections are so filed within said period of twenty days, the County Court of said City and County of San Francisco shall assign a day for the hearing and trial of said objections, and on the day assigned, or on such other day or days to which the same shall be adjourned, said Court shall hear the allegations of the party or parties so objecting, and shall take proof in support of and against said objections, and of said report and the assessments therein, and shall confirm the said report, or may modify the same, or may set the same aside, either in whole or in part, or, in its discretion, may refer the matter back to the same Commissioners with instructions, who shall thereupon proceed as hereinbefore provided, or according to said instructions. Upon the hearing of said objections before said County Court, it shall be competent for any party to introduce evidence, either in support of said objections or the report of said Commissioners; and in case said report should be referred back to said Commissioners by said County Court, then, upon a second report being made by said Commissioners, the same right of objection, by any party interested, shall exist as to said second or amended report as is hereinbefore provided as to said first report; and upon the coming in of said second or amended report (in case there should be any second or amended report), the said County Court shall have power to render a judgment as to said report, or as to any of the matter therein contained, and such judgment of said

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County Court as to the premises shall be final and conclusive. And upon the final judgment of said County Court as to the premises, all assessments made and set forth in said report shall, from and after such final judgment, be a lien upon the respective lands and property in the district upon which said assessments are charged by said report."

It will be observed, by a careful reading of this section, that even after the report of the Commissioners of assessment has first been filed with the Clerk of the County Court, the jurisdiction of the County Court is not invoked and does not attach until, under the notice published by the Clerk of the Court, some party interested in the proceedings has filed with the Clerk of the Court objections to the report of the Commissioners, or some part thereof. Until this is done there is no case in Court, and no occasion for the action of the Court; but when objections to the report are properly filed, there is a case or matter in Court of which the statute requires it to take jurisdiction, the parties to which are substantially the municipal corporation of the City and County of San Francisco, affirmatively proceeding under the statute on the one side, and the persons filing objections to the report of the Commissioners on the other. The issues are made by the report and objections thereto, and the Court is required to proceed to hear the allegations of the parties objecting to the report, and take evidence in support of and against such objections, and of said report and the assessment thereon, and shall confirm said report, or may modify the same, or may set the same aside, either in whole or in part, or, in its discretion, may refer the matter back to the same Commissioners, with instructions, etc.; and, in case such report should be referred back, then, upon a second report being made, the same right of objection by any party interested shall exist as to said second or amended report as to the first report; and, upon the hearing of objections to the second or amended report of the Com-

Points decided.

missioners, the County Court is empowered to render a judgment as to said report, or as to any matter therein contained; and such judgment of the County Court as to the premises shall be final and conclusive. This judgment of the County Court upon the second or amended report of the Commissioners is the final and conclusive act of that Court in the premises, and terminates its power and jurisdiction therein. It has no power to further review the action of the Commissioners, to re-refer any matter to them, or hear further objections, nor in any manner, on motion for new trial or otherwise, to review its own action in the premises.

This, in my judgment, is the extent of the restriction imposed, and the language of the statute should not be construed as prohibiting a review of the final judgment of the County Court in the premises by a Court upon which the Constitution has conferred appellate jurisdiction of the specific matter involved therein, or as repealing by implication a general law authorizing appeals from such judgments.

The motion to dismiss, I think, should be denied.

[No. 2,708.]

JOSEPH S. PAGE v. LOUIS VILHAC.

WHEN DEED WITH AGREEMENT TO SELL BACK NOT A MORTGAGE.—Where Page conveyed land to Vilhac on December 12th, 1864, by deed absolute on its face, in consideration of Vilhac's satisfying a mortgage for two thousand five hundred and twenty-two dollars, which he held against Page upon the property, and paying off a previous mortgage for five thousand two hundred and fifty-five dollars, held by a third party on the same property, and at the same time Vilhac gave Page a contract, agreeing to sell back the whole or any part of the property, on payment of eight thousand three hundred and seventy-seven dollars or a proportional part thereof, on or before November 1st, 1865, at which time the agreement was to "cease to be in force and become entirely null and void," and it appeared that the eight thousand three hundred and seventy-seven dollars to be paid represented moneys actually paid and to be paid by Vilhac, on the property, and no part of it to be made

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up of interest to accrue during the interim, and that the attorney who drew the papers was directed by the parties to draw a full deed and not a mortgage, but to give Page a privilege of buying back the whole or any part, if he was able to do so by November 1st, 1865, and that both parties so understood the arrangement: *held*, that the transaction was one of sale and not of mortgage, and that after November 1st, 1865, without anything having been done, Page had no right or equity in the property.

APPEAL from the District Court of the Fifth Judicial District, San Joaquin County.

The land conveyed by the plaintiff to the defendant consisted of three tracts in San Joaquin County, embracing in all about four hundred and ninety acres. The complaint alleged that the conveyance was intended by way of mortgage to secure the indebtedness of plaintiff to defendant, with interest, and prayed for an accounting between the parties and a redemption of the property, in favor of the plaintiff, upon his payment of what on such accounting might be found due to defendant.

The complaint was filed January 12th, 1869. April 16th, 1870, the findings copied in the opinion were filed, and afterwards judgment was entered to the effect that plaintiff was not entitled to redeem; that the defendant was the owner of the property in fee simple absolute, and dismissing the complaint. The plaintiff moved for a new trial, which was denied, and he then appealed from the judgment and order.

Pringle & Pringle, for Appellant.

Whether the contract between the parties was a mortgage or a conditional sale is a mixed question of law and fact. In doubtful cases, the leaning of the Courts is in favor of holding a transaction a mortgage. The deed and contract here were a mere device to avoid the process of foreclosure. In such cases the maxim of the Courts is, that the debtor shall not be allowed to deprive himself of his equity of redemption by any device to which his creditor may

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obtain his consent. (Story's Equity, Sec. 1019; *Henry v. Davis*, 7 John. Ch. R. 41.)

The relation of debtor and creditor continued to exist after the conveyance of the land. The words of the agreement, that "on and after the first day of November next this agreement shall cease to be in force, and shall then be entirely null and void," are the ordinary words to carry out the form of swift security, which the creditor endeavored to adopt. They are not stronger than in the old form of a mortgage, and in this transaction mean nothing more.

The relation of debtor and creditor, the simultaneous execution of the deed and of the covenant for reconveyance, the continuance of the indebtedness—these circumstances control all other features, and compel the recognition of the mortgage. (*Enos v. Sutherland*, 11 Mich. 538; *Hickox v. Low*, 10 Cal. 197; *Brown v. Dean*, 3 Wend. 298; *Brown v. Dewey*, 1 Sandf. Ch. 56; *Barton v. May*, 3 Sandf. Ch. 450; *Reitenbaugh v. Ludwick*, 31 Penn. H. R. 131; *Wilson v. Thoenberger*, 31 Penn. H. R. 295; *Daubenspeck v. Platt*, 22 Cal. 334; *Wing v. Cooper*, 37 Vt. 169; *Tibbs v. Morris*, 44 Barb. 138; *Graham v. Stevens*, 34 Vt. 5 Shaw, 166; *Roberts v. McMahan*, 4 Greene, Iowa, 34.)

W. L. Dudley and J. H. Budd, also for Appellant.

The transaction between Page and Vilhac, including the conveyance and written agreement to reconvey, constituted a mortgage, and remains a mortgage, and the mortgaged premises are subject to redemption.

In *Friedly v. Hamilton*, 17 S. & R. 70, it was held that an absolute deed and defeasance made at the same time, constituted a mortgage. (See, also, 1 Hilliard on Mortgage, 39; *Brown v. Nickle*, 6 Barr, 390; *Rogan v. Walker*, 1 Wis. 545; *Newcomb v. Bonham*, 1 Vern. 7; *Erskine v. Townsend*, 2 Mass. 493; *Carey v. Rawson*, 8 Mass. 159; *Eaton v. Whitney*, 3 Pick. 484; *Manlove v. Ball*, 2 Vern. 84.)

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George & Loughborough, for Respondent.

Though Courts of equity permit parol evidence to prove that a conveyance, absolute upon its face, was intended as security, and in doubtful cases they will lean in favor of the right of redemption, and permit slight circumstances to determine the transaction to be one of mortgage, still they inquire into all the facts and circumstances to ascertain the intention of the parties, and will not do violence to their understanding. (See *Hickox v. Low*, 10 Cal. 197; *People v. Irwin*, 14 Cal. 428, and 18 Cal. 117; *Green v. Butler*, 26 Cal. 595; *West v. Hendricks*, 28 Ala. 226; *Leading Cases in Eq.* 624, notes.)

James C. Carey, also for Respondent.

The agreement shows, and the testimony was, that the relation of debtor and creditor ceased to exist on the delivery of the deed; it was taken in satisfaction of the debt, and not as security for a loan. A prior existing debt may be the consideration of a sale, and there is no presumption that the deed is given to secure its payment. (*Eckford's Ex. v. De Ray*, 26 Wend. 36; *West v. Hendricks*, 28 Ala. 234.)

The debts were extinguished by the deed. (26 Ala. 312; *Leading Cases in Eq.* 637; *People v. Irwin*, 14 Cal. 435; *Ford v. Irwin*, 18 Cal. 119; *Barker v. Thrasher*, 4 Denio, 495.) If not by the deed, then by the release of record executed by Vilhac and Hazelton. A release is not only evidence of extinguishment, but it is the extinguisher itself. (*McCrea v. Purmot*, 16 Wend. 473.)

By the Court, WALLACE, J.:

On the 3d day of December, 1864, Page, by deed of that date, absolute in form, and reciting a consideration of seven thousand five hundred dollars, conveyed to Vilhac the prem-

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ises in controversy. On the same day Vilhac executed and delivered to Page an instrument in the nature of a defeasance, referring to the conveyance so made, and agreeing, in terms, to sell to Page, at any time before the succeeding first day of November, which would be in the year 1865, the whole, or any portion less than the whole, of the premises embraced in the deed, at the price of eight thousand three hundred and seventy-seven dollars for the whole, should the whole be purchased, and if less than the whole, then at such price for such less portion as the parties might agree upon as the relative value thereof — concluding with the stipulation “that on or after the first day of November next the agreement shall cease to be in force, and shall then be entirely null and void.” The premises having advanced greatly in value, in 1868, an action was brought in January, 1869, and the question made by the pleadings is, whether the transaction is to be considered as amounting to a mortgage, or to a sale with an agreement for a reconveyance, upon the conditions and within the period already named.

Upon the trial, each party was examined as a witness in his own behalf, and several other persons also testified, and the Court found the facts to be as follows:

“1. That on the 3d day of December, A. D. 1864, the plaintiff, Joseph S. Page, being the owner of the premises described and referred to in the plaintiff's complaint, and being indebted to W. P. Hazelton in the sum of five thousand two hundred and fifty-five dollars gold coin, the same being the amount of principal and interest then due by said plaintiff to said Hazelton, upon a certain note secured by first mortgage upon said premises, and of certain moneys expended by said Hazelton in the payment of certain taxes on said premises, and of certain costs, including attorney's fees, that had accrued in a certain action then pending for the foreclosure of said mortgage, and the said Page being at

the same time indebted to the said defendant, Louis Vilhac, in the sum of two thousand five hundred and twenty-two dollars, gold coin, the same being the amount of principal and interest then due by said Page to said Vilhac, upon a certain note secured by second mortgage upon said premises, did make and enter into a verbal agreement with Vilhac to sell and convey to him the said premises in fee simple, and free of all incumbrances, in consideration that he, the said Vilhac, would pay to the said Hazelton the said sum of five thousand two hundred and fifty-five dollars, gold coin, and would release to said Page the said debt of two thousand five hundred and twenty-two dollars, gold coin, and would cancel the note and mortgage last aforesaid, which said two sums amounted to seven thousand seven hundred and seventy-seven dollars; and in further consideration that the said Vilhac would, by written agreement, give to said Page the privilege to purchase the said premises at any time before the first day of November, A. D. 1865, for the sum of eight thousand three hundred and seventy-seven dollars, gold coin, or to purchase any part of said premises at any time before the day last aforesaid, for a proportionate price to be agreed upon between the said parties.

"2. That in pursuance of said verbal agreement the said Vilhac did, on the 12th day of December, 1864, pay to the said Hazelton the said sum of five thousand two hundred and twenty-five dollars, gold coin, who did thereupon surrender to said Page the note first aforesaid, and did cancel the said note and release and discharge the mortgage first aforesaid, and did dismiss the said foreclosure suit, and did accept the said sum in full payment and satisfaction of the said indebtedness; and at the same time and in further pursuance of the said verbal agreement the said Vilhac did release to said Page the said debt of two thousand five hundred and twenty-two dollars, gold coin, and did surrender to said Page the note second aforesaid, and did cancel the same,

and did release and discharge the said mortgage, whereby the said note was secured as aforesaid, and that in pursuance of said verbal agreement the said Page did, thereupon, on the said 12th day of December, A. D. 1864, deliver to the said Vilhac a deed, signed and sealed by him, the said Page, wherein and whereby he did sell and convey to said Vilhac, in fee simple, the premises aforesaid, free of all liens and incumbrances, which said deed bears date the 3d day of December, A. D. 1864, and is the same deed of conveyance mentioned and referred to in the pleadings filed in this action; and that the said Vilhac did, thereupon, and in pursuance of said verbal agreement, deliver to said Page, on the said 12th day of December, 1864, a written contract, duly signed by him, the said Vilhac, and sealed by him, wherein and whereby he did give to said Page the privilege to purchase the said premises, at any time before the 1st day of November, A. D. 1865, for the sum of eight thousand three hundred and seventy-seven dollars, gold coin, or to purchase any part thereof at any time before the said day, for a proportionate price, to be agreed upon between the said parties, which said agreement bears date the 3d day of December, A. D. 1864, and is the same that is referred to in said complaint, and is made part of the defendant's answer.

"3. That it was not agreed between said Page and said Vilhac, nor understood or intended by either of them, that the said money, or any part thereof, that was paid, as aforesaid, to said Hazelton, should be advanced by said Vilhac as a loan to said Page, or that the same should be repaid by said Page to said Vilhac, but on the contrary thereof, it was understood and agreed between them, and intended by each of them, that the same should be paid as a part of the price to be paid by said Vilhac for the purchase of said premises.

"4. That the said deed of conveyance was made and deliv-

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ered by said Page to said Vilhac in payment of the said debt, which was due as aforesaid, by said Page to said Vilhac, and the same was accepted by said Vilhac in full payment and satisfaction of the said debt.

"5. That immediately upon the delivery of said deed of conveyance the relation of debtor and creditor ceased to exist between the said Page and the said Vilhac.

"6. That it was understood, agreed, and intended by each of the said parties, that the said deed should operate as a sale and conveyance of said premises to the said Vilhac.

"7. That it was not understood or intended by said Page or by the said Vilhac that the said Vilhac should hold the said premises, under the said deed or otherwise, as security for any purpose whatever, or that the said deed or conveyance and the said contract for a reconveyance, should operate as a mortgage.

"8. That the sum of seven thousand five hundred dollars was not the real consideration for said conveyance, as recited in said deed, but that the real consideration thereof was the sum of seven thousand seven hundred and seventy-seven dollars, which was paid by said Vilhac to said Page in the manner hereinbefore set forth, that is to say: by releasing and discharging the said debt, which was due to him as aforesaid, and paying to said Hazelton as aforesaid the amount that was due to him as aforesaid by said Page.

"9. That the said Page was not indebted to the said Vilhac as set forth in said complaint, or otherwise than is hereinbefore set forth, and that all debts from said Page to said Vilhac were paid and extinguished by and upon the delivery of the said deed.

"10. That the time limited in said contract for the purchase of said premises by said Page was understood, agreed, and intended by and between the said parties as of the essence thereof.

"11. That the said Page never paid, or offered to pay, to

said Vilhac any money whatever for the purchase of said premises, or any part thereof, and that he never in any manner offered to buy the said premises, or any part thereof, from the said Vilhac, under the said written agreement or otherwise."

Subsequently, upon exception being taken for the want of a finding as to the value of the lands when the deed and agreement were made, the Court added a finding to the effect that the value of said land was then eight thousand dollars, or thereabouts, and that the consideration paid by the defendant to the plaintiff, as stated in the findings, was not inadequate to the value of said land. Judgment for the defendant having been thereupon rendered, a motion for a new trial was made and subsequently denied, and this appeal is taken from the judgment and the order denying the motion.

The facts as found, bring the case clearly within the general principles recognized here in the case of *Farmer v. Gross*, *post*, page 169. In that case the principal question was, whether or not the conveyance made by Barry and wife to Farmer, and the contemporaneous agreement in writing by which Farmer undertook to reconvey to Barry upon the receipt of certain sums of money to be paid by Barry within the period of time in the agreement limited, amounted to a mortgage, or to a sale, with a covenant to reconvey upon conditions. In that case, as here, the grantor was in necessitous circumstances; the premises were doubly mortgaged, the grantor was unable to remove these mortgages, and the mortgagees, or one of them, threatened a foreclosure. Under the agreement in that case, made contemporaneously with the conveyance, the grantor was to have the possession of the premises in the meantime, and a right to remove the crop thereon, and the sum which he was to pay upon reconveyance was the exact amount expressed

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as the consideration in the deed, with interest at an agreed rate, with addition of such taxes as the grantee might in the meantime pay or become liable to pay on account of the premises, and also such sum or sums as might be expended by him in the prosecution of any action or actions to recover the possession of the premises. The significance of these circumstances, considered of themselves as tending to raise the presumption of a loan and a mortgage to secure its payment, was remarked in that case, but the presumption was held to be overcome by the other facts there appearing. These were, that the conveyance was absolute upon its face; that the agreement itself recited the fact that the grantee had *bought* the premises from the grantor and had *paid* him the purchase price; that Barry was not to be entitled to a reconveyance, unless he should comply with the conditions prescribed in the agreement on or before the first day of October following — after which time neither party was to be “held or bound by the terms of the same.”

In the case now under consideration the conveyance is absolute on its face — the agreement is “to sell” — to sell the whole or *any portion less* than the whole premises; that at the expiration of the period of time therein limited “this agreement shall cease to be in force, and shall then be entirely null and void.” No portion of the sum to be paid by Page upon reconveyance was made up of interest to accrue during the intervening period — the consideration named in the deed was seven thousand five hundred dollars — the sum to be paid upon reconveyance was eight thousand three hundred and seventy-seven dollars; the evidence shows that this sum was made up of a debt due from Page to Hazelton, and paid by Vilhac with interest, taxes on the premises, advanced by Hazelton as mortgagee, and secured to him by the terms of the mortgage, attorney’s fees, and costs incurred in the pending foreclosure suit which Hazelton had instituted, and in which Vilhac, as the holder of a former mortgage was

made a party defendant, also of a debt from Page to Vilhac, amounting, principal and interest, to some two thousand five hundred dollars, with interest at the rate of two and one quarter per cent per month, secured by note and mortgage on the premises, which note and mortgage Vilhac surrendered to Page at the time, and released the mortgage of record; to these amounts was added the sum of six hundred dollars, representing the rent of the premises for the current year, which rent Page had already received from Hodges, the tenant in possession.

The agreement for the reconveyance was prepared by an attorney to whom the parties jointly applied for that purpose, and with whom they talked it over. In relating what was said by both parties in his presence together, he says: "The understanding was that Vilhac should receive a full deed of the property; he had a mortgage already, and would not take another mortgage, but would give Page the privilege of buying the property back — give him the refusal of it for one year, or eleven months; that if he could turn himself and get it back, or buy any part of it at a proportionate value, he was to do it," * * * "Vilhac had stated distinctly he would not have another mortgage, and must have it so provided that it would not be a mortgage." * * * "The conditions were settled clearly by Vilhac, if I recollect, as I have stated before, and Page said that that was his understanding; that that was his agreement, words to that effect — an assent that was clear and unequivocal."

The record abounds with evidence of the most persuasive character, such as the conduct of the plaintiff at the time, and for long afterwards, his repeated statements made to others, etc., establishing with unusual clearness that he himself distinctly understood the transaction to amount to an agreement for a resale at his option, and nothing more, as

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Vilhac emphatically and persistently insisted that it should be.

Judgment affirmed.

Mr. Justice TEMPLE did not participate in the foregoing decision.

[No. 1,119.]

E. P. ATKINS v. ALEXANDER GAMBLE.

SALE OF MINING STOCKS BY BAILLEE.—A. and G. each owned shares of stock in a mining company, all the shares being of equal value; A. delivered a number of his shares to G., to be held as collateral security for money advanced by G., to pay assessments upon the stock of A., and to be sold by G. whenever he could obtain not less than five hundred dollars per share; G. transferred certain of A.'s shares for less than the price named, in fulfillment by G. of a contract for a sale of his own stock, and, on settlement with A., G. transferred an equal number of his own shares to A., exchanging receipts with him in full of all demands. Subsequently A. sued G. for the amount of money received for the shares sold, alleging that the settlement had been procured by false representations on the part of G.; and G. defended by showing that he transferred the shares in fulfillment of a contract for the sale of his own stock, and that he at all times had and held for A.'s use an equal number of shares of equal value, and that he had so replaced them. *Held*, that G. did not become responsible for the proceeds of the sale of the shares. The technical breach of trust presents a case of *damnum absque injuria*.

RIGHT OF BAILOR TO DEMAND PROCEEDS OF WRONGFUL SALE.—If the bailee of personal property sell it, in violation of his authority, the owner may ordinarily ratify the transaction and demand the proceeds of the sale.

RIGHT OF OWNER TO RECOVER SPECIFIC PROPERTY.—The owner of personal property which has been wrongfully converted is ordinarily entitled to recover his specific property, or its value, and cannot be compelled to accept other property of the same kind and equal value in lieu of that which was converted.

IDEM.—Shares of stock in a corporation stand upon a different footing, because they are mere evidence of interest in the business of the corporation; and, if all the shares are of equal value, there can be no reason for preferring one share to another.

APPEAL from the District Court of the Fourth Judicial District, City and County of San Francisco.

Argument for Respondent.

The facts are stated in the opinion of the Court.

S. M. Wilson and A. P. Crittenden, for Appellant.

A share of stock in an incorporated company is, in its very nature, incapable of identification. No ear-mark can be placed upon it. One share is as good as another share, all shares being of equal dignity. (*Nourse v. Prince*, 4 John. Ch. R. 496; *Arnold v. Ruggles*, 1 R. I. 165; Ang. & Ames on Cor., Secs. 557, 558, 560, 561, 562, 565; *Wildman v. Wildman*, 9 Ves. 177; *Kerby v. Patter*, 4 Ves. 751; *Planter's Bank v. Merchant's Bank*, 4 Ala. 753; *Denton v. Livingston*, 9 Johns. R. 96; *Hutchins v. State Bank*, 12 Metc. 421; *Mechanics' Bank v. N. Y. and New Haven R. R. Co.* 13 N. Y. R. 626, 627; *Collier v. Collier's Executors*, 3 Ohio St. R. 374, and cases cited; 2 Hilliard on Torts, 129, et seq.; 1 ib. 55, et seq.; *Weston v. Bear River and Am. W. and M. Co.* 5 Cal. 184; *Stout v. Natoma W. and M. Co.* 9 Cal. 80; *Allen v. Dykers*, 4 Hill, 593; s. c., 7 Hill, 498; *Leroy v. Eastman*, 10 Mod. 499; *Cruikshank v. Turner*, 7 Bro. Parl. C. 255; *Elkins v. Macklish*, Amb. 187; *Longton v. Waite*, 6 Law Rep. 165; *Gunter v. James*, 9 Cal. 660, and cases cited.)

A share means a part. Ten shares out of one hundred shares and ten parts out of a hundred parts mean the same thing. To enter into a contract by which you become entitled to ten parts out of a hundred parts of the profits of an enterprise is the same as ten shares of the stock of the enterprise. If the right to collect one tenth of the profits of a corporation—that is, one tenth of the dividends—be vested in A, and he assigns or transfers that right to an agent, or debtor, or creditor, and he receives back the right to collect one tenth, we perceive no injury.

E. Casserly and W. H. L. Barnes, for Respondent.

The plaintiff was entitled to have back from defendant the identical shares of stock which he had intrusted to him

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for sale. Defendant could not, in lieu thereof, return to plaintiff an equal number of other shares of stock of the same company.

Identity of the thing owned is of the essence of all property under our law. Whatever a party cannot identify as being specifically his in a Court of law, he does not show to be his property. The exception is in the instance of a tortious confusion of chattels, where the law, rather than leave the innocent party without remedy, gives him the whole — an exception which proves the rule. The question of value, whether equal or superior, is an immaterial circumstance, either in respect of the right of property or the defense of a wrong done to it. In the abstract sciences, things equal to the same thing are equal to each other. In the law, which, like the science of government, of which it is an important part, is eminently a practical science, the rule, especially as to questions of property, is emphatically *nullum simile est idem* — whatever is like, is not the same. The element of identity pervades the whole law of sales. To a sale of personal, or even of real property, it is essential that the property shall have been identified, either by a definite description in the case of lands, or by parting it out, or marking it, etc., in the case of chattels. Until this is done no property passes, because without identity there is no property. (Hilliard Sales, second ed. 1860, p. 135-141, and cases in notes; 1 Parsons' Contr., ed. 1866, p. 527.) "The property does not pass absolutely, unless the sale be completed, and it is not completed so long as anything remains to be done * * * to identify the thing sold, or discriminate it from other things." (*Bailey v. Smith*, 43 N. H. 141-143; *Ockington v. Richey*, 41 N. H. 279-281; *Aldridge v. Johnson*, 7 Ellis & B. 90 E. C. L. 885, 899-903.) The exceptions to this rule are rather apparent than real, and will be found to refer generally to something else to be done after the identity is ascertained, as measuring, weighing, etc., for the purpose of

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fixing the purchase price, etc., or to be the result of express contract. (See, also, *Busk v. Davis*, 2 M. & S. 402-406; *Wallace v. Breeds*, 13 East, 522; *Shepley v. Davis*, 5 Taunt., 617; *White v. Wilks*, ib. 176-178; *Gardner v. Lane*, 9 Allen, 498, 499.) That the general rule of identity applies to stocks equally with any other species of chattels, is not only clear on principle, but on authority. (*Wilson v. Little*, 2 Comstock, 443; *Brookman v. Rothschild*, 3 Simmons, 6 Eng. Ch. 153; *Seymour v. Wyckoff*, 10 N. Y. 213; *Ford v. Hopkins*, 1 Salk. 283; *Parsons v. Martin*, 11 Gray, 111; *Markham v. Fandon*, 41 N. Y. 235; *Brass v. Worth*, 40 Barb. 648; *Gilpin v. Howell*, 5 Penn. State R. 57.) Where stock has been wrongfully converted by a trustee, the *cestui que trust* may either compel a redelivery of the stock or claim the value of it at the time of the conversion. (*Hart v. Ten Eyck*, 2 Johns. Ch. 117; *Forrest v. Elwes*, 4 Vesey, 799; *Bank of Montgomery v. Reese*, 2 Casey, 149; *Wilson v. Whitaker*, 13 Wright, 117; *Piety v. Stace*, 4 Vesey, 622, 623; *Pocock v. Redington*, 5 Vesey, 794-800, and note; *Bostock v. Blakeney*, 2 Brown's Chancery Cases, 653-657.)

By the Court, CROCKETT, J.:

The legal propositions involved in this case are of great practical importance, and, in arriving at a satisfactory solution of them, we have been very much aided by the able and exhaustive briefs of the respective counsel.

In 1863 the Antelope mine, in Esmeralda District, was owned by an incorporated company, established under the laws of the State, and having its principal place of business at San Francisco. The defendant was President of the company, and the plaintiff was Superintendent of the mine. The interests of the respective stockholders in the company were represented by certificates of stock, in the usual form,

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and the plaintiff was the owner of thirty-three and one-third shares, represented by six certificates for five shares each, and one certificate for three and one-third shares. He was also the owner of certain shares, represented by similar certificates, in the Real del Monte Company, another mining corporation. In order to meet accruing assessments on these stocks, the plaintiff borrowed from defendant a certain sum of money, which was to be refunded, with an agreed rate of interest, and hypothecated the stocks with the defendant as collateral security for the sum advanced and the accruing interest. The certificates were indorsed by the plaintiff and delivered to the defendant. The plaintiff claims that it was agreed that the defendant should sell, for the plaintiff's account, the Real del Monte stock, whenever he could obtain therefor not less than forty dollars per share, and the Antelope stock, when he could obtain for it not less than five hundred dollars per share. Ultimately the Real del Monte stock was sold by the defendant at the price limited, and he received the money therefor, of which fact the plaintiff was duly notified, and no complaint is made in respect to this transaction. The money thus received was not only of sufficient amount to refund the advances made to the plaintiff, with the interest then due thereon, but there remained in the hands of the defendant a considerable excess to the credit of the plaintiff. During all this time the defendant was the owner, in his own right, of a number of shares of stock of the Antelope Company, exceeding in amount the thirty-three and one-third shares of the plaintiff. Whilst the plaintiff's certificates for the Antelope stock so remained in the hands of the defendant, the latter sold to Edward Martin ten shares of the stock of that company, for four thousand dollars, being at the rate of four hundred dollars per share, and delivered to Martin, in fulfillment of the contract of sale, ten shares of the plaintiff's stock. The defendant claims that in the sale to Martin he sold his own stock,

and not the plaintiff's; and that he delivered the plaintiff's certificates for the ten shares, instead of his own, only because, being the President of the company, he feared it would depreciate the value of the stock in the market if it should become known that he was selling his own stock; and that he used the plaintiff's certificates under the belief that no damage could result to the plaintiff, inasmuch as he (the defendant) had and continued to have more stock of the same company than was necessary to replace it, which he held for the plaintiff's use in lieu of that delivered to Martin. It further appears that the defendant caused fifteen shares of the plaintiff's stock to be transferred on the books of the company to Donohoe, Ralston & Co., to whom new certificates were issued, and who immediately indorsed the new certificates and returned them to the defendant. It also appears that the defendant on one occasion loaned to Perry, a stock broker, five shares of plaintiff's stock, and within a few days thereafter Perry returned to the defendant another certificate for the same amount of stock. The defendant further claims that after all these transactions he and the plaintiff had a full and final settlement of all matters connected with these stocks; and that after being fully informed of all that the defendant had done in the premises the plaintiff ratified his acts and the parties exchanged receipts.

The complaint, after averring the ownership of the plaintiff of the Antelope stock, and describing the several certificates, alleges that the plaintiff duly indorsed the certificates, so that the title might pass by delivery, and delivered them to the defendant, to hold the same in trust and as agent for the plaintiff, and if sold to be sold for the account and benefit of the plaintiff, and the proceeds to be paid to the plaintiff; that the defendant afterward sold ten of said shares for the market price of four hundred dollars, in gold coin, per share, and received the money therefor, to

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and for the use of the plaintiff; that he subsequently sold fifteen of the remaining shares for the then market price of three hundred and forty-five dollars, in gold coin, per share, and received the said sum to and for the use of the plaintiff; that he afterwards sold five of the remaining shares at the then market price of two hundred dollars, in gold coin, per share, and received said sum to and for the use of the plaintiff; that the defendant willfully and fraudulently failed and neglected to inform the plaintiff of these sales, and fraudulently concealed said transactions from the plaintiff, and thereby caused the plaintiff to believe that the stock had not been sold; that, being thereby deceived in respect to the facts, the plaintiff afterward paid to the defendant certain sums as and for so much money advanced by the defendant to pay assessments on said stock; whereas, in fact, before the assessments were levied, the defendant had sold said stocks, and had received the proceeds to and for the plaintiff's use; that during all this time the plaintiff was absent from San Francisco, and was ignorant of the dealings of the defendant in said stocks; that ultimately the plaintiff came to San Francisco, and called upon the defendant for a settlement; that the defendant then returned the certificate for three and one third shares, and informed the plaintiff that he could get the residue of the stock at the office of the company, and represented and stated that there had been some manipulation going on, which had made it necessary for him to use the plaintiff's name, but never informed the plaintiff that he had sold the plaintiff's stock, and falsely and fraudulently, and with intent to cheat the plaintiff, induced him to believe, and he did believe, that the plaintiff's stock was at the office of the company, ready to be delivered to him; that thereupon, at defendant's request, the plaintiff took from the company a certificate for thirty shares belonging to defendant, and supposing the same to belong to the plaintiff, being induced and fraudu-

lently persuaded by the defendant to receive the same; and was also compelled to pay to the company seven hundred and fifty-five dollars, as assessment on said thirty shares, before it was delivered to him, which he would not have done if he had known that it was the defendant's stock and not his own; that the defendant had and received the said sums of money as the agent of the plaintiff, and to and for his use; that whilst the plaintiff was ignorant of these facts, and misled and deceived by the statements and concealments of the defendant, the defendant procured from the plaintiff a receipt in full of all demands; that the receipt was obtained by fraud, undue influence, and willful misrepresentation, and with the intent to secure to the defendant the money received for the thirty shares, etc.; that, on discovering the fraud, he demanded payment of the defendant, which was refused. The prayer of the complaint is for a judgment for the several sums received by the defendant, with interest.

The answer admits that the plaintiff owned the thirty-three and one third shares and delivered the certificates therefor, properly indorsed, to the defendant; but avers that they were delivered solely as collateral security for the advances made by the defendant to the plaintiff, and not upon any trust whatsoever; that the defendant was then and thereafter a large dealer in the stock of said company, having many shares standing in his own name, and holding many certificates for both large and small amounts, issued to other persons, and properly indorsed, so as to pass by delivery; that desiring to make sale of a portion of his own stock in said company, he ordered his broker to sell the same; and in performing the contract of sale he delivered to the purchaser, amongst other certificates, two of those of the plaintiff for five shares each; that he delivered them as his own certificates, and not as those of the plaintiff; that the contract of sale was for his own account and for his own stocks,

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and not for the plaintiff, or on his account; that he had then, and has ever since had, other certificates of the same kind, and of the same amount, which he held for the plaintiff, and has at all times been ready to deliver. The answer denies the sale of the fifteen shares and of the five shares, or that the defendant ever received any sum of money therefor; and denies all the fraudulent representations and concealments charged in the complaint, or that the plaintiff was ignorant of the actual facts as they existed. It then avers that, after being fully informed of all the facts, the plaintiff accepted a certificate for the thirty shares, and gave to the defendant a receipt acknowledging payment in full of all demands to that date.

The findings are to the effect:

First — That the plaintiff owned the thirty-three and one third shares, for which he held certificates as above stated, which were so numbered as to render them easily capable of identification; and that he also owned one hundred and twelve shares of Real del Monte stock.

Second — That in October, 1862, he made an arrangement with the defendant by which the defendant agreed to receive, and did receive, the said stocks for sale under the plaintiff's instructions; and, until the same should be sold, to advance and pay for the plaintiff the assessments levied and to be levied on said stocks, holding the stocks as security for said advances and interest thereon.

Third — That up to February 28th, 1863, the defendant had in this manner advanced for the plaintiff about one thousand dollars, on which day the defendant sold the Real del Monte stock for four thousand four hundred and eighty dollars, which he received; out of which he paid himself his advances and interest; and by agreement with the plaintiff, held the balance of three thousand three hundred and seventy-eight dollars and ninety-three cents for the account of the plaintiff and

as a fund from which to pay any assessments to be thereafter levied on the Antelope stock; and the said fund was more than sufficient for that purpose.

Fourth — That on the 7th of March, 1863, the defendant wrongfully sold ten shares of the plaintiff's Antelope stock for four thousand dollars in gold coin, which he received and appropriated to his own use; that on the 29th of April, 1863, without the knowledge or authority of the plaintiff, the defendant wrongfully disposed of, to his own use, fifteen other shares of said stock, which was then of the market value of three hundred and forty-five dollars, in gold coin, per share; that on the 19th of February, 1864, without the knowledge or authority of the plaintiff, the defendant wrongfully disposed of, to his own use, five other shares of said stock, which was then of the market value of two hundred dollars per share, in gold coin.

Fifth — That the plaintiff never made any ratification, confirmation, or settlement of said transactions, or any of them; that in March, 1864, the plaintiff required of the defendant that he should return to him his thirty-three and one third shares, and account with him for the moneys in defendant's hands; that the defendant did not account with the plaintiff for said moneys, or return said stock; but in lieu thereof returned to him only three and one third shares, and delivered to him an order on the Secretary of the company to transfer on the books of the company to the plaintiff thirty shares of the defendant's stock, on the payment by the plaintiff of seven hundred and fifty dollars in gold coin, being the amount of an assessment alleged by the defendant to be due thereon; and the defendant at the same time handed to the plaintiff three hundred and seventy-one dollars and thirty-nine cents in cash, as and for the balance of the plaintiff's moneys in his hands, alleging that all the rest of the plaintiff's money in the defendant's hands, being three thousand and seven dollars and fifty-four cents, had been applied by

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the defendant in payment of assessments on said thirty shares of the plaintiff's stock; that of the said sum, three thousand dollars had not in fact been so applied, and the assessments referred to by the defendant as those on which he had applied the three thousand dollars, were all levied after the periods when he had wrongfully disposed of said thirty shares; that at the defendant's request, receipts in full of all demands, written out by the defendant, were then and there exchanged between the parties; that the plaintiff paid to the company the seven hundred and fifty dollars in gold coin, and had the thirty shares transferred to him on the company's books; that the defendant did not then, or at any time, disclose to the plaintiff the facts, or any of them, specified in the fourth finding, but withheld the same from the plaintiff; and the plaintiff received the thirty shares, paid the seven hundred and fifty dollars and exchanged receipts with the defendant, in ignorance of said facts and by reason of such ignorance; that said facts were not discovered by the plaintiff until about the middle or latter part of June, 1864, when he immediately returned to the defendant the certificate for the thirty shares, and demanded payment of the moneys sued for, which payment was refused, and has never been made.

Sixth — That during all the period covered by these transactions the defendant had more than seventy shares of the Antelope stock standing in his name on the books of the company, and owned by him.

Seventh — That by the custom of brokers in San Francisco one share of stock is considered of no more value than another share of stock in the same corporation, and that stock brokers frequently exchange certificates for the same number of shares in the same corporation; but neither the plaintiff nor defendant was a member of the Board of Brokers, nor were said transactions, or any of them, had with reference to any custom of said Board.

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As conclusions of law, the Court finds: 1st, That from October, 1862, to February 28th, 1863, the defendant held the plaintiff's stocks as pledged, and as security for the advances made by the defendant to pay assessments on the stocks; that the bailment by way of pledge terminated on said twenty-eighth of February, after which the defendant sold the Antelope stock as the plaintiff's bailee and agent for the sale thereof, under the plaintiff's orders; 2d, That the custom of the Board of Brokers is irrelevant and immaterial to this case; 3d, That the dealings of the defendant with, and the disposition made by him of the several parcels of said stock, amounting to thirty shares, were wrongful, and were not, any of them, authorized, ratified, or confirmed, nor was any settlement thereof made by the plaintiff, and the plaintiff is entitled to recover the four thousand dollars, proceeds of the sale of ten shares; five thousand one hundred and seventy-five dollars, the value of the fifteen shares; one thousand dollars, the value of the five shares; three thousand three hundred and seventy-eight dollars and ninety-three cents, the balance of plaintiff's money remaining in defendant's hands (less the three hundred and seventy-one dollars and thirty-nine cents paid to the plaintiff); and the seven hundred and fifty dollars paid by the plaintiff to the company; the whole sum for which judgment is ordered being thirteen thousand nine hundred and thirty-two dollars and fifty-four cents, with interest from July 1st, 1864, of which sum, seven thousand dollars and the interest thereof, is to be paid in gold coin. Judgment was entered for the plaintiff in accordance with these findings, and the defendant moved for a new trial, on the ground, amongst others, that the evidence was insufficient to support the findings, and the statement in support of the motion contains the proper specifications in that respect. The motion for a new trial was denied, and defendant has appealed.

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We have been thus minute in stating the pleadings and findings, in order to avoid any misapprehension as to the precise points to be decided on the appeal.

In respect to many of the controlling facts of the case, there is little or no contrariety in the evidence. As to the ten shares of Antelope stock, the only testimony concerning the sale of them by the defendant was to the effect that the defendant, being the owner in his own right of a large amount of the stock of that company, ordered his broker to sell a portion of it; that the broker contracted to sell twenty or more shares to Edward Martin, and in performing the contract of sale the defendant, who was President of the company, delivered to Martin ten shares of the plaintiff's stock; that in so dealing with these shares the defendant delivered them as his own, and not as the property of the plaintiff; that the sale to Martin was intended by the defendant to be of his own stocks, and not the plaintiff's; and that the defendant, during the whole time, held in his own name more than enough of the stock of the company to replace the ten shares of the plaintiff.

The argument of the counsel for the plaintiff on this branch of the case is, that inasmuch as the defendant sold these ten shares without the authority of the plaintiff, and against his orders, it was a wrongful conversion of the stock by the defendant to his own use; that it was optional with the plaintiff whether he would repudiate the sale and hold the defendant for the market value of the stock, or, waiving the wrongful conversion, ratify the sale and demand the proceeds.

There can be no doubt as to the general proposition that, if the bailee of personal property sell it in violation of his authority, the owner may ratify the transaction and demand the proceeds of the sale. If A. intrust to B. a steamboat, for sale at a limited price, and if B., in violation of his duty, sell it for a less price, A. may acquiesce in the sale and

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demand the proceeds. This proposition needs no argument or citation of authorities to sustain it. It would not be at the option of the bailee whether he would account for the proceeds or deliver another steamboat of equal value; nor would it be any defense for him to say that he, at all times, had and held another steamboat of equal value, which he was ready to deliver in place of the first. If certificates of stock in mining corporations are to be treated in this respect as other personal property, it is evident the defendant became liable to the plaintiff for the proceeds of the ten shares sold to Martin.

But we think such certificates stand upon a different footing. Whilst stock in corporations is denominated personal property, and is subject to seizure and sale under execution, and whilst a particular certificate may be capable of complete indentification, by its numbers or otherwise, the certificate is but the evidence that the holder of it is entitled to an undivided share in the assets and business of the corporation. The stockholders are the joint owners of the franchise and property of the corporation, each being entitled to an undivided share thereof, and the only office of the certificate is to furnish the evidence of the quantum of interest held by the owner of the certificate. "Certificates of stock are not securities for money in any sense; much less are they negotiable securities. They are simply the muniments and evidence of the holder's title to a given share in the property and franchises of the corporation of which he is a member." (*Mechanics' Bank v. New York and New Haven Railroad Company*, 18 N. Y. R. 626.)

If a firm, doing business as an ordinary partnership, issue certificates to each of its members, specifying the interests of the respective copartners, such certificates would have no intrinsic value, except as evidence of the *quantum* of interest of each copartner. The joint interest of the copartner in the property and business of the firm is the substance, of

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the existence of which the certificate is but the evidence. If, for example, there be three copartners, each owning an undivided interest of one third, there is no appreciable difference between the respective interests. They are in all respects precisely similar, and each several interest is an exact duplicate of the others. The same principle is applicable to corporations. The holder of ten shares of stock stands precisely upon the same footing as any other holder of ten shares. Their interests are precisely similar, and of the same value, and each holds but an undivided interest in the common property. This proposition is not new in this Court, and is substantially decided in *Hawley v. Brummagem*, 33 Cal. 394; *Hardenburgh v. Bacon*, 33 Cal. 356.

The general rule is, as we have stated, that the owner of personal property which has been wrongfully converted, is entitled to recover his specific property or its value, and cannot be compelled to accept other property of the same kind and of equal value, in lieu of that which was converted. The reason of the rule is obvious. The owner may have special reasons for desiring to retain that specific chattel; and there may be reasons why he attached a peculiar value to it beyond the value of other chattels of a precisely similar kind. If his desire in this respect be the result of mere caprice, he is entitled to be gratified in the exercise of it. Visible, tangible chattels may have secret defects which no vigilance could detect. If two visible objects be apparently precisely similar, one may have infirmities not discoverable on inspection, which would impair or destroy its value. Hence the owner of such chattel cannot be compelled to accept in lieu of it another which appears to be precisely similar and of equal value. He cannot be required to take the risk of secret defects in the substituted article. Other considerations, also, affect the general rule. If a favorite horse, a pet dog, or a family picture be converted by a wrongdoer, he could not escape

responsibility by offering another horse, dog, or picture, even of greater value.

But we think the reason of the rule ceases when applied to stocks. It is impossible that any sane person should have centered his affections upon a particular stock certificate, or that any violence could be done to his feelings by requiring him to accept another certificate of precisely similar character, in lieu of it. His own certificate was only the evidence that he owned an undivided interest in the capital and business of the corporation. Another certificate of the same kind, for the same amount of stock, would entitle him to precisely the same rights as the former certificate. Each would be a precise equivalent of the other, and it is certain he could suffer no pecuniary loss by the transaction; whilst the nature of the property, or rather of his interest in it, forbids the idea, that it could be the object of personal attachment, or have a peculiar value in his estimation as contradistinguished from any other equal number of shares in the same company.

For these reasons, we think, a different rule should govern the conversion of a certificate of stock; and if the wrongdoer was at all times ready and willing to transfer to the owner an equivalent number of similar shares in the same company, by a proper and valid certificate, it would present a case for nominal damages only.

Inasmuch as we have been referred to no adjudged case precisely similar to this, and the question involved being one of great practical importance, we propose to notice briefly the authorities relied upon.

Wilson v. Little, 2 Comst. 443, cited by the plaintiff's counsel was an action to recover the value of fifty shares of New York and Erie Railroad stock, deposited with the defendant as collateral security to secure the payment of a promissory note with authority to sell the stock on non-payment of the note. The defendant sold the stock before maturity of the

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note, and the plaintiff afterwards tendered payment and demanded a return of the stock. It appears the company had two kinds of stock, for which it had issued certificates; one termed the "consolidated," and the other the "converted," which had different values in the market, the former being the most valuable. The stock which was pledged was the "consolidated," and the defendant offered to return "converted" stock in lieu of that which he sold. The Court very properly held that the plaintiff was under no obligation to accept a different kind of stock from that which was pledged.

In discussing this branch of the case, the Court say: "The defendants were bound to restore the identical stock pledged." And in another part of the opinion: "Although the plaintiff was strictly entitled to a retransfer of the same shares which were pledged, it appears that his broker was willing to receive other stock of the same description and value," etc. In the first paragraph quoted we understand the Court to refer to "consolidated," as contradistinguished from converted stock; but if it be conceded that in strict law the plaintiff was entitled to a retransfer of the same identical shares which were pledged, it by no means follows that he was entitled to any but nominal damages, if the defendant was at all times ready and willing to transfer to him an equal number of shares of the same kind of stock with that which was pledged.

Brookman v. Rothschild, 3 Simmons, 6 Eng. L. 153, was a bill in chancery to set aside certain transactions in stocks on the ground of fraud. The defendant was the plaintiff's agent, and rendered accounts showing large transactions in stocks for the plaintiff's account. It appeared on the trial that the stocks stood in the name of the defendant, and were never in any manner appropriated or set apart to the plaintiff. The Court held that the stocks never became the prop-

erty of the plaintiff, and he was therefore not liable for losses incurred by the sale of them.

Seymour v. Wickoff, 6 Seld. 213, was an action to recover the value of a quantity of pork in barrels, left with the defendants as commission merchants, for sale, and which was sold at ten dollars per barrel; but the plaintiff was not advised of the sale, and afterwards, on discovering it, brought an action for the proceeds. The defense attempted to be set up was that the pork in question was only a portion of a much larger quantity belonging to the defendant, or consigned to him by others, and which had the same inspection brand, and was stored in the same warehouse, by reason of which it had lost its identity, like wheat mixed in a bin, and that so long as the defendant had on hand an equal quantity of pork of the same brand, he might apply the plaintiff's ownership to that parcel, and sell it on his account. This defense was held to be insufficient, as it manifestly was. But there is no analogy between pork in barrels, capable of complete identification, and having peculiar qualities, on which its value depends, and certificates of stock, having no value over other similar certificates for the same stock.

In *Ford v. Hopkins*, 1 Salk. 283, the plaintiff had delivered certain lottery tickets to a goldsmith to collect the money due on them. The goldsmith, having received of the defendant other tickets in the same lottery, and given his note for them, took up his note by delivering the plaintiff's tickets to the defendant.

The Court held that the goldsmith had no authority, except to receive the money due on the tickets, and had no power to sell them or exchange them for other tickets; consequently, no title passed to the defendant.

Nourse v. Prime, 4 John. Ch. R. 496, and which was more fully considered in 7 John. Ch. R. 87, is, in some respects, very similar to this case. The defendants were stock brokers, and had purchased for the plaintiff four hundred and

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property, of which the property in suit is a part. For the purchase money they gave a promissory note, in which they represented themselves as Trustees of the La Fayette Mining Company, but which they signed with their individual names only. The note was secured by a mortgage upon the property purchased. The note being unpaid at maturity the mortgage was foreclosed and the premises sold to the mortgagees.

The other facts are stated in the opinion of the Court.

Alexander Deering, for Appellant, argued that the foreclosure suit was not a suit against the company, and could not affect the title to the property which had passed into the corporation.

J. M. Corcoran and J. B. Campbell, for Respondents.

By the Court, SPRAGUE, J.:

This action is brought for the purpose of perpetually enjoining the sale on execution of certain real estate by the defendant, Sheriff of Mariposa County. The property was levied upon as the property of the La Fayette Mining Company, a corporation, to satisfy a judgment against the corporation in favor of one John W. Wilcox. Plaintiffs claim that at the date of the judgment against the corporation, and ever since, they were and have been the owners of the property, and that the La Fayette Mining Company, at the date of the rendition of said judgment, had not and at no time since have had any title to or interest in the property. Upon this defendant took issue.

On the trial, plaintiffs, to establish their title to the property, offered and read in evidence, against defendant's objections, the judgment roll in a certain case wherein one of the present plaintiffs and seven other individuals were plaintiffs,

and Joseph Queriola, Samuel Miller, and Simon Morrison were defendants, the order of sale issued thereon, the certificate of sale, and Sheriff's deed to the purchasers at such sale, among whom was one of the present plaintiffs. It appears by the findings of the Court that these proceedings were had and completed sometime prior to the date of the entry of the judgment in favor of Wilcox against the La Fayette Mining Company.

The question on this appeal is, whether the above evidence offered and read on the trial, established, or tended to establish, plaintiff's title to the property, the sale of which in satisfaction of the Wilcox judgment against the La Fayette Mining Company, they, by this suit, seek to enjoin.

It appears from the finding that the La Fayette Mining Company as a corporation duly organized, became the owner of the property on the 29th day of March, 1866; and this ownership continued in said company until after the levy under the Wilcox judgment against the company, unless such ownership and title of the company was divested and passed to these plaintiffs and others by virtue of the judgment sale thereunder, and Sheriff's deed offered and read in evidence on the trial, as above stated.

Without reference to the character and object of the suit resulting in the judgment, sale thereunder, and Sheriff's deed, under which present plaintiffs claim title to the property, it is sufficient to state, that, as appears from the judgment roll offered and read in evidence, one of the present plaintiffs and seven other individuals were party plaintiffs in said suit, and Joseph Queriola, Samuel Miller, and Simon Morrison, as individuals, were party defendants, and that judgment and decree was entered in said suit on the 18th day of December, 1866, against the defendants therein, to wit: Joseph Queriola, Samuel Miller, and Simon Morrison. The La Fayette Mining Company was not a party to the suit, and no judgment or decree was therein ren-

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dered against it; no title to, or interest in the property of the corporation could be divested, or in any manner legitimately affected by a judgment and proceedings thereunder to which it was not a party. It follows, therefore, that the judgment roll, certificate of sale thereunder, and Sheriff's deed, read in evidence, did not establish, or tend to establish, plaintiff's title to the property; and that the Court erred in admitting the same in evidence against objections of defendant, and in its decree perpetually enjoining the defendant from proceeding to sell the property in satisfaction of the Wilcox judgment on execution.

Judgment and order denying new trial reversed, and cause remanded.

[No. 1,928.]

DAVID CALDERWOOD, AND ELIZABETH CALDERWOOD, HIS WIFE, v. HENRY PEYSER.

ORDER STRIKING NEW TRIAL STATEMENT FROM FILES.—Where a statement on motion for new trial was filed in time, but not served on the opposite party, and for this reason the Court, on motion, struck it from the files: *held*, that such striking from the files was error.

APPEAL FROM ORDER.—An appeal may be taken from an order made after judgment striking a statement on motion for a new trial from the files.

CASE OVERRULED.—*Quivey v. Gambert*, 32 Cal. 305, on the point that the Supreme Court has no jurisdiction of an appeal from an order made after final judgment, unless such order followed the judgment, not merely in time but also in logical sequence, overruled.

TIME FOR APPEAL FROM COUNTY COURT IN CASE APPEALED FROM JUSTICE'S COURT.—Where an action for unlawful detainer was originally commenced in April, 1863, before a Justice of the Peace, and afterwards appealed to the County Court, and while pending there the Acts of December 28d, 1863, and April 4th, 1864 (Stats. 1863-4, pp. 1, 399), for the transfer and changing of the original jurisdiction in such cases, took effect: *held*, that the jurisdiction of the County Court did not cease to be appellate, or become original; and that therefore an appeal from a judgment therein must be taken within ninety days.

SET-OFF OF EXECUTIONS.—PARTIES MUST BE THE SAME.—An execution in favor of Peyser and against Calderwood cannot be set off against an

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execution in favor of Calderwood and Douglass (his former wife) against Peyser — the apparent fact being that the parties to the two executions are not the same.

STATEMENT ON MOTION FOR NEW TRIAL NEVER TO BE STRICKEN OUT.—

While a motion for a new trial may be denied, for failure to serve the statement on the opposite party, an order striking such statement from the files cannot be properly made under any circumstances. Such statement need not be served on the opposite party.

APPEAL from the County Court of the City and County of San Francisco.

The judgment involved in this appeal was in favor of plaintiffs and against defendant, and was entered on March 30th, 1868. Afterwards counsel for defendant moved for leave to offset an execution in favor of defendant and against the plaintiff David Calderwood, against the execution issued in this action in favor of plaintiffs, for their costs on a former appeal. The motion was denied April 13th, 1868. Defendant's statement on motion for new trial was struck from the files June 8th, 1868. The appeal from the order refusing to offset the executions was taken June 17th, 1868; the appeal from the judgment and order striking out statement was taken July 14th, 1868.

E. A. Lawrence, for Appellant.

By the operation of the new Constitution, and the Act of December 23d, 1863, transferring all cases pending in the old County Court into the new County Court, and the Act of April 4th, 1864, concerning forcible entries and unlawful detainers, this became a special case, over which the County Court only had original jurisdiction, and, as in all other original cases, the right of appeal from a judgment extended to one year.

The action of the Court in not settling the statement on motion for new trial, but in striking out, was in direct violation of the recent decision of this Court. (*Quivey v. Gambert*, 32 Cal. 304.)

P. G. Buchan, for Respondents.

The appeal from the judgment was not brought in time, for the reason that it was a judgment on appeal from an inferior Court. The operation of the new Constitution was not to make any difference in the case or to change its character.

The statement on motion for new trial was properly struck out, and the order striking it out was not an appealable one. The case of *Quivey v. Gambert*, 32 Cal. 304, is directly against the appellant.

By the Court, WALLACE, J.:

The earlier history of this case is to be found in 31 Cal. 333. Upon the return of the cause, after the order granting the new trial had been affirmed here, the defendant filed a plea *puis darrein continuance*, in which he set up: First, the judgment rendered in the action August 16th, 1865, as a bar—alleging to be in full force and unsatisfied; second, that prior to the recovery of that judgment the female plaintiff, Elizabeth Douglass, had transferred to Calderwood one half the rents claimed in the action; third, that on July 28th, 1865, one Brooks commenced an action against David Calderwood, Elizabeth Douglass, and her husband, William J. Douglass, in the District Court of the Twelfth Judicial District, and after due proceedings, on the 18th day of June, 1866, obtained a decree to the effect that he was the owner in fee of the demised premises, and that the defendants in that action had no right, title, or interest therein, nor in the possession thereof, and enjoining them from the assertion of any right or title thereto against Brooks, the plaintiff therein, and that upon appeal the decree had been affirmed here (*Brooks v. Calderwood*, 34 Cal. 563); fourth, that Brooks was the landlord of the defendant at the time of the commence-

ment of the action against him in the Justice's Court by Calderwood and Elizabeth, his then wife; that the tenancy then existing had been terminated, and the possession of the demised premises had been surrendered to Brooks on May 10th, 1864, since which time the defendant had not held the possession thereof in any wise. A trial of the action was again had in the County Court, March 30th, 1868, and resulted in a judgment in favor of the female plaintiff, Elizabeth Douglass, for the possession of the premises and nine hundred and fifty-five dollars damages, with costs of action.

A motion for a new trial, made by defendant and supported by a statement filed, was not determined by the Court below — but the statement was stricken from the file upon the application of the plaintiff, because, though filed, it had not been served. The action of the Court in this respect is now represented for review, upon appeal taken from the order by which the statement was stricken from the files.

The first question to be considered concerns the appellate jurisdiction of this Court, for the respondent claims that it does not extend to the review of an order striking from the files of the Court below a statement placed there in support of a motion for a new trial, and there is no doubt that such was the view announced in *Quivey v. Gambert*, 32 Cal. 305, upon the authority of several adjudged cases in this Court, there enumerated. The general doctrine of those cases is, that "any special order made after final judgment" (Practice Act, Sec. 336, Subd. 3), to become the subject of an appeal here, must have followed the judgment, not in mere point of time of its entry, but that the order to be reviewed must, in some way, have depended upon the judgment itself, or have followed it in logical sequence (*Pendegast v. Knox*, 32 Cal. 73); that it must have "followed the judgment in the same line of proceedings" (31 Cal. 365), etc.

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I am unable, however, to discover any reason upon which these distinctions can be supported. If there in reality be any, these cases have not pointed it out, but have stopped with simply announcing the supposed distinctions themselves.

Shortly after I came here the case of *Kimball v. Semple*, yet pending upon other points because of the disqualification of one of the Justices of this Court to set in the case, came before the Court for decision.

One of the points in that case concerned our appellate jurisdiction, and it arose substantially upon the following facts: Judgment had been rendered in the District Court in favor of Kimball, for the recovery of the possession of the premises there in controversy. A motion for a new trial had been made by the defendant, and denied by the Court, and an appeal having thereupon been brought to this Court from the order of denial, a judgment was subsequently rendered here to the effect that the order be affirmed. After the return of the cause to the District Court, Semple, the defendant, moved that Court to set aside its order denying the new trial, so that he might perfect the statement which had been filed in support of the original motion; the Court below entered an order that this motion be denied, and an appeal to this Court was thereupon brought. It will be seen that the order thus appealed from, like the one at bar, was "a special order made after final judgment," in the language of section three hundred and thirty-six, as well as of section three hundred and forty-seven of the Practice Act, and did not "follow the judgment," in the sense of being *dependent upon it*. The point thus raised was the same now under consideration, and the authorities upon which it was rested, the case of *Quivey v. Gambert* and the others already mentioned.

In the case of *Kimball v. Semple*, I said:

"I think that the views announced in those cases, in respect to the point now under consideration, ought not to be maintained. The appellate jurisdiction of this Court is declared by the Constitution to extend to all cases in equity, to all cases at law which involve the title or possession of real estate, etc. (Art. VI, Sec. 4.)

"The case at bar is one involving the title of certain real estate, and, as a case, is therefore clearly embraced within the appellate jurisdiction of this Court. A case is a state of facts which furnishes occasion for the exercise of the jurisdiction of a Court of justice; to the existence of such a case parties are necessary, also pleadings and proceedings, trials, orders, judgments, etc., usually follow. These together constitute the case, and when, as here, that case is itself one within the appellate jurisdiction of this Court, *any order* made therein by the Court below becomes part of it, and must consequently be subject to the power of this Court to review it.

"This is the view upon which we entertain an appeal from the final judgment itself, or the order denying or granting a new trial, for neither such a judgment nor such an order of themselves necessarily constitute the entire case, but are only *parts of it*, and may be considered in this Court at different times, and upon distinct appeals.

"By an examination of section three hundred and forty-seven, *supra*, it will be seen that certain enumerated orders made in a case, and which respectively concern a new trial, an injunction, an attachment, or proceedings in partition, constitute of themselves distinct subjects of appeal, whether entered *before* or *after* the rendition of final judgment. So, if any order, though not included within this enumeration, be made *before* the rendition of final judgment, it is reviewed here through the instrumentality of an appeal taken from

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the *judgment itself*; and section three hundred and forty-seven declares that any special order made after final judgment shall also, *of itself*, be the subject of appeal. The necessity for this latter provision is apparent, when it is considered that an appeal from the judgment would only bring up the record of the proceedings resulting in the rendition of the judgment, and that such an appeal may have been taken, and even disposed of here, by affirmance or reversal, *before* the order complained of was made in the Court below; so that while an appeal from a judgment might in some instances be safely relied upon for the review of an order entered before its rendition, it would afford no reliable remedy against such an order only entered *subsequently* to its rendition. Accordingly, the statute allows an appeal to be taken directly from any special order made after final judgment, as the only safe and convenient method for its review. The statute declares such an order, made subsequently in point of time to the rendition of the judgment, to be the subject of a distinct appeal, and we are not at liberty to add that it must also be an order made in the direct line of the procedure. From an order *refusing to dissolve an attachment*, for instance, an appeal is given by *designation*, "from any special order made after final judgment;" a like appeal is as clearly given by *definition*, and I do not see why we might not upon some idea of the particular line of procedure pursued below refuse to entertain an appeal in the one case with as much propriety as in the other.

"For other reasons, too, I think that the rule laid down by the cases cited upon this point ought not to be maintained; the rule itself is so vague and indefinite that its application to cases coming here on appeal would, in many instances, be productive of the utmost confusion and the most profitless preliminary discussion. What is the required line of procedure? In what way must the order depend upon the judgment? Or, when may it be said to

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follow the judgment in the same line of proceeding? Can there be said to be any uniform line of proceeding at all, or one that is capable of such delineation as would make it safe or reliable as a boundary line between orders within and orders without the appellate jurisdiction of this Court? Nor does the rule in question, by its practical operation upon the substantial rights of parties, commend itself to my judgment. For under that operation a special order, if made after the rendition of judgment, and made in a case, too, within our appellate jurisdiction, though it might be clearly erroneous, and perhaps of the most oppressive and ruinous character, is nevertheless effectually withdrawn from revision in this Court, because, forsooth, it was not entered in a particular line of procedure. Its other errors are not to be inquired into here, because it has the merit of having been irregularly entered in the Court below. The case of *Quivey v. Gambert*, 32 Cal. 304, is one that may be referred to as an illustration of this view. In that case Gambert had made a motion for a new trial, and filed a statement in its support. The Court below struck this statement from its files. Gambert appealed from the order striking out the statement. He had no other effective remedy, for the order having removed his statement from the files, his motion for a new trial was necessarily left wholly unsupported, and had he appealed from an order denying the motion for a new trial, the order in that condition of the record must have been affirmed here.

“Upon considering the case of *Quivey v. Gambert*, this Court arrived at the conclusion that the Court below had erred in striking the statement from the files; but, on the authority of *Leffingwell v. Griffin*, *Ketchum v. Crippen*, etc., and because the erroneous order striking out the statement was not entered in the ordinary line of proceedings had on motion for a new trial, it held that it had *no jurisdiction* to correct this demonstrated error, because it could not enter-

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tain an appeal for that purpose. This Court, however, in dismissing the appeal for the supposed want of jurisdiction, *advised* the Court below to set aside its order striking out the statement, and to allow the motion for a new trial to proceed. This advice the Court below was, of course, at entire liberty to disregard — and, if it had chosen to do so, the consequence would have been that Gambert would, as the result of an erroneous order entered in the Court below, have been deprived of the benefit of his motion for a new trial, and placed beyond the power of this Court to relieve him from the consequences of that error.”

This was the substitution of a sort of *jus precarium* to supply the place of the constitutional authority which rightfully belonged to this Court, but which it had thrown aside in the assertion of a distinction, in itself impossible of maintenance, and which, if maintained, would be productive of nothing but confusion and embarrassment in the administration of justice.

These general views, as expressed in the Kimball case, received the assent of a majority of the Court at the time, and have since been followed here (*Morris v. De Celis*, 41 Cal. 331; *Dooley v. Norton*, 41 Cal. 439). The case of *Quivey v. Gambert*, and the others upon which it is based, must, therefore, be considered as overruled upon the question of the appellate jurisdiction of this Court to review “special orders made after final judgment.”

The Court below manifestly erred in striking the statement from its files, and its order in that respect must be reversed.

An appeal from the judgment is also presented by the record, but objection is taken by the respondent that it was not brought within the time prescribed by law, and should, therefore be dismissed.

The judgment was rendered, as we have seen, the 30th

day of March, 1868, and the appeal therefrom was taken on the fourteenth day of July following. The action having been commenced originally in the Court of a Justice of the Peace, a judgment against the defendant was rendered there in May, 1863, and during the same month the case reached the County Court by appeal. If the County Court, when it rendered the judgment in question, in March, 1868, is to be considered as the Court in which the action was commenced, then, the appeal having been taken within one year after the rendition of that judgment, the objection that it was taken too late cannot prevail. (Practice Act, Sec. 336, Subd. 1.) But if, upon the other hand, the judgment rendered by the County Court is to be considered as "a judgment rendered on an appeal from an inferior Court," the appeal, not having been taken within ninety days after judgment rendered, is too late, and it must be dismissed. (Practice Act, Sec. 336, Subd. 2.)

Unquestionably the jurisdiction which the County Court first obtained over this cause, through the appeal taken on the 14th day of July, 1868, was appellate, and not original in its nature.

It is argued, however, that while the cause was yet pending in the County Court its jurisdiction over it ceased to be appellate and became original in its character. This change is said to have been effected by an Act, approved December 23d, 1863, providing for the transfer of cases to the Courts established by the constitutional amendments of 1862 (Acts 1863-4, p. 1), and by the Act of April 4th, 1864, concerning causes of action in forcible entries and unlawful detainers, as existing in 1863 (Acts 1863-4, p. 399), but upon examination of those Acts I am unable to see that any such change was effected thereby.

It is expressly declared in the first named Act, section six, that its true intent is that no suit, cause, or proceeding which may be pending in any Court shall be in anywise discontin-

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ned, but that "the same shall in all respects be proceeded in as though no change had taken place."

The provisions of the Act of December, 1873, irrespective of any question of their constitutionality (and none is made), place proceedings in forcible entry in all cases existing prior to December 31st, 1863, *in statu quo* "as to any act done or right accrued or established, or cause of action which existed, and as to any suit or proceeding upon or for the same, pending or in judgment," etc., except that no fine should be imposed or damages trebled.

The judgment of March 30th, 1868, was, therefore, "rendered on an appeal from an inferior Court," and the appeal therefrom to this Court, not having been taken within the time prescribed for appeals from judgments of that character, should, for that reason, be dismissed.

The appeal is taken lastly from an order refusing to set off an execution in favor of the defendant, and against David Calderwood, against an execution in favor of David Calderwood and Elizabeth Douglass, formerly Calderwood. The apparent facts being that the parties to the two executions are not the same, there was no error in denying the motion.

The appeal from the judgment is dismissed; the order denying the motion to set off the executions is affirmed; and that striking the statement of the defendant from the files is reversed, and the cause remanded for further proceedings on the motion for a new trial.

RHODES, C. J., concurring specially:

I concur in the judgment, except that portion which sustains the appeal from the order striking out the statement on new trial, and from that portion of the judgment I dissent, as I am of the opinion that *Quivey v. Gambert*, and the cases decided on the authority of that case, state the correct rule.

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[A petition for a rehearing was afterwards filed, on behalf of the respondents, and in response thereto the following opinion was rendered:]

By the Court, WALLACE, J.:

We understood from the record in this case, and understand now, that the Court below struck from its files the statement placed there by the defendant in support of the motion for a new trial. We understood, too, and still understand from the record, that the ground upon which the order was made by the Court below was that the statement, though filed, had never been served upon the plaintiff's attorney. We reversed this order because we held, as was held in *Quivey v. Gambert*, 32 Cal. 305, that such an order cannot be supported if objected to below. Even though service of a statement on motion for new trial had been required by a rule of the Court, or by statute (which it is not), the Court, while it might deny the motion for a new trial for failure to serve it (if the opposite party made it an objection to granting the motion), could not properly strike the statement from the files.

The petition for a rehearing is founded upon a total misapprehension of the decision made here, as well as of the ground upon which it rests, and it is therefore denied.

[No. 2,282.]

THE PEOPLE OF THE STATE OF CALIFORNIA v.
CHARLES SHIMMINS, J. M. TEWKSBURY, ET AL.

ASSESSMENT OF LAND AS AN ENTIRETY.—The San Pablo Rancho was assessed as an entirety to a large number of owners; some of the owners individually paid taxes upon thirteen thousand five hundred and

Argument for Appellants.

ninety-eight acres, leaving four thousand three hundred and thirty-eight acres, owned by numerous persons, upon which the taxes were unpaid. Judgment was rendered against certain persons who were assessed, for delinquent taxes, ordering the sale of a certain number of acres undivided, without designating the interests of the judgment debtors in the land. *Held*, to be erroneous.

ASSESSMENT TO COPARTNERS, ETC.—Where land is assessed as an entirety to numerous persons, without designating the interest of any one of them, it is an assessment to them as copartners, joint tenants, or tenants in common, and not as owners in severalty.

ISSUE.—**DUTY OF COURT TO EXONERATE OWNERS NOT DELINQUENT.**—If such an assessment be legal, it would be the duty of the Court in giving judgment for delinquent taxes upon the land, to ascertain by its judgment what particular undivided interests in the land were delinquent, and to exonerate from the lien for the delinquent tax the interests of those who had already paid their proportion of the general burden.

SALE OF UNDIVIDED INTEREST IN LAND FOR TAXES. QUERY?—Whether, under an assessment to several persons of a tract of land *in solido* and as an entirety, an undivided interest can, in any case, be sold for a delinquent tax.

HOW ASSESSMENT SHOULD BE MADE.—It is the better practice to assess each particular person who claims an interest in a tract of land according to his interest or claim of title, and not to assess the whole tract *in solido* to all those who claim an interest in it.

RIGHT TO BE ASSESSED IN SEVERALTY.—When a person holds an interest in a tract of land in severalty, he is entitled to be assessed for his particular tract only.

APPEAL from the District Court of the Fifteenth Judicial District, Contra Costa County.

The San Pablo Rancho, consisting of seventeen thousand nine hundred and thirty-six acres, having been assessed as an entirety to numerous owners, without designating the individual interest, and the taxes upon a portion of it remaining unpaid, this suit was brought to enforce the payment of the delinquent taxes. The plaintiff had judgment, and the defendants appealed.

The other facts are stated in the opinion of the Court.

B. S. Brooks, for Appellants, argued that the whole of the ranch having been assessed as an entirety, there was no

authority for selling an undivided interest, and the judgment for that purpose was erroneous.

H. Mills, District Attorney, and Jo Hamilton, Attorney General, for Respondents.

By the Court, CROCKETT, J.:

I have carefully reviewed the questions which are involved in this case, and am satisfied that the judgment of the Court below cannot be sustained. The San Pablo Rancho, containing about four leagues, was assessed, as an entirety, to about one hundred persons; but whether as copartners, tenants in common, joint tenants, or as owners, claimants, or occupants in severalty, does not appear on the face of the assessment. At the trial the Court found that the taxes had been paid on the whole rancho, except an undivided interest therein of four thousand three hundred and thirty-eight acres, and that the defendant, Tewksbury, had paid the tax on all his interest in the rancho. The judgment was that the lien for so much of the tax as was delinquent should be enforced by a sale of so much as was necessary of the undivided interest of four thousand three hundred and thirty-eight acres. But the judgment and the assessment do not designate to what particular persons this undivided interest was assessed. Indeed, no specific undivided interests were assessed to any particular persons; but the whole rancho, *in solido*, was assessed as an entirety to numerous persons, without designating the interest of any one of them. This can be regarded in no other light than as an assessment to the several persons as copartners, joint tenants, or tenants, in common, and not as owners or claimants in severalty. If it be admitted that such an assessment is unobjectionable, and in strict conformity with the statute, and that any one or more of the persons assessed may pay his or their proportion of the tax, and thus exonerate his or their interests in the land, it would

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be the duty of the Court, in that event, to ascertain by its judgment what particular undivided interests in the land were delinquent, and to exonerate from the lien for the delinquent tax the interests of those who had already paid their proportion of the general burden. Unless this be the proper rule there would be no method by which it could be ascertained what particular undivided interest was to be sold in satisfaction of the delinquent tax. Purchasers could not know what particular interests they were buying, and those of the owners who had already paid their just proportion of the tax would be forced to pay the whole, in order to protect their own interests from sale, for a tax which they did not justly owe. All this difficulty and hardship may be avoided by ascertaining what particular undivided interests were delinquent, and subjecting these, and these only, to sale. In this case a different course was pursued, and the Court ordered to be sold only an undivided interest equal to a specified number of acres, without designating to whom this interest belonged, or had been assessed, and without exonerating the remaining interests of those persons who had already paid their proportion of the tax.

For this reason the judgment must be reversed, but we reserve our opinion upon the point whether under an assessment of a tract of land *in solido*, and as an entirety, an undivided interest can, in any case, be sold for a delinquent tax. Whatever may be our ruling on this point, when it becomes necessary to decide it, we may say in advance, that it is certainly the better practice to assess each particular person who claims an interest in a tract of land according to his interest or claim of title, and not to assess the whole tract *in solido* to all those who claim an interest in it, as appears to have been done in this case. The mode of assessment here indicated would, doubtless, impose some additional labor on Assessors, but would greatly simplify the collection of taxes, and prevent much needless embarrassment and confusion in

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titles. And it is quite certain that when a person holds a tract of land in severalty, he is entitled to be assessed for his particular tract only, and not as a tenant in common with a hundred others claiming a large tract which includes the particular tract.

Judgment reversed and cause remanded for a new trial.

[No. 2,184.]

JOHN A FAIRCHILD v. JOHN S. DOTEN.

JUDGMENT UPON AWARD APPEALABLE.—A judgment entered in accordance with an award is a judgment upon a proceeding commenced in a District Court, within the meaning of the Practice Act, and is, therefore, appealable.

JURISDICTION OF SUPREME COURT.—The Supreme Court has appellate jurisdiction from judgments rendered in District Courts upon awards.

CHARACTER OF PROCEEDINGS IN CASES OF AWARD.—Proceedings upon award are special in character, and they must be in substantial compliance with the statute, or the judgment upon the award will not be valid.

JURISDICTION OF COURT.—The statute provides only for entering the submission to awards, as a rule of Court. If it clearly appear that the parties meant merely that the award and not the submission should be made a rule of Court, or that judgment should be entered upon the award, the Court has no jurisdiction.

APPEAL from the District Court of the Ninth Judicial District, County of Siskiyou.

The parties to this action, having failed to settle their partnership accounts, made the following agreement of submission to arbitration:

“We, the undersigned, hereby mutually agree to submit all matters and questions in difference between us, touching and concerning the settlement, liquidation, and adjustment of the accounts between us, the respective members of the firm of Fairchild & Doten, and said firm. But this arbitration is not intended to embrace and does not affect any sum or sums

Statement of Facts.

of money due said firm from others, or any sum or sums due from said firm to others, but is confined to accounts between the members of said firm and between said firm and the members thereof, save and excepting any indebtedness between said firm or the members thereof and their employes, which is to be considered in this arbitration, whose names are hereunto subscribed to A. P. McCarton, and E. M. Anthony; the said McCarton and Anthony, as soon after their meeting together as practicable, to select a third man, and they three or any two of them to hear and determine all questions and differences aforesaid, and to make their award in writing, at as early a day as practicable. And it is hereby further mutually agreed between the parties hereto, that judgment in the District Court of the Ninth Judicial District of the State of California, in and for the County of Siskiyou, may be rendered upon the award to be made pursuant to this submission, to the end that all matters in controversy between them, so far as settling, liquidating, and adjusting the accounts hereinbefore referred to are concerned, shall be finally concluded.

“Witness our hands and seals this 16th day of July, A. D. 1868.”

An award was filed December 7th, 1868, signed by A. P. McCarton and Horace Archer, stating that the two arbitrators selected by the parties had mutually agreed to appoint Archer as the third arbitrator; that they had proceeded to take testimony as to claims; had allowed some claims and rejected others; and finally agreed upon an award in favor of Fairchild and against Doten, for the sum of twelve thousand one hundred and thirty-nine dollars and thirty-two cents. Anthony refused to sign the award. Doten filed in the District Court exceptions to the award, upon the ground that Archer had not been selected until after the award was made, and then only by McCarton, and upon various other

grounds. He moved to vacate the award. The Court denied the motion, and rendered judgment in accordance with the award.

Doten appealed from the order denying his motion. The appeal was dismissed (see 88 Cal. 286), and he then took this appeal from the final judgment.

George Cadwalader, for Appellant.

E. & C. A. Garter and *E. Steele*, for Respondent.

By the Court, TEMPLE, J.:

There is great force and plausibility in the argument of the respondent that the evident intent of the framers of the Practice Act must have been that no appeal should be taken from a judgment rendered upon an award of arbitration; that review of the proceedings of the arbitrators should only be had upon a motion to vacate the award in the District Court, and that an appeal to this Court can only be taken from the order vacating or refusing to vacate the award.

I think, however, the judgment upon an award is a judgment upon a proceeding commenced in the District Court, within the meaning of section three hundred and thirty-six, and therefore is appealable under that statute. In that section, actions or proceedings *commenced* in the Court from which the appeal is taken are placed in opposition to such as might have been brought to that Court by appeal. An arbitration, for the purposes of that section, may be said to be a proceeding commenced in the District Court. The agreement submitting the matter to arbitrators takes the place of the pleadings, and the arbitrators, upon the submission being filed, become subject to the control of the Court, to a great extent, and their award is analagous to a judgment reported by a referee appointed to try a cause and

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report judgment. Section three hundred and eighty-eight does not, in express terms, deny an appeal from such judgment after a motion has been made to vacate the award. I think we ought not to refuse to take jurisdiction, unless it were expressly excepted from the statute granting appeals from the judgments. It is certain that the Constitution has given this Court appellate jurisdiction in cases of this character, and manifestly objections may well exist to a judgment upon an award which are not specified in the Practice Act as grounds of vacating the award. We will not presume that the Legislature has attempted to deny to parties a constitutional right, or to deprive this Court of its appellate jurisdiction.

The submission to arbitration contains a stipulation that judgment in the District Court of the Ninth Judicial District, in and for the County of Siakiyou, may be rendered upon the award made in pursuance of the submission. There is no stipulation that the submission shall be entered as a rule of the Court, and it is claimed by the appellant that the District Court acquired no jurisdiction of the matter. The proceeding is a special one, and the statutory provisions must be substantially complied with or the judgment will not be valid. The statute provides only for entering the submission as a rule of Court. Numerous cases have been decided in which it has been held that an agreement that the award shall be made a rule of Court will be considered tantamount to an agreement that the submission shall be made a rule of Court. This seems very much like making a contract for the parties different from that which they have made for themselves; or at least to permit parol evidence to vary the written contract, and thus to nullify the statute, which requires the submission to be in writing. This liberal construction is only applied to those cases where it appears that the word "award" has been used by mistake, and the Court can see by the language used that the par-

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ties intended that the arbitration should be made under the statute. If it clearly appear that the parties meant merely that the award and not the submission should be made a rule of Court, or that judgment should be entered upon the award, the Court has no jurisdiction. In this case it is not even stipulated that the award shall be entered as a rule of the Court, but that judgment may be entered upon the award. The parties evidently did not intend that the arbitration should be conducted under a rule of the Court, or to avail themselves of the machinery of the Court to compel the attendance of witnesses or otherwise. The agreement was intended as authority to enter a judgment against the losing party. Upon this point the case stands upon all fours with the case of *Ryan v. Dougherty*, 30 Cal. 218. (See, also, *Caldwell on Arbitration*, 44; *Cromwell v. Marsh*, 1 Breese, 230.)

The Court derives its jurisdiction entirely from the statute, there being no cause pending in that Court in which judgment could be entered. The statute not having been complied with, the judgment was unauthorized.

Judgment reversed and cause remanded.

RHODES, C. J., concurring specially:

I concur in the judgment.

[No. 2,704.]

**THE BANK OF STOCKTON v. L. L. HOWLAND &
CO., JOHN INGLIS, A. J. COBURN, G. H. CASTLE,
AND H. LAMBERT.**

JOINT JUDGMENT ERRONEOUS AS TO ONE DEFENDANT.—A joint judgment on a promissory note rendered against the administrator of a deceased maker and the surviving makers, is erroneous as to the administrator,
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Argument for Respondent.

If it is not made payable *de bonis testatoris*, but this error does not invalidate it as to the other defendants.

PRESENTATION OF CLAIM TO EXECUTOR.—An objection to a recovery on a claim against the estate of a deceased person on the ground that it was not presented to the executor for allowance, cannot be made for the first time in the Supreme Court, nor on motion for a new trial.

APPEAL from the District Court of the Fifth Judicial District, County of San Joaquin.

The action was commenced in February, 1870, on a joint promissory note for five thousand dollars. After the commencement of the suit the defendant, Coburn, died. In June, 1870, Harriet Coburn, the administratrix of his estate, was substituted as a defendant in his place, and about the end of the same month judgment was rendered against the administratrix and the other defendants jointly. A motion for a new trial having been denied, the administratrix and the defendants, Castle and Lambert, appealed.

J. H. Budd and W. L. Dudley, for Appellants.

The judgment against the administratrix of the estate of A. J. Coburn, deceased, was erroneous, because the note was never presented to her for allowance or rejection; and no recovery could be had thereon without proof of presentment. (Probate Act, Sec. 138; *Hentsch v. Porter*, 10 Cal. 555; *Coleman v. Woodward*, 28 Cal. 567.)

The judgment is entire, and being erroneous as to the administratrix, it is erroneous as to Castle and Lambert, and must be reversed as to all. (*Camp v. Bennett*, 16 Wend. 48; *Easton v. Calendar*, 11 Wend. 96; *Richard v. Walton*, 12 Johns. 434.)

Byers & Elliott, for Respondent.

The statute provides that "an action shall not abate by the death of a party," and that "in case of the death of a party * * * the Court may, on motion, allow the action

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to be continued by or against his representative." (Practice Act, Sec. 16; *Gordon v. Sterling*, 13 How. 405.)

The objection of want of presentation of the claim to the administratrix, should have been made before judgment by plea. She had an opportunity to plead any defense that might have arisen subsequent to the filing of the original answer.

If the judgment against the administratrix was improper, the judgment against the other defendants will still be maintained. The common law rule, that a judgment against a joint debtor must stand or fall, as a whole, has been modified, if not entirely changed, under our practice. (*People v. Frisbie*, 18 Cal. 402; *Lewis v. Clarken*, 18 Cal. 399; *Chester v. Miller*, 13 Cal. 558; Practice Act, Secs. 32, 145.)

The objection to the judgment against the administratrix is taken for the first time in this Court, and will not be considered. (*Hentsch v. Porter*, 10 Cal. 555.)

By the Court, CROCKETT, J.:

This is an action against the several joint makers of a promissory note, who all appeared and pleaded to the merits, except one or two, who were duly served and made default. The defendant Coburn, died after his answer was filed, and before the trial; and thereupon an order was duly entered that the action proceed against his administratrix. No additional pleadings were filed, and on the trial the Court made written findings, and entered a judgment for the plaintiff, against all the defendants, including the administratrix, from which judgment, and from an order denying their motion for a new trial, the administratrix and three other defendants prosecuted this appeal. One of the grounds of error relied upon on the motion for new trial, and on this appeal, is, that there was no proof that the plaintiff's demand had been presented to the administratrix of Coburn

Opinion of Rhodes, C. J., concurring.

Mr. Chief Justice RHODES delivered the following concurring opinion, in which Mr. Justice WALLACE and Mr. Justice TEMPLE concurred:

I concur in the opinion of Mr. Justice CROCKETT, except upon the question of the presentation of the claim to the administratrix. The doctrine of this Court is, that the objection to the recovery of a claim against the estate of a deceased person on the ground that it was not presented to the administrator, as provided in section one hundred and thirty-eight of the Probate Act, cannot be made for the first time in this Court — that it should have been first made in the Court below. (*Hensch v. Porter*, 10 Cal. 555; *Coleman v. Woodworth*, 28 Cal. 567.) The purpose of the rule is to give the claimant an opportunity to supply the requisite pleadings or proof, as the case may require. In this case the objection that there was no proof of the presentation of the claim to the administratrix was made for the first time on the motion for a new trial. It was too late at that time for the plaintiff to have supplied the requisite proof. The objection must, therefore, be disregarded.

In my opinion, the judgment should be affirmed as to all the defendants, except as to Harriet Coburn, the administratrix of the estate of A. J. Coburn, deceased; and as to her the cause should be remanded, with directions that the judgment be modified by requiring the sum therein mentioned to be paid out of the estate of said deceased in due course of administration.

So ordered.

Mr. Justice SPRAGUE did not participate in either of the foregoing opinions.

Opinion of the Court—Wallace, J.

[No. 1,940.]

MARGARET BRIODY v. T. D. CONRO AND JOSHUA HILTON.

COLLUSIVE ATTACHMENT CONFERS NO RIGHT AGAINST SUBSEQUENT BONA FIDE ATTACHMENT.—Where a member of a firm in failing circumstances made a firm note to his sister for a personal debt of his own to her, but which was barred by the Statute of Limitations, and procured her to sue the firm upon it, and attach the firm property, and he advanced the costs of suit, and had the property bid off in her name, and it was plain, from the circumstances, that the proceedings were collusive, and that the firm, as a firm, owed her nothing: *held*, that no title passed by such attachment and sale as against subsequent attaching creditors of the firm.

APPEAL from the District Court of the Fifteenth Judicial District, City and County of San Francisco.

The cause was tried by jury in the Court below, and there was a verdict for the plaintiff. The main ground of defendants' motion for a new trial and on this appeal was insufficiency of the evidence to justify the verdict and judgment; and the briefs of counsel were chiefly directed to abstracting and discussing the weight of the evidence.

The other facts are stated in the opinion of the Court.

Eugene B. Drake, for Appellants.

Elisha Cook, for Respondent.

By the Court, WALLACE, J.:

This is an action for the recovery of certain personal property—the liquors, groceries, etc., formerly belonging to the copartnership of Briody & Pardee, in San Francisco. The defendants, judgment creditors of the copartnership, levied an execution upon these goods, and sold them to satisfy their debt. The plaintiff (a sister of John Briody, one of the members of the firm of Briody & Pardee) thereupon brought this action, and recovered a judgment for the

Opinion of the Court—Wallace, J.

possession of the property, etc.; and a motion of defendants for a new trial having been denied, this appeal is taken from the judgment and the order denying the new trial.

It appears from the evidence given at the trial that Briody & Pardee were in failing circumstances; that the demand of the defendants, upon which they afterward recovered judgment, had been presented to them for collection, and that they had promised to pay it on the 16th day of June, 1865. On that day two attachments were levied upon the property of the firm of Briody & Pardee, the writs issuing in actions commenced in the Court of a Justice of the Peace—one in the name of the plaintiff Margaret as plaintiff, the other in the name of one Brower as plaintiff. The action in the name of the plaintiff, Margaret, was brought upon a promissory note executed, or purporting to be executed, to her or to her order, by Briody & Pardee, bearing date May 1st, 1865, for the sum of three hundred dollars, payable thirty days after date, without grace, and bearing interest at the rate of one and one half per cent per month from date until paid. The action brought in the name of Brower as plaintiff was brought upon another note, similar upon its face to the first in all respects, except that it bore date June 1st, 1865, and fell due fifteen days after date. It purported to have been made to the plaintiff, Margaret, as payee, and indorsed by her to Brower. The indorsement made of this note to Brower was made by the plaintiff, Margaret, at the suggestion of Harding, a Constable, who advised that both suits should not be commenced in her name, but that one of them be commenced in the name of Brower. The dates borne by the notes were false in fact—they were both of them really made on the 16th day of June, 1865, being drawn up by Harding, the Constable, and antedated by him, the very day upon which they were put in suit. It appears that upon that day one Brownell applied to Harding to have an

Opinion of the Court—Wallace, J.

action brought against Briody & Pardee upon "a note for five hundred dollars or six hundred dollars." Harding informed him that a demand so large in amount as that exceeded the jurisdiction of a Justice of the Peace, and thereupon the notes in suit were prepared and executed, one of the notes indorsed to Brower, and the attachments immediately issued, one in the name of the plaintiff, the other in that of Brower as plaintiff. Harding, the Constable, when executing these writs of attachment against the firm of Briody & Pardee, collected of the latter the costs of both suits—John Briody taking the money out of the drawer in the store to pay him these costs. A keeper was placed in charge, but the store was not closed; in fact, the business of the firm proceeded as usual. No defense to the actions brought by the plaintiff and by Brower being made by Briody & Pardee, judgments by default were promptly entered, to wit, June nineteenth, and executions, immediately issued thereon, were at once levied upon the liquors, groceries, etc., in the store, and also upon a horse and wagon used in conducting the business. A sale could not, however, have ordinarily taken place until after an advertisement of five days, as required by the statute regulating sales of personal property upon execution; but the defendants stipulated to waive the advertisement required by law, and the sale accordingly took place on the twenty-first of June. The proceedings at the sale seem to have fallen into some confusion, notwithstanding the evident anxiety of the defendants in execution that it should be both speedy and effective. At the request of John Briody, the Constable exposed to sale the property of the firm, consisting of liquors, groceries, etc., including horse and wagon, in one entire lot, and, according to the understanding of the Constable making the sale, the plaintiff, Margaret, and her

Argument for Appellant.

APPEAL from the District Court of the Twelfth Judicial District, City and County of San Francisco.

This was an action to recover the sum of seven thousand five hundred dollars, the value of two hundred and sixty-nine shares of the capital stock of the Exchequer Mining Company, alleged to have been converted by the defendants. It appears that in 1867 Joseph Tilden hypothecated five hundred shares of the stock of that company with defendants, as collateral security for a debt of eighteen thousand six hundred and seventy-five dollars. Of these shares the two hundred and sixty-nine referred to stood in Tilden's name as "trustee," on the books of the company, but belonged in fact to the plaintiff.

There having been a judgment in the Court below in favor of defendants, and a motion for new trial denied, the plaintiff appealed.

J. W. Winans, for Appellant.

Defendants knew that the stock belonged to the plaintiff. But even if Tilden had hypothecated the stock for his debt to defendants, and defendants had believed the stock to be his, and there were no facts to put them on inquiry, still plaintiff is entitled to recover, under the express provisions of the statute and otherwise. (*Hittell's Digest*, 940; *McNeil v. Tenth National Bank*, 55 Barb. 59; *Ballard v. Burgett*, 47 Barb. 646; *Weston v. Bear River and A. W. and M. Co.*, 5 Cal. 186; 6 Cal. 429; *Naglee v. Pacific Wharf Co.*, 20 Cal. 523; *Strout v. Natoma W. and M. Co.*, 9 Cal. 78.)

Again, the certificates were made to "Jos. Tilden, trustee," and the legal title to them was never transferred from Tilden to defendants by indorsement, and never became the property of defendants. (*Payne v. Bensley*, 8 Cal. 266.) The fact that the certificates were in the name of Jos. Tilden, as trustee, was sufficient to put defendants upon inquiry,

Argument for Respondents.

and subject them to the equities of the true owner, even if the stock of plaintiff was otherwise hypothecated and was hypothecated to them. (*Sayre v. Nichols*, 7 Cal. 535; *Hall v. Crandall*, 29 Cal. 571; *Brockway v. Allen*, 17 Wend. 40; *Urquhart v. McIver*, 4 Johns. 116; *De la Chauvette v. Bank of England*, 9 B. & C. 205; *Williamson v. Brown*, 15 N. Y. 354.)

The use of the word "trustee" in the indorsement, corresponding to the word "trustee" attached to the name of the party to whom the certificate was issued in the body of the certificate, made Tilden's indorsement only a qualified one, and saved the rights of the plaintiff in the paper. (1 *Parsons on Bills*, 95; *Lawrence v. Clark*, 36 N. Y. 128; *Farrington v. Frankfort Bank*, 24 Barb. 554; *Mott v. Hicks*, 1 Cowen, 538; *Hicks v. Hinds*, 9 Barb. 530; *Sayre v. Nichols*, 7 Cal. 540; *Darrell v. Haley*, 1 Paige Ch. 493; *Williamson v. Brown*, 15 N. Y. 364; *Holbrook v. Mix*, 1 E. D. Smith, 154-160.)

John B. Harmon, for Respondents.

Brewster, having given Tilden the usual *indicia* of ownership, and of the right of disposal, by delivering the stock to him with power to put it in his own name, and to dispose of it, Tilden's pledge to Sime & Co. was valid; and the fact that, when pledged, the certificates stood in the name of "Jos. Tilden, trustee," did not affect the power of disposal, whether by sale or pledge.

Our statute (Hittell, 942) authorizes the party holding stock as trustee to vote it—recognizing him as the owner of the legal title. It is a matter of common notoriety that this section of the statute has given rise to the general custom, with bankers and brokers, to put stock in the name of one of their clerks, as trustee, the sole object being to vote the stock, or to keep track of it. But when such trustee indorses the certificate no one ever asks for

Opinion of the Court — Crockett, J.

whom he is trustee. If the person named be the real owner the word is surplusage; if he is not, then the owner has permitted the trustee to hold himself out as owner, and he is bound. (*Gibson v. Stevens*, 8 How. 399.) The rule applicable is this: Where the owner of personal property has voluntarily given to another the usual *indicia* of the right of disposal, the owner is bound by any disposition made to persons acting upon the faith of such *indicia*. (*Saltus v. Everett*, 20 Wend. 278; *Com. Bank of Buffalo v. Kortright*, 22 Wend. 361; *Western Transp. Co. v. Marshall*, 37 Barb. 509; *Crocker v. Crocker*, 31 N. Y. 507; *Fatman v. Lobach*, 1 Duer, 354.)

By the Court, CROCKETT, J.:

There are in this case but two material questions of fact, and two of law. The questions of fact are: First, Did Tilden pledge to defendants plaintiff's stock as collateral security for a loan made at the time? Second, Did the defendants then have actual notice that the stock belonged to plaintiff and not to Tilden? On both these points there is a substantial conflict in the evidence. The defendant Hastings testified explicitly that this, with other stock, was hypothecated with the defendants by Tilden, as security for a loan made at the time, and that they had no knowledge or notice that the plaintiff owned any part of it, or that it belonged to any one else than Tilden. The defendant Sime testifies substantially to the same facts; and on the first point they are corroborated to some extent by the witness Sharp. On the other hand, Tilden testifies that the plaintiff's stock was not included in the hypothecation; and his testimony tends to show that Sime had actual notice that the stock belonged to the plaintiff. It was for the Court below to weigh the evidence, and to determine what credence the respective witnesses were entitled to. In such cases it is not our prac-

tice to disturb the judgment on the ground that it is not justified by the evidence, even though we should consider it to be against the weight of evidence.

The questions of law are: First, Whether the fact that the stock stood on the books of the corporation in the name of Tilden, "*trustee*," was sufficient to put the defendants upon inquiry as to the plaintiff's title, and operated as constructive notice of his equitable rights. Second, Whether the fact that the plaintiff, on his departure for Europe, had placed the stock in Tilden's hands for sale, with authority to transfer it on the books of the corporation, had the effect to clothe him with such *indicia* of ownership as to protect the defendants, if in good faith and ignorance of the plaintiff's rights they advance money to Tilden on the hypothecation of the stock.

I am duly sensible of the gravity of these questions, in a community where transactions in stocks to a large amount are daily made, and where it is a matter of general notoriety that it is a common practice to transfer stocks into the name of some person as "*trustee*," for the sole purpose of concealing the name of the real owner, whose transactions in buying or selling a particular stock, if his name were known, might operate to enhance or depress its market value. To avoid this result, and also, possibly, with a view to escape assessments upon stocks of doubtful value, or to protect his credit from the damage to which it might be exposed if it were known that he was a large operator in certain stocks, the owner frequently resorts to the device of causing the stock to be transferred into the name of some other person, as "*trustee*." In such cases the trustee is a mere man of straw, having no interest in the stock nor any trust to perform, except to manage and dispose of it as the owner shall direct. This practice has become so notorious in this State that we cannot affect to be ignorant of it.

In view of the general prevalence of this practice, what

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effect in law should be given to the fact that there is appended to the name of the person to whom the certificate is issued the word "trustee?" Shall this be held to operate as constructive notice to all persons dealing with the so-called "trustee" that he is not the owner? Must they deal with him at arm's length, and if they shall purchase the stock, or loan him money upon it, do they take the hazard that on the next day, or the next month, the secret owner may disclose himself and repudiate the transaction and demand the stock? In my opinion, considerations of public policy and common justice demand that, when stock is placed in the name of a "trustee" under these circumstances, the secret owner shall be bound by the acts of his "trustee" dealing with persons who have no actual notice of the relations between the parties. If nothing more appear on the books of the corporation, or on the face of the certificate, to indicate the trust and its nature, than the mere addition to the name of the word "trustee," the owner, who has clothed his agent with the legal title, one of the highest *indicia* of ownership, should bear the consequences resulting from the acts of the agent, rather than an innocent person who advances the money on the faith that the agent is the real owner, or at least has authority to sell or hypothecate the stock. I am not, however, to be understood as holding that words may not be inserted in a certificate which would so clearly indicate a trust and its nature as to limit the power of the trustee, and operate as constructive notice of the equities of the *cestui que trust*. All that is intended to be decided is, that the mere addition of the word "trustee" after the name in the certificate is not, in this State, of itself, nothing more appearing, to be deemed constructive notice of the equities of a secret owner of the stock. If it is intended that the so-called trustee shall not have power to sell or hypothecate the stock, without the express consent of the equitable owner, it is an easy matter to limit his

authority by apt words in the certificate. In the absence of such words, the mere addition of the word "*trustee*" after the name will not have the effect to limit the absolute power of disposition, or to operate as constructive notice of any secret equities, as against persons who, in good faith, purchase or advance money on the stock without notice. Standing alone, the mere fact that a person holding the legal title, and apparently having the right of disposition, is styled "*trustee*," raises no implication that he has not authority to sell or hypothecate the stock in the usual course of business. If it should be held to raise a presumption that some one else was the owner, nevertheless the inference would be, that, in clothing the trustee with the legal title, he had invested him with authority to sell and hypothecate in the usual course of business. And the rule is universal, that where the legal title and apparent right of disposition is vested in a person upon some secret trust, which restricts the powers of the trustee as between the parties, nevertheless the rights of purchasers, pledgees, and mortgagees, in good faith, for a valuable consideration paid at the time, and without notice, are unaffected by the trust.

The transaction between the plaintiff and Tilden was, in my opinion, a secret trust within the true sense and spirit of this rule. When about to leave for Europe the plaintiff indorsed his certificates of stock, so that they could be transferred in his absence, and deposited them with Tilden for sale, knowing that he, thereby, enabled him to transfer the legal title and apparent ownership into his own name. He placed Tilden in a position to represent the stock as its true owner. The indorsement and delivery of the certificates to him, so that they could pass by delivery and might be transferred at his option, clothed him with all the *indicia* of own-

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ership, and enabled him to hold himself forth as the real owner. If Tilden had caused the stock to be transferred to himself, omitting the word "*trustee*" from the certificate, it cannot be doubted that he would, apparently, have been the real owner, with a perfect title. There would have been nothing on the face of the certificate, or in the corporate books, to awaken the slightest suspicion that he was not the owner. In that event, if the defendants, finding his title perfectly regular on its face, had loaned him money on a pledge of the stock, without notice of the plaintiff's equities, the lien for their advances would have been unquestionably good as against the plaintiff. After enabling Tilden to invest himself with a legal title, perfectly regular on its face, and apparently valid, the plaintiff would be estopped to deny Tilden's title as against purchasers or pledgees who advanced their money in good faith in the ordinary course of business, and without notice of the plaintiff's equities. If the rule were otherwise, there would be an end to transactions in stocks. If purchasers and pledgees dealing with titles strictly regular and apparently valid on their face, are to take the hazard of all latent equities existing in the hands of any antecedent holder of the stock, prudent persons would abstain from such perilous ventures. If Tilden, in violation of his agreement with the plaintiff, has caused the stock to be transferred to himself, and has hypothecated it for his own account, instead of selling it for account of the plaintiff, he is liable in damages for a breach of the contract. But after enabling Tilden to invest himself with the legal title and apparent ownership, on the faith of which he obtained advances from the defendants, without notice of the plaintiff's equities, the plaintiff occupies the relation of *cestui que trust* attempting to assert a secret trust against persons who, in ignorance of the trust, have made advances on the property to the trustee holding the legal title and apparent ownership. If Tilden has perpetrated a fraud, the plaintiff

enabled him to do it, by placing it in his power to invest himself with the legal title and apparent right of disposition, and his equities are inferior to those of the defendants, who, in good faith, and without notice, made advances on the stock in the belief that Tilden was the owner, or, at least, had the right to hypothecate it. There is nothing new in these propositions. In this State stock is personal property, and the general rule is, that if the owner of such property places it in the possession of another, and confers upon him the usual *indicia* of ownership or right of disposal, he is bound by any disposition made of it, to one who acquires it, without notice, for a valuable consideration on the faith of such *indicia*. (*Saltus v. Everett*, 20 Wend. 278, 280; *Com. Bank, etc., v. Kortright*, 22 Wend. 361; *Western Transportation Company v. Marshall*, 37 Barb. 509, 515; *Crocker v. Crocker*, 31 N. Y. 507; *Fatman v. Lobach*, 1 Duer, 354; 2 Kent's Com. 621; Story's Agency, Secs. 83, 94, 228; *Bridenbecker v. Lowell*, 32 Barb. 17; *Johnson v. Jones*, 4 Barb. 373; *Bank of Metropolis v. New England Bank*, 11 How. 240.)

The mere delivery of the possession of personal property does not, standing alone, constitute such an *indicium* of ownership as will bind the owner. For example: If A. loan his horse to B. temporarily, the latter can make no disposition of it which would bind the owner. But if the delivery be accompanied by an absolute bill of sale, and if B. exhibits the bill of sale to a purchaser who buys in good faith, without notice, in the belief that B. is the owner, A. will be bound by it, even though it was secretly agreed between A. and B. that notwithstanding the bill of sale the horse was to remain the property of A. (*Ballard v. Burgett*, 47 Barb. 646; *Coril v. Hill*, 4 Denio, 327.) There must be something more than the mere delivery of the possession to constitute such *indicia* of ownership as will bind the owner. But in this case the plaintiff not only delivered to Tilden the possession of the certificates, but accompanied the delivery with

Statement of Facts.

an authority to transfer the stock on the corporate books, whereby Tilden was enabled to procure new certificates in his own name, vesting in him the legal title and apparent right of disposal. This brings the case fully within the rule already discussed, and estops the plaintiff from setting up his title in derogation of the defendants' lien.

Judgment affirmed as of the 2d day of October, 1871.

[No. 968.]

GEORGE SPANGEL v. AMBROSE C. DELLINGER,
RICHARD M. TREADWAY, JOSEPH W. REAY,
AND JOHN S. ELLIS.

APPEARANCE OF COUNSEL.—Where counsel appears expressly for certain defendants in an action, his signature to papers in the case after that time as the attorney for the defendants, will be construed as limited to those defendants for whom he expressly appeared.

APPEAL from the District Court of the Fourth Judicial District, City and County of San Francisco.

The plaintiff sued to have certain deeds from Treadway to Dellinger, and from Dellinger to Reay, set aside, on the ground that the first was made with intent to defraud creditors, and that the second was obtained by Reay with full knowledge of such fraudulent intent; and also to enjoin defendant Ellis, as Sheriff, from executing the deed for the property in suit to Reay. The Court found in favor of the plaintiff, and rendered judgment in his favor. Defendants Reay and Ellis moved for a new trial; the motion was denied, and on appeal the order denying the motion was reversed.

The other facts are stated in the opinion of the Court.

[The former decisions in this case are reported in 34 Cal. 476, and 38 Cal. 278.]

Opinion of the Court — Sprague, J.

E. A. Lawrence, for Appellants.

James B. Townsend and Nathaniel Bennett, for Respondent.

By the Court, SPRAGUE, J.:

The attorney for Reay and Ellis moves that the appeal in the above entitled cause be considered, and that the cause be determined as to defendants Dellinger and Treadway. On the former hearing it was considered by the Court — and such seems to have been the understanding of counsel — that the motion for a new trial had been made and the appeal taken by Reay and Ellis alone. Upon a reëxamination of the record we are satisfied that our former construction was correct. Counsel appeared expressly for Reay and Ellis. His signature to pleadings, etc., after that time, as the attorney for the *defendants*, will be construed as limited to those defendants for whom he expressly appeared.

[No. 2,477.]

W. E. HUGHES v. H. T. HAZARD AND JOHN DOE.

POSSESSION OF PUBLIC LAND — FURROWS AND STAKES.—In ejectment for a portion of a tract of land taken up by plaintiff's grantor under the Possessory Act of April 20th, 1852 (Stats. 1852, p. 158), where it appeared that all the acts done were, that such grantor, besides filing his claim and affidavit, built a fence on one side, ran furrows around the whole tract, put stakes at the corners and along the lines, occupied and cultivated a portion not embraced in the suit, and while so occupying and cultivating sold to plaintiff, but by consent remained in possession till his crop was off. *Held*, insufficient to prove either actual or constructive possession in the plaintiff of the land sued for.

DEED OF POSSESSORY CLAIM DOES NOT CONVEY CONSTRUCTIVE POSSESSION.—Where the vendor of a tract of land taken up under the Possessory Act (Stats. 1852, p. 158), remained in possession, with vendee's consent, of the only portion ever actually occupied by him,

Argument for Appellant.

and vendee never entered under his deed: *held*, that whether such possession by the vendor might be considered as an entry under his deed by the vendee or not, the deed would certainly not extend the vendee's possession by construction to any portion of the tract never in the actual possession of the vendor.

APPEAL from the District Court of the Seventeenth Judicial District, Los Angeles County.

Ejectment for eighty acres of land in Los Angeles County. There having been a judgment for defendants, and motion for new trial overruled, plaintiff appealed.

The other facts are stated in the opinion.

A. Brunson, for Appellant.

The boundaries of the claim of Quijada, plaintiff's grantor, were well defined. They were marked by furrows and ditches, and that in a county where nine tenths of the crops are and for the last twenty years have been raised without fence or inclosure. These facts are entitled to some significance, as they enter into the reason of the law, and for that reason become a part of the law itself. It was not necessary under the Possessory Act that Quijada should have the entire tract inclosed in order to have the legal possession of the whole, or to eject a naked intruder. (Hitt. Gen. Laws, Sec. 6,795; *Keane v. Cannovan*, 21 Cal. 291; *Doran v. Central P. R. R. Co.*, 24 Cal. 248; *Moon v. Rollins*, 36 Cal. 333.)

A purchaser in good faith from a prior possessor in good faith can expel a mere naked trespasser from lands claimed by metes and bounds, whether inclosed or uninclosed, especially when the lines and exterior limits are all plainly marked on the soil and traced upon the public records of the county. Nor can we see that this principle, recognized as law by the authorities, has been overruled by *Wolfskill v. Malajowich*, 39 Cal. 276.

H. T. Hazard, for Respondents.

The deed from Quijada to plaintiff was void as to the land

in controversy. Quijada himself never had possession of it, and there is no pretense that plaintiff ever was on it. There was no constructive possession in the plaintiff. (*Cannon v. Union Lumber Company*, 38 Cal. 672.)

The decision in *Wolfskill v. Malajowich*, 39 Cal. 276, is a sufficient answer to the argument on the other side. It is there clearly held that an entry on part of a tract of land under a deed which the grantee knows conveys no title, will not establish constructive possession of the whole tract. In this case, therefore, even if the plaintiff had made an entry, which he did not, it would not aid him.

By the Court, TEMPLE, J.:

Action of ejectment, in which the plaintiff relies upon the prior possession of his grantor. On the trial the plaintiff proved a claim and affidavit made by his grantor under the Act known as the Possessory Act, passed April 20th, 1852, for a tract of land, including the tract in controversy. He also proved the occupation by his grantor of a portion of the land described in his possessory claim, but not of any portion of the land now in the possession of the defendants, except that the witness states that he had a fence on one side, and furrows were run with a plow around the whole tract, and stakes set at the corners and along the lines. This is manifestly insufficient to prove actual possession. After the conveyance to plaintiff, his grantor remained in possession, with plaintiff's consent, until he had removed his crops. Plaintiff never entered into possession of any portion of the premises under his deed. The possession of the vendor, after the deed was executed, was in accordance with the contract of sale. But if the continued possession of the vendor, with the consent of the plaintiff, can be considered as an entry under his deed on the part of the plaintiff, it does not appear that he had the actual possession of any portion sued for,

Points decided.

and the deed, under such circumstances—the lands being public lands, were never in the possession of the vendor—would not extend his possession by construction. (*Wolf-skill v. Malajowich*, 39 Cal. 276.)

Judgment and order affirmed.

[No. 2,338.]

NATHANIEL GRAY v. JOSEPH C. COLLINS, LOUIS TRENCH, THOMAS CHAPMAN, WILLIAM SHERIDAN, AND S. B. THOMPSON.

PEACEABLE AND ACTUAL POSSESSION UNDER FORCIBLE ENTRY LAW.—In a forcible entry case, where it appeared that the property was a city lot; that plaintiff built a substantial fence, which, with the house and fence of a neighbor on one side, made a complete inclosure, and planted two dozen ornamental trees along two sides of it; and that this state of things continued two months, when defendants entered; *held*, that the plaintiff was in the peaceable and actual possession of the lot, within the meaning of the forcible entry law, without residing or having a house upon it.

A FENCE ALONE AS SHOWING ACTUAL POSSESSION.—Residence upon premises is not indispensable to their actual possession, nor is cultivation necessary, nor improvement, as contradistinguished from the erection of fences or substantial barriers, marking the line of the premises over which control is asserted.

CULTIVATION OF CITY LOT—ORNAMENTAL TREES.—The erection of a substantial fence and planting of ornamental trees around a city lot amount to actual possession and cultivation of it, as appropriate to such lot as the seasonable plowing and sowing of agricultural lands would be, and equally significant as acts manifesting control over the premises.

WHAT IS A "FORCIBLE" ENTRY?—The forcible entry statute now in force (Stats. 1865-6, p. 768) was evidently drawn to avoid nice distinctions as to the amount of force necessary to constitute an entry a forcible one within its intent.

"CIRCUMSTANCES OF TERROR" MAKING AN ENTRY FORCIBLE.—Where a large number of men were employed to take possession of premises in the possession of another, though he had no house on them, and was not personally present, and they entered hurriedly at daylight, tore down one fence, and put up another and a shanty, and fired off a pistol shot to celebrate its completion; *held*, that there was sufficient "circumstances of terror" to make the entry a forcible one.


Statement of Facts.

APPEAL from the County Court of the City and County of San Francisco.

The lot in controversy had a front of forty-eight feet nine inches on Post street, and seven feet nine inches on Sutter street, being a long strip in the middle of a block. The entry, as found by the referee, was made under the following circumstances:

"On the morning of the 17th or 18th of February, 1869, the defendant Collins, a little after daylight, with a force of ten men, eight of whom were carpenters, employed by him in putting up a building in the neighborhood, went into the lot and tore down the fence on the west line, and constructed another parallel with the east line of the lot, and also put up a cross fence, cutting out plaintiff's previous inclosure midway between Post and Sutter street lines — the lot thus inclosed being about fifty feet front on Post street, and running back half way to Sutter street. While the fence was being taken down and rebuilt on the new line, and the cross fence put up, a shanty was erected on the lot, the material of which was brought from an adjoining lot by the defendant and his men immediately on their arrival in the morning. The fence and the shanty were hurriedly put up in a rough manner, and all completed by eleven o'clock in the forenoon of the day when the work was commenced; and the completion of the job was celebrated by a pistol shot. Two men in the employ of the defendant Collins remained in charge of the property."

As conclusions of law, from the facts of the plaintiff's possession as stated in the opinion and the defendants' entry as above set forth, the referee found that the plaintiff had no actual possession of the lot, and that defendants had not been guilty of any forcible entry. Judgment having been



Argument for Appellant.

entered in accordance with the referee's report for defendants, the plaintiff appealed.

Gray & Haven, for Appellant.

The possession of plaintiff was actual, and peaceable, and sufficient. (*Hutchinson v. Perley*, 4 Cal. 33; *Hicks v. Davis*, 4 Cal. 67; *House v. Keiser*, 8 Cal. 501; *Preston v. Kehoe*, 15 Cal. 316; *Minturn v. Burr*, 16 Cal. 107; *Hussey v. McDermott*, 23 Cal. 413; *Cummins v. Scott*, 23 Cal. 527; *Hoag v. Pierce*, 28 Cal. 187; *Brummagin v. Bradshaw*, 39 Cal. 24.)

The object of the forcible entry statute is to prohibit not simply an actual breach of the peace, but everything which would tend to produce a breach of the peace. And as an entry with a strong force of men upon the possession of another would tend to or might lead to a breach of the peace, whether any person was present or not at the time of entry, all such modes of entry are prohibited. And this we understand to be the doctrine established by this Court in *Brown v. Perry*, 39 Cal. 23.


The entry of defendants was wrongful and forcible. The question of legal right to enter relates to the fact of possession and not of title. The law will not allow one to violate the actual, open, and peaceable possession of another, and then justify the act on the ground of a belief that he had a better title. And the *quo animo* must be determined by one's acts, and not by his declarations. Collins was fully aware of the possession of plaintiff, and of his claim of title. His entry, to put the best construction upon it, was made to obtain an advantage in law over the plaintiff, and consequently not made in good faith. (*Shelby v. Houston*, 38 Cal. 410.) The plaintiff is entitled to judgment on the findings.

Bartlett, Pratt & Bartlett, for Respondents.

Plaintiff did not have actual possession sufficient to maintain the action. There are two kinds of possession known to the law — actual and constructive. Either may, perhaps, do in ejectment, or to put the Statute of Limitations in motion. But only actual possession will suffice in forcible entry and detainer. This distinction in cases should be kept constantly in view, and care should also be had not to confound the terms “adverse possession,” “prior possession,” and “actual possession.” Thus, in ejectment, a prior possession might be sufficient, which fell far short of being actual possession. The question of its being an actual or a constructive possession might not arise, as either might be sufficient in such a case. So, a possession might be adverse, and put the Statute of Limitations in motion; which fell far short of actual possession. The Statute of Limitations has itself prescribed that a substantial inclosure shall constitute adverse possession; but nowhere in the statutes or decisions is it said that a substantial inclosure is sufficient evidence, or even any evidence, of actual possession.

The mere building of a fence and planting a few shrubs, and then abandoning the premises without any intention of making any other use of them at any definite period — the doing of these things for the mere purpose of thereby holding the premises, without any reference to any beneficial use of them — does not constitute such a possession, use, or occupation as is contemplated by the statute.

The entry was not forcible. No actual force, menace, or threat was used, either in the entry or detainer. Nor was the entry “unlawful,” within the meaning of the law. To have been so, it must have been made with a wrongful intent, without any color of title, and *mala fide*. (*Dickinson v. Maguire*, 9 Cal. 46; *Thompson v. Smith*, 28 Cal. 527;



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Janson v. Brooks, 29 Cal. 214; *Shelby v. Houston*, 38 Cal. 410.)

By the Court, WALLACE, J.:

This is an action of forcible entry and detainer. The case was sent to a referee to take the testimony and to report a judgment. He found the facts, and his conclusions of law therefrom, and reported a judgment for the defendants, which was, thereupon, entered. The lot in controversy is situated in the City of San Francisco, between Sutter, Post, Webster, and Fillmore streets. In November, 1868, the plaintiff built a fence, which, with the house and fence of the occupant of a lot adjoining this on the west, made a complete inclosure of it. This fence which he then constructed was built of redwood posts, three by four inches, set in the ground at proper distances, with three fence boards nailed thereon in the usual manner, and also a fourth board nailed on the top of the posts, forming a cap — the whole constituting a substantial fence about four feet high. After thus inclosing the lot the plaintiff caused some two dozen trees to be set out in line along the two sides of it. He did not reside upon the lot, and had no house thereon. This state of things continued until about the middle of February, 1869, a period of between two and three months, when the defendants entered.

The first question to be considered is as to whether these facts established in the plaintiff the peaceable, actual possession of the premises at the time the entry occurred. That his possession, such as it was, was peaceable, there is no doubt, for until the entry of the defendants, some two months after possession was taken, nothing had occurred to disturb it. Nor is there any doubt that it was actual in that sense which is contemplated by the statute of April, 1866, concerning forcible entries and unlawful detainers.

Residence upon the premises is not indispensable to their actual possession — nor is cultivation necessary — nor improvement, as contradistinguished from the erection of fences or substantial barriers, marking the line of the premises over which control is asserted. The subjection of the premises to the exclusive will and control of the possessor by means of the exercise, by him, of visible and notorious acts of dominion over them, constitute actual possession. The acts thus visibly and notoriously done upon and about the premises, and their present effect as excluding the interference of all other persons, are the evidences through which the actual possession is made to appear. These acts of possession will necessarily depend somewhat upon the nature of the premises appropriated; the character of the soil; the uses to which it may be applied; and, in a city lot especially, sometimes will depend upon its situation, as being near to or remote from a rapidly improving locality. In this case there was the erection of a substantial fence, connecting with the adjoining house and fence so as to form a complete inclosure, and the planting of ornamental trees upon the premises — this amounted to cultivation, suitable to a city lot such as this, as appropriate to such lot as the seasonable plowing and sowing of agricultural lands would be, and, as an act manifesting control over the premises, equally significant.

The first count of the complaint is for forcible entry and detainer, under the Act concerning forcible entries and detainers (Acts of 1865-6, p. 768), and the only question remaining to be considered concerns the character of the entry and detainer here, as being forcible or otherwise. The statute (section one) denounces all entries into premises, at the time in the actual peaceable possession of another, if made with violence and strong hand, whether such entry be by the actual breaking into the house situate on the premises, or by any kind of violence, or "circum-

Opinion of the Court — Wallace, J.

stances of terror." Its aim is the conservation of the public peace, which it would prefer to the assertion of a mere private right, when made in such a manner as would be likely to provoke a breach of the peace.

The statute of this State now in force is evidently drawn with a design to avoid nice distinctions as to the amount of force necessary to constitute the entry a forcible one within its intent. "Circumstances of terror" accompanying the entry, no less than "violence," "strong hand," "breaking open doors," etc., are within the prohibition of the Act.

Here, the large number of men employed, the unusual time at which the entry was made, the hasty manner in which the possession was seized upon, the firing of small arms, etc., are "circumstances of terror," which leave no room to doubt that the entry was not of that peaceable character which the law permits to be made. No actual collision ensued in this instance, it is true, but the lawlessness of the conduct of Collins, the principal defendant, and of the other defendants who acted under his direction in making the entry, is not, on that account, less apparent. It tended strongly to produce a breach of the peace, and that it did not result in an actual collision is attributable to something else than to their deportment.

The judgment must be reversed, and the cause remanded, with direction to render judgment for the plaintiff upon the report of the referee, with costs of action, but without damages; and it is so ordered.

Mr. Justice TEMPLE did not participate in the foregoing decision.

[No. 2,594.]

JOHN H. HILL v. J. W. HASKIN.

ADVANCES ON JOINT VENTURE — WHEN STATUTE OF LIMITATIONS COMMENCES RUNNING.— In an action by Hill, to recover one half his advances made under a contract between him and Haskin, whereby they agreed to buy and sell on joint account certain mining stock, Hill to advance all the money and Haskin to repay one half with interest, and Hill to hold all the stock purchased as security for his advances, but without specifying any time within which the repayment was to be made: held, that an offer to account and a demand for repayment by Hill were conditions precedent to his right to maintain the action, and that the Statute of Limitations would not commence running against him until such offer and demand.

APPEAL from the District Court of the Fifteenth Judicial District, City and County of San Francisco.

The facts are stated in the opinions.

Chas. H. Sawyer and *G. W. Gordon*, for Appellant.

It is an undoubted rule of law that the cause of action arises as soon as the party plaintiff has a right to apply to the proper tribunals for relief. In other words, the breach of contract by the defendant is requisite to quicken into life a correlative right of action in the plaintiff. But in the case at bar no such breach can be charged against defendant. He cannot be said to have been in default for not paying, when he had no notice of a liability existing against him from the only party cognizant of the fact. (1 Chitty on Pl. 330; Chitty on Con. 800; *Hartland v. Jukes et al.*, 1 Hurlstone & Coltman Ex. 667; *Sinkler v. Indiana Co.*, 8 Penn., P. & W. 149; *Baker v. Joseph*, 16 Cal. 173.)

A fair test of the accuracy of our position would be to suppose the suit at bar inverted — that defendant had sued as plaintiff, on precisely the same contract and the same facts, except that he, on the 27th day of May, 1865, for the first time had demanded from the present plaintiff an accounting, and offered performance. Would opposing counsel

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then be found on that side contending for a Statute of Limitations! It seems inequitable, illogical, and opposed to legal principles, that either party should be able successfully to elude liability, under the pretense that the other was not vigilant, when by his own conduct he has disarmed suspicion and constructively approved of the course of procedure.

H. F. Crane and Wm. S. Wells, for Respondent.

The obligation of defendant to repay arises clearly upon this written contract, as he there promises to pay money to plaintiff upon a certain contingency, to wit, in case plaintiff makes certain purchases of stock, and pays for the same, defendant is then to repay to plaintiff one half of the advances, and no other time of payment is specified. Upon the purchase and advance by plaintiff there immediately arose an obligation on defendant to repay to plaintiff one half his advance, and no demand was necessary, especially where the defendant had full knowledge and was consenting to the transaction. (*Thompson v. Ketchim*, 8 Johns. 148; *Parsons on Con.* 552; 5 Barn. & Adolph. 911; *Chitty on Con.* 733; *Aden v. Rightmire*, 20 Johns. 365; *Nelson v. Bostwick*, 5 Hill, 37; 22 Wend. 125.) In *Stover v. Flock*, 30 N. Y. 64, a case similar to this, the Court held that the statute commenced running from the time the advance was made. The plaintiff's theory would permit a demand of this character to run for an indefinite period of time, and then he could revive the same by a demand. A doctrine which leads to such preposterous conclusions cannot be within the terms or spirit of the Statute of Limitations.

By the Court, CROCKETT, J.:

In 1863 the plaintiff and defendant entered into a partnership venture, for the purchase and sale, from time to time,

on joint account, of the stock of a specified mining company. The contract was that the plaintiff was to advance all the money necessary for the purchases, and the defendant was to repay to the plaintiff one half of such advances, with interest at a stipulated rate; but no time was specified within which repayment was to be made. It was further provided that the plaintiff was to hold all the stock purchased, as a security for his advances, and that, if requested by the plaintiff, the defendant would deposit additional security against loss from a depreciation of the stock. The action is brought to recover one half the amount advanced by the plaintiff for the purchase of the stock; and the complaint avers that in December, 1863, and January, 1864, the several purchases of stock were made by the plaintiff, with the knowledge and consent of the defendant, and that the stock proved to be utterly worthless, and the sum invested in its purchase has consequently become a total loss. The complaint further avers that the plaintiff, before suit was brought, offered to account with the defendant concerning said stocks, and demanded payment of the amount due from the defendant.

The defense relied upon is the Statute of Limitations, the action having been commenced in 1868, more than four years after the date of the last advance of money by the plaintiff.

On the trial it appeared that in May, 1865, the plaintiff for the first time offered to account with the defendant concerning said stocks, and demanded payment of the balance due. Having proved the other allegations of the complaint the plaintiff rested, and the defendant moved for a nonsuit, which was granted, on the ground that the plaintiff's demand was barred by the statute. From this judgment, and from

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an order denying his motion for a new trial, the plaintiff has appealed.

It is clear that if the plaintiff could have maintained an action against the defendant for his share of the advances immediately after they were made, without a previous offer to account concerning the stocks and a demand of payment, the action is barred by the statute. The only question, therefore, is whether a previous offer to account and a prior demand of payment were conditions precedent to his right to maintain the action, and I think they were. There appears to have been no limitation in the contract as to the quantity or price of the stock to be purchased, or of the time within which it was to be purchased. The plaintiff was at liberty to purchase any quantity of the stock, at any price, and at any time his judgment dictated, until the contract was put an end to by the action of one or both of the parties, and the plaintiff was entitled to the custody of all the stock as a security for his advances. He also had authority to sell the stock on their joint account. Until informed by the plaintiff of the result of these transactions, or, at least, until the plaintiff offered to account concerning them, and informed the defendant of the balance due, the latter was in no default. The complaint, it is true, avers that the defendant had actual notice of the purchases which were made; but he could not have known, until informed by the plaintiff, that he had made no other purchases, nor that he had made no sales of the stock already purchased. For aught that he could know, until informed to the contrary by the plaintiff, the latter may have sold the stocks within an hour after they were purchased, at a large advance, in which event the plaintiff would have been indebted to the defendant. The transactions being wholly within the knowledge of the plaintiff, the defendant had a right, under the contract, to be informed of them and of all that the plaintiff had done, before he could be put in

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default. He had no means of knowing, except on information from the plaintiff, what sums were advanced, or at what times, or what sales were made, or at what times or prices. It was, therefore, incumbent on the plaintiff, before demanding payment of the defendant, to offer him this information, and to offer to account concerning his transactions in the stock. Until this was done, the defendant was not liable to an action for his share of the advances. The defendant, it is true, might have obtained this information on application to the plaintiff, but neither the contract nor the law imposed this duty on him, and he was not in default for omitting to do it.

In my opinion the action was not barred, and the judgment ought to be reversed and the cause remanded for a new trial; and it is so ordered.

WALLACE, J., dissenting:

The applicability of the Statute of Limitations as a bar to the action is the only question presented. On November 21st, 1863, the parties entered into the following agreement in writing:

“Agreement between Dr. John H. Hill and J. W. Haskin, for the purchase of Crockett Consolidated mining stock on joint account. All profits arising from the purchase and sale of said stock to be divided equally. Dr. Hill to furnish money for the purchase of said stock, one half of the amount so advanced to be paid to him by said Haskin, with interest at four per cent. per month. Dr. Hill to hold all stock purchased as security for money advanced; Mr. Haskin to deposit with Dr. Hill additional security at any time when called upon by Dr. Hill for security, against loss by depreciation of said Crockett stock.”

It appeared on the trial that on the day of the making of

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the contract, Hill made the first purchase of stock in pursuance of its terms, and advanced the purchase money; that in December, 1868, he made the second, and by far the largest purchase of this stock, and paid for it; and that in January, 1864, he made two inconsiderable payments on account of assessments imposed upon the stock so purchased. This stock turned out to be worthless, and the moneys invested in the purchase and in paying assessments were wholly lost. The defendant, Haskin, never repaid to Hill any part of these advances, but in May, 1865, upon a casual meeting between the two in the City of New York, Hill notified Haskin that he was prepared with his account, and then demanded of the latter the payment of one half of the moneys he had advanced under the contract. This action was brought in December, 1868, and the Statute of Limitations having been pleaded as a defense, the Court below, upon these facts appearing, nonsuited the plaintiff on the ground that the demand was barred by the statute.

The Statute of Limitations, as to each of the sums sued for, commenced to run from the earliest period at which Hill might have maintained an action against Haskin for its recovery.

There is nothing in the terms of the contract by which the former agreed to extend the time of payment, and his right to receive of Haskin the one half of each advance, as he made it, was capable of immediate enforcement. It may be that Haskin expected indulgence at the hands of Hill, and that the latter had a purpose at the time to extend it to him, but there was no agreement, express or implied, between them to that effect, and Hill's action, if brought *eo instante* that he made the advance, could not have been defeated on the ground that his suit was premature. It was left optional with Hill whether he would sue immediately after the time he made the advance, or would delay enforcing his demand to some later period. Haskin, prob-

Argument for Appellants.

ably, did not expect to be called upon immediately, but if, contrary to his expectation in that particular, Hill had demanded immediate reimbursement, it is clear that no agreement to give credit could have been found in the contract under which the money was advanced.

I think that it results that the plaintiff's demand was barred, and that the judgment should be affirmed.

Mr. Justice TEMPLE having been of counsel in the action, did not participate in the foregoing decision.

[No. 2,990.]

**THE PEOPLE OF THE STATE OF CALIFORNIA v.
JAMES HARRINGTON AND WILLIAM MINOR.**

MATTER OF REVIEW.—Any action of the Court during the progress of a trial for felony, which deprives the defendant of a substantial legal right in the premises, or to his prejudice, to any extent, withholds or abridges a substantial, legal, or constitutional privilege of a defendant, and by him claimed on the trial, is a proper subject matter of review on appeal.

RIGHT OF PRISONER TO APPEAR FOR TRIAL WITHOUT IRONS.—By the common law a prisoner is entitled to appear for trial, upon his own plea of not guilty, free from all manner of shackles or bonds, unless there is danger of his escape.

ERROR.—To require a prisoner during the progress of his trial to appear and remain with chains and shackles upon his limbs, without evident necessity as a means of securing his presence for judgment, is a violation of the common law rule and of the thirteenth section of the Criminal Practice Act.

APPEAL from the County Court of Calaveras County.

The facts are stated in the opinion of the Court.

George W. Tyler, for Appellants, argued that by the common law the appellants were entitled to appear for trial without shackles, and that the denial of that right prejudiced them in the minds of the jury. (Bract. 1, 8 de Caron. C. 18, Sec. 3; Flet. 1, 1 C. 31; 1 Britt. Ch. 5; 2 Hale's P. C.

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219; 2 Hawk. P. C. 308; 4 Black. Com. 322, and notes; Waite's Case, Leach, 34; 6 State Trials, 280.) He also argued that the action of the Court was a violation of law. (Practice Act, Sec. 13.)

Attorney General Hamilton, for Respondent, argued that even if the action of the Court was erroneous, the matter of refusing to order the irons removed was no part of the trial of the cause.

By the Court, SPRAGUE, J.:

The defendants were indicted, tried, and convicted of the crime of robbery, and appeal from the judgment of the Court rendered against them upon the verdict. The only point now urged by the defendants against the validity of the judgment is presented by the following bill of exceptions:

"On the 22d day of June, 1871, a jury was called, impaneled, and sworn in said cause to try said cause — the defendants at the time being in Court and in irons. The counsel for defendants asked that the irons be removed from the limbs of defendants while they were being tried. The Court refused to order the same to be done, and ruled and decided that said defendants should be tried while in irons — no circumstances or facts being shown to the Court why a different rule should be enforced in this cause than any other — the Court being of the opinion that no rights of defendants were violated by being tried in irons without their consent, to which ruling and decision of the Court the defendants, by counsel, then and there excepted."

Appellants insist that by the action of the Court in refusing, upon their motion, to direct the manacles which were upon their limbs to be removed while they were in Court upon trial, and compelling them to be tried while their limbs were shackled with irons, without any apparent or pretended

necessity therefor, they were deprived of a substantial legal right, and that the judgment, for that reason, should be reversed. In answer, the Attorney General claims that this action of the Court is no part of the trial of the case, and hence cannot be reviewed on appeal.

I think there can be no question but that any action of the Court during the progress of a trial for felony which deprives the defendant of a substantial legal right in the premises, or to any extent, to his prejudice, withholds or abridges a substantial legal or constitutional privilege of a defendant, and by him claimed on the trial, is a proper subject matter of review by this Court on appeal. (*People v. Keenan*, 13 Cal. 584.) The question, then, is whether a prisoner placed upon his trial for a felony, can, as a legal or constitutional right, demand that during his trial, while before the Court and jury, his limbs should not be manacled, or that he should not be *in vinculis* during his trial, there being no pretense of necessity for such restraint to secure his continued presence in Court.

It has ever been the rule at common law that a prisoner brought into the presence of a Court for trial, upon his plea of not guilty to an indictment for any offense, was entitled to appear free of all manner of shackles or bonds; and prior to 1722, when a prisoner was arraigned, or appeared at the bar of a Court to plead, he was presented without manacles or bonds, unless there was evident danger of his escape. (2 Hale's Pleas of the Crown, 219; 4 Black. Com. 322; Laver's Case, 6 State Trials, 4th edition, by Hargrave, 230, 231, 244, 245; Waite's Case, 1 Leach's Cases in Crown Law, 36.)

The Legislature of this State, at its first session, declared that "the common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of the State of California, shall be the rule of decision in all the Courts of this State." (Stats. 1850, p. 219); and by the thirteenth section of our

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Criminal Practice Act it is declared that "no person shall be compelled in a criminal action to be a witness against himself, nor shall a person charged with a public offense be subjected, before conviction, to any more restraint than is necessary for his detention to answer the charge."

The same statute also requires that at every stage of a prosecution for felony the defendant shall personally be present in Court. (Secs. 259, 320, 415, 449, Criminal Practice Act.)

By section eight, Article I, of our State Constitution, it is declared that "in any trial in any Court whatever, the party accused shall be allowed to appear and defend in person and with counsel;" and further, by the Act of April 2d, 1866, in all proceedings against persons charged with the commission of crime or offense, the person so charged is granted the privilege, on request, of testifying in his own behalf as a competent witness. (Stats. 1865-6, p. 865.)

A prisoner upon his trial in Court is in the custody of the law, and under the immediate control of and subject to the orders of such Court. Should the Court refuse to allow a prisoner on trial for felony to manage and control, in person, his own defense, or refuse him the aid of counsel in the conduct of such defense, he would manifestly be deprived of a constitutional right, and a judgment against him on such trial should be reversed. In my opinion any order or action of the Court which, without evident necessity, imposes physical burdens, pains and restraints upon a prisoner during the progress of his trial, inevitably tends to confuse and embarrass his mental faculties, and thereby materially to abridge and prejudicially affect his constitutional rights of defense; and especially would such physical bonds and restraints in like manner materially impair and prejudicially affect his statutory privilege of becoming a competent witness and testifying in his own behalf.

Again, to require a prisoner during the progress of his

Points Decided.

trial before the Court and jury to appear and remain with chains and shackles upon his limbs, without evident necessity for such restraint, for the purpose of securing his presence for judgment, is a direct violation of the common law rule, and of the thirteenth section of our Criminal Practice Act.

In the present case there is no pretense of necessity for the manacles and chains upon the defendants during their trial, to secure their presence to answer the judgment.

The action of the Court, as disclosed by the bill of exceptions, was manifestly erroneous and materially prejudicial to the legal rights of defendants.

Judgment reversed and cause remanded for a new trial.

[No. 2,177.]

**ELIJAH T. FARMER v. CORNELIUS GROSE AND
BERNARDO MUNOS.**

DEED WITH DEFEASANCE BACK—MORTGAGE.—When a deed absolute on its face is given of a tract of land, and at the same time the grantee makes to the grantor a defeasance, agreeing to sell the grantor the land, if he pays a sum fixed by a certain time, the test by which to determine whether the transaction is a mortgage or a defeasible sale is the fact, whether or not, notwithstanding the conveyance, there is a substituting, continuing debt from the grantor to the grantee.

ISSUE.—If the consideration for the conveyance was an antecedent debt, and the property is to be reconveyed on the payment of the debt, and nothing more appears, prima facie the transaction constitutes a mortgage.

ISSUE.—In like manner, if there is no antecedent debt, but a loan of money to be repaid, with interest, it is a mortgage.

PAROL EVIDENCE TO SHOW DEED A MORTGAGE.—Where there is a deed absolute on its face, and a defeasance back, parol evidence is admissible to show whether the transaction constitutes a mortgage.

APPEAL from the District Court of the Seventh Judicial District, Sonoma County.

Argument for Respondent.

Ejectment. The defendants were indebted to one Manion, on a note secured by mortgage on the demanded premises, and obtained from Farmer the money to pay the note. Farmer relied on his paper title. The defendants appealed.

The other facts are stated in the opinion.

Alexander, Armstrong & Hinkson, for Appellants.

Courts of equity regard the substance and not the form of the transaction, and though disguised under the forms of that language which describes a sale, yet if in fact the reality was a mortgage, they drag it from under its disguise and act upon it as a security for a loan.

Every conceivable phase of this case is considered and determined in our favor by the Supreme Court of the United States, in the case of *Russell v. Southard*, 12 How. Rep. 145, and upon this case alone we might rest, but we cite the following cases in support of it: *Brown v. Dewey*, 1 Sandf. Ch. R. 60; *Skinner v. Miller*, 5 Littell, 84; *Pierce v. Robinson*, 13 Cal. 125; *Flagg v. Mann*, 2 Sumner, 486; *Edington v. Hooper*, 3 J. J. Marsh, 353; *Jarvis v. Woodruff*, 22 Conn. 548; *Bacon v. Brown*, 19 Conn. 29; *Page v. Foster*, 7 N. H. 392; *Marshall v. Stewart*, 17 Ohio, 359; *Dow v. Chamberlain*, 5 McLean, 281; *Van Buren v. Olmstead*, 5 Paige Ch. R. 9; *Miller v. Thomas*, 14 Ill. 428; *Beasley v. Phelps*, 2 Woodbury & Minot, 427.)

A. Thomas, for Respondent.

The deed from Barry and wife to respondent, and the bond from respondent to Barry to reconvey upon paying five thousand dollars and interest, constitute a conditional sale. (4 Kent, 147, note *a*; 1 Washburne on Real Estate, 492; Hilliard on Mortgages, 401, Sec. 42 and note 1; *West v. Hendrix*, 28 Ala. 226; 19 Wend. 518; *Holmes v. Grant*, 8 Paige, 243; 4 Abbott's N. Y. Dig. 46; *People v. Irwin*,

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14 Cal. 429; *Ford v. Irwin*, 18 Cal. 117; *Hickox v. Low*, 10 Cal. 197; 3 Edwards, 138.)

By the Court, CROCKETT, J.:

On the 29th of March, 1867, Barry and wife, by their absolute deed of that date, reciting a consideration of five thousand dollars, conveyed to the plaintiff the land in controversy. On the same day the plaintiff executed and delivered to Barry a writing in the nature of a defeasance, which recites that on that day Barry and wife had sold the land to the plaintiff for the sum of five thousand dollars, which was paid to them and then provides that if Barry shall pay to the plaintiff the said sum of five thousand dollars, on the first day of the ensuing October, with interest at the rate of one and one quarter per cent per month, and also any taxes that may have been assessed on the land for the year 1867, if the same shall have been paid by the plaintiff or assessed to him, and for which he may be personally liable, "and also the necessary costs and expenses that may accrue by reason of any suit or suits that may be necessary to recover possession of the land," then that the plaintiff would reconvey the land to Barry by good and sufficient quitclaim deed; but in case Barry should fail to pay said sums at the stipulated time, "then the above obligation to be void, and neither party held or bound by the terms of the same." It was further provided that Barry was to retain the possession of the land until the said first day of October, and was to be entitled to the growing crop, and that, if the crop should not be harvested or removed from the land by the said first day of October, it might be removed by Barry within a reasonable time thereafter. The deed and defeasance were both duly acknowledged and recorded on the same day, and the principal question in the case is, whether the two instruments taken together consti-

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tuted a mortgage, or a sale with a covenant for a reconveyance on conditions to be performed by Barry. The District Court held it to be the latter, after hearing much oral proof relating to the entire transaction between the parties. In cases of this class the well-established test by which to determine whether the transaction is a mortgage or a defeasible sale is the fact whether or not, notwithstanding the conveyance, there is a subsisting, continuing *debt* from the grantor to the grantee. If the consideration for the conveyance was an antecedent debt, and the property is to be reconveyed on the payment of the debt, with interest, and nothing more appears, *prima facie* the transaction would be a mortgage. In like manner, if there was no antecedent debt, but a loan of money, to be repaid with interest, and such was the real intention and understanding of the parties, it would be a mortgage, and not a defeasible sale, whatever may be the terms employed in the contract. It may be doubtful whether it would not have been the wiser rule to adhere to the written contract as the best and safest exponent of what the parties meant. But it is now so well established, by a long series of decisions, that parol evidence is admissible to explain the transaction and show its real character, that we would not be justified in overturning a rule so long acquiesced in and so firmly established.

If we consult the face of the deed and defeasance put in evidence in this case, without resorting to the parol evidence, we should hold the transaction to be a defeasible sale, and not a mortgage. The deed is not only absolute on its face, but the defeasance recites that "the said E. T. Farmer has this day *bought* of said John Barry and Nancy L. Barry, his wife, certain land," etc., "for which the said E. T. Farmer has paid to the said John Barry the sum of five thousand dollars, in gold coin of the United States." It further provides that Barry is to retain the possession until the time stipulated for repayment of the money, and

is to have the growing crop, with the liberty of removing it after the expiration of the time; and in case the money was not promptly paid, the obligation to reconvey was to be void, "and neither party held or bound by the terms of the same." It was evidently intended that on a failure to pay the money on the first of October Barry was to surrender the possession, and Farmer was thenceforth to be under no obligation to reconvey. Nor do the written instruments contain any promise or agreement on the part of Barry to pay in any contingency. It was at his option whether he paid or not. It is plain that on the face of the instruments there was no obligation on Barry to pay anything. The only fact appearing on the face of the papers which could possibly raise a presumption of a loan is, that the sum to be paid by Barry, in case he desired a reconveyance, was the precise amount expressed as the consideration in the deed, *with interest*. That this is a circumstance tending to raise a presumption of a loan is true, but, of itself, it is insufficient to overcome the contrary presumption arising from other portions of the instrument.

Parol evidence was introduced by each party to explain the transaction, and there is a substantial conflict in the testimony in respect to the acts and intentions of the parties. Barry testifies that he distinctly understood the transaction to be a loan of money, and a conveyance by way of security; whilst the plaintiff testifies, fully and explicitly, that it was not a loan of money, but a purchase, with an agreement to reconvey on condition. It is not our province to weigh these conflicting statements; and the Court below, which heard the witnesses, having decided in favor of the plaintiff, we would not be justified in setting aside its judgment on the ground that it was against the weight of the evidence, even though we might be inclined to the opinion that the preponderance of proof was on the other side.

Points decided.

But, on the contrary, we think the finding and judgment are fully justified by the evidence.

Judgment affirmed.

Mr. Justice TEMPLE, being disqualified, did not sit in this case.

[The above case was decided at the July Term, 1870, but for some cause not reported. It is cited in *Page v. Vilhac*, page eighty-three of this volume; and *Page v. Vilhac* was printed before this case was placed in the printer's hands. REPORTER.]

[No. 1,498.]

EDWARD CHRISTY v. JULIA E. DANA, ADMINISTRATRIX OF THE ESTATE OF E. O. DANA, DECEASED, AND THE NATOMA WATER AND MINING COMPANY.

ENFORCEMENT OF MORTGAGE.—A mortgagee may enforce his mortgage as against the land, notwithstanding the personal liability of the mortgagor, for the debt may be barred by a discharge in insolvency.

PLEADING CONCLUSION OF LAW.—An averment in an answer that the plaintiff's debt is barred by a discharge in insolvency, is only a conclusion of law, and not the statement of a fact.

INTEREST ON CLAIMS AGAINST INSOLVENT ESTATE.—Section one hundred and thirty-one of the Probate Act, which provides that when the estate is insolvent a creditor can only recover interest at the rate of ten per cent after the letters of administration issue, cannot be invoked by a purchaser of the mortgaged property who buys from the mortgagor after the mortgage is given, and who is made a party in an action to enforce the mortgage. Said section is intended only for the benefit of the estate, and if the complaint waives a judgment for a deficiency, the estate has no interest in the matter.

ENFORCING MORTGAGE AFTER DEATH OF MORTGAGOR.—If the mortgagor sells the land after he gives the mortgage, and then dies, the mortgagee may enforce his mortgage as against the subsequent purchaser without presenting his claim to the administrator for allowance.

EVIDENCE OF ACTUAL NOTICE OF A MORTGAGE.—When the mortgage is recorded, so as to give constructive notice to a subsequent purchaser, there is no need of proof of actual notice in an action to enforce the mortgage.

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TITLE ACQUIRED BY MORTGAGOR FEEDS HIS PRIOR MORTGAGE.—If a mortgagor mortgages public land upon which he is residing, and afterwards obtains a patent to the same from the United States, and then sells, the title acquired by the patent inures to the benefit of the mortgagee, and the mortgage may be enforced against the subsequent purchaser.

DECLARATIONS OF THE PRESIDENT OF A CORPORATION — EVIDENCE.—The declarations of the President of a corporation may be received in evidence to show that at the time the corporation purchased land it had actual notice of a mortgage on the same.

APPEAL from the District Court of the Sixth Judicial District, Sacramento County.

The facts are stated in the opinion.

C. G. W. French, for Appellant.

Robert C. Clark, for Respondent.

By the Court, CROCKETT, J.:

This is an action to foreclose a mortgage made by E. O. Dana, deceased, in his lifetime, to the plaintiff, upon a tract of land which at the time was a part of the public domain, but upon which Dana resided, and which he proposed to claim as a preëmtor. The land is described in the mortgage as "fragment of southwest quarter of section twenty-four, and fragment of northwest quarter of northwest quarter of section twenty-five, township ten north, range seven east, Mount Diablo meridian, being a possessory claim under the statute of California, said land containing one hundred and twenty-five acres, more or less, and being the only possessory claim held by said party of the first part in said county."

The mortgage was dated March 3d, 1863, and was duly recorded March 9th, 1863. On the 12th of May, 1865, Dana duly filed his petition for the benefit of the insolvent laws, and after proper proceedings obtained his final discharge on the 25th of February, 1866. Dana's preëmption claim being perfected, the plaintiff furnished the money to pay the Gov-

Opinion of the Court — Crockett, J.

ernment price for the land, and the patent was issued to Dana April 13th, 1866. On the 30th of April, 1866, Dana and his wife conveyed the land by absolute deed, to the defendants, The Natoma Water and Mining Company, for a valuable consideration, describing the land in the deed as "fractions numbered four and five of section number twenty-four, and fraction number one of section number twenty-five, township ten north, range seven east, Mount Diablo base and meridian." From the proof and findings it appears that the land included in the deed is the same land embraced in the mortgage to the plaintiff. On the 5th of May, 1866, E. O. Dana died intestate, and on the twenty-second of the same month his widow, the defendant, Julia E. Dana, was duly appointed administratrix of his estate. There is a provision in the mortgage to secure the repayment of any money which the plaintiff might pay for his greater security in procuring the title to the land, or otherwise, and for a reasonable attorney's fee in the event of a foreclosure.

The action is brought against the administratrix and against The Natoma Water and Mining Company; and the complaint prays for foreclosure of the mortgage and a sale of the land, but expressly waives a judgment against the estate for any deficiency.

The administratrix, in her answer, admits the allegations of the complaint and consents to a judgment of foreclosure as prayed for. The answer of The Natoma Water and Mining Company denies that the land included in the deed is the same land embraced in the mortgage, and denies that the whole mortgage debt remains unpaid; but admits that the plaintiff's claim was presented to the administratrix for allowance, and denies that at the time it was presented she was acting as such administratrix, and also denies that the plaintiff paid the money to the Government as he alleges.

The answer then proceeds to set up what it designates as a "further and equitable defense" to the action, and avers

that Dana was regularly and duly discharged from all his debts, including the plaintiff's under the proceedings in insolvency; that Dana filed his declaratory statement as a pre-emptioner on the 3d of July, 1865, for the lands as they are described in the deed to said defendant, and paid for the land and received his certificate of purchase in October, 1865, and his patent on the 13th of April, 1866; that on the 30th of April, 1866, Dana and his wife sold and conveyed the land to said defendant for one thousand dollars, which was its full value; that said land so conveyed, embraced a portion of the land included in the mortgage; that in their deed Dana and his wife warranted the premises to be free from incumbrance done or suffered by them, with full covenants for further assurance; and prays, as affirmative relief, that the land conveyed to the defendant may be decreed to be free from the plaintiff's lien, and that the plaintiff's claim be adjudged to be null and void. No replication was filed to this portion of the defendant's answer.

On the trial the District Court found the facts to be substantially as we have recited them, and entered a judgment for foreclosure for the principal and interest due on the note together with the amount paid by the plaintiff to the Government for the purchase of the land and one hundred and fifty dollars attorney's fees, and ordered the judgment for principal and interest to bear interest until paid at the rate stipulated in the note and mortgage. The Natoma Water and Mining Company made a motion for a new trial, which was denied, and it has appealed both from the order and the judgment.

The points relied upon by the appellant are in substance:

First — That there being no replication to its answer, the affirmative matter therein contained stands admitted, and no proof to the contrary was admissible.

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On examining the answer, we find no new matter which was material. It avers, it is true, that the plaintiff's debt was barred by the discharge in insolvency; but that is only a conclusion of law and not a fact, and on the facts admitted it is evident the plaintiff was entitled to enforce his mortgage as against the land, notwithstanding the personal liability of Dana for the debt may have been barred by the discharge.

Second — That Dana's estate being insolvent, the plaintiff, under section one hundred and thirty-one of the Probate Act, could only recover interest at the rate of ten per cent per annum after the letters of administration issued.

The plaintiff asks no relief against the estate, and it is, therefore, of no importance to those interested in the estate whether the interest be greater or less. The estate has no interest in the land, and could in no manner be benefited by a reduction of the interest. Section one hundred and thirty-one of the Probate Act has no application to such a case.

Third — That the land included in the deed is not the same land included in the mortgage.

This objection is answered by the finding, which explicitly declares the lands to be identical, and the proof fully supports the finding.

Fourth — That the mortgage does not authorize the money paid by the plaintiff to the Government and the attorney's fee to be included in the judgment.

We think the mortgage fully supports the action of the Court in respect to these items.

Fifth — That the plaintiff's claim was not presented to the administratrix for allowance until after the administration was closed.

There appears to be some confusion in the record on this point. But we do not comprehend how it was possible that the estate could be closed on the 5th of June, 1866, when the letters of administration were granted on the 22d of

May, 1866. The findings do not state when the estate was closed, and there was no exception to them on that ground. It is, therefore, too late for the defendant to raise this point, even if it was material. But inasmuch as no relief is demanded against the estate, and the intestate, at the time of his death, had no interest in the land, there was no need for the plaintiff to present his claim to the administratrix for allowance.

Sixth — That the Court erred in admitting certain oral testimony on behalf of the plaintiff.

But the testimony was competent to establish that the defendant, The Natoma Water and Mining Company, had express notice of the plaintiff's mortgage before taking a deed for the land, if such proof had been needed; but we do not perceive the materiality of such proof when the mortgage was duly recorded and operated as constructive notice.

Seventh — That inasmuch as Dana had no title to the land at the date of the mortgage, the title which he subsequently acquired by means of the patent did not inure to the benefit of the plaintiff as mortgagee.

This is no longer an open question in this Court, and is fully decided in *Clark v. Baker*, 14 Cal. 612; *Kirkaldie v. Larrabee*, 31 Cal. 455. This disposes of all the points raised by the appellant.

Judgment affirmed.

Points decided.

[No. 2,288.]

WILLIS JONES v. ANTHONY CLARK, ROBERT WINSPEAR, JOHN M. MINER, ROBERT O. CRAVENS, MARY J. CRAVENS, JAMES WILLIS LOW, EZRA S. BRADLEE, AND ASAHIEL HUNTLEY, ADMINISTRATOR OF THE ESTATE OF WILLIAM RUFUS LONGLEY, DECEASED.

PROMISSORY NOTE OF MINING PARTNERSHIP SIGNED BY SUPERINTENDENT.

A promissory note, purporting to have been executed for and on behalf of a mining partnership, and signed by the Superintendent as such, is binding on the partnership, provided the Superintendent had authority to execute it, or it has been subsequently ratified by the company.

POWER OF SUPERINTENDENT TO BIND MINING PARTNERSHIP.—A managing Superintendent cannot bind a mining partnership, except upon such contracts as are usual and necessary in the ordinary prosecution of the work, unless specially authorized.

FINDINGS — FACTS STATED AS CONCLUSIONS STILL FACTS — Where, on a question of ratification of a note, the findings embraced several facts tending to establish it, and then a conclusion from them that there had been a full ratification and confirmation; *held*, that such conclusion was the ultimate fact to be ascertained; but that it was none the less a finding of fact because stated as a conclusion.

DIFFERENCE BETWEEN MINING PARTNERSHIPS AND ORDINARY PARTNERSHIPS.—Mining partnerships, where there are no partnership articles, are governed by the law of ordinary partnerships, except so far as the general usage of persons engaged in similar pursuits or the established practice of the particular company has established a different rule — the only differences generally existing being such as flow from the fact that in such partnerships there is no *delectus personarum*.

LIABILITY OF MINING PARTNERS ON NOTE BY SUPERINTENDENT — ESTOPPEL.

Where a promissory note, purporting to be executed for and on behalf of a mining partnership, and signed by the Superintendent as such, was given in payment for property which the partnership was using, and such use was a beneficial one, and all the members knew soon after the execution of the note of its existence, and believed it to be a company note, and acquiesced in paying interest upon it until long after the original debt would have been barred if the note were held invalid; *held*, that the members of the partnership should be estopped from disputing its validity.

LIABILITY OF NEW MINING PARTNERSHIP ON OLD PARTNERSHIP DEBT.—If

a promissory note is binding upon a mining partnership as a valid contract, such partnership continues liable, at least, to the extent of the partnership assets, though some members of the company may have

Statement of Facts.

parted with their interests — the new members having purchased with knowledge, and subject to the payment of partnership debts.

ACTION FOR DISSOLUTION OF MINING PARTNERSHIP — FORMER PARTNER AS PARTY.— If, in the case of a mining partnership, a retiring partner still continues bound for a partnership debt, he, nevertheless, parts with his equity to have the partnership debts paid out of the partnership property; and in a suit to dissolve the partnership as among the partners, though he may be a proper, he is not a necessary party.

MINING PARTNERSHIP — DEATH OF PARTNER — NO CONTROL BY SURVIVOR.— A mining partnership is not dissolved by the death of a partner, nor has a surviving partner any right to take control of the property as survivor — this right only applying where the *delectus personæ* exists.

FINDINGS AS TO MORE PROBATIVE FACTS IMMATERIAL.— Where additional findings were asked for in the way of exceptions to findings, and such additions were either upon immaterial points or probative facts merely; held, that they were properly refused.

APPEAL from the District Court of the Fourteenth Judicial District, Placer County.

There was a judgment in this case in February, 1869, dismissing the action as to the defendants Robert O. Cravens, Mary J. Craven, J. Willis Low, and Ezra S. Bradlee, dissolving the partnership known as the "Dardanelles Mining Company," existing between the plaintiff, defendant Clark, and the estate of William R. Longley, deceased, and ordering a reference to take an account as to the partnership affairs as between the said partners, and as to their transactions with the defendants Robert Winspear and John M. Miner.

In its findings upon which the foregoing judgment was based, the Court below, after reciting the facts, proceeded as follows:

"From the foregoing facts I find as matters of law: First, that said promissory note set forth in the complaint, dated August 1st, 1862, has been fully ratified and confirmed by said Dardanelles Company, and is to be held as the note of said company," etc.

Statement of Facts.

The referee, J. I. Fitch, Esq., filed his report in August, 1869. He found, among other things, that J. Russell Glover, in December, 1867, acquired from the plaintiff one half share of his said two and one half shares, and that, at an election held in that month, Glover was put in the place of Clark for Superintendent. As to the injuries occasioned by the washing away of the bed-rock, the referee reported as follows:

“XVIII—The Dardanelles Company, in working their claim, did not clean up their bed-rock very closely, but saved the rock for future working. The rock contained gold in considerable quantities in places to the depth of four or five feet, and was sufficiently soft to enable the workmen to ‘pick it up.’ The rock was of such a character that the gold could not be extracted by ordinary sluice washing. This rock was regarded by the company, and all others acquainted with it, as valuable, and had been saved by the company to be worked only when they had determined upon the proper mode, and were prepared with the means of working accordingly. Clark had, during several years, subjected this rock to various tests and experiments, to determine the proper mode of working it. The result of these experiments was the conviction that but a small part of the gold could be obtained by the usual sluice washing; that if it was to be worked by sluicing at all, that the tailings should be caught, allowed to lie and slake in the air for a considerable time, then sluiced again, and this operation to be repeated four or five times. In the experiments referred to quite satisfactory results were had, by first burning or heating the rock and afterwards washing it. The most satisfactory result, however, was obtained by crushing the rock before washing it. In the Summer of 1867 Clark was offered, by two parties, fifteen thousand dollars for this bed-rock, and desired to sell it; but plaintiff would not con-

Statement of Facts.

sent. One of the parties, the Chinaman who bought the tailings, offered eight thousand dollars cash, and the balance in installments, and the other, ten thousand dollars cash, and the balance to be paid afterwards. During the last Winter Jones and Glover have picked up and sluiced down the cañon about half of this bed-rock, and have not realized from it more than enough to pay expenses. Clark forbid Jones from working this rock. Jones and Glover knew of the experiment made by Clark, and knew that it had long been the opinion of the company that the gold could not be extracted by the ordinary sluice washing. Jones, on the trial, claimed that as much of the gold was saved in the way he worked it as in any other; that the cañon was more than a mile long, and it is owned by the company, is very steep and rocky, and that the gold would be freed in its passage down the cañon.

“XIX—On the 20th day of January, 1869, plaintiff, Jones, and said Glover, made a contract with the Oro Company, which owns mining claims adjoining the Dardanelles claims, by which it was agreed that the Oro Company could wash its dirt through a tunnel and flume of the Dardanelles Company, about seven hundred feet, until this flume united with a flume through which the Dardanelles Company washed, and that then the earth and water of the Dardanelles claims should mingle with those of the Oro, and the two companies should divide the gold that came out after they mingled, in the proportion that the amount of gold taken out of the Dardanelles above this point bore to the amount of gold that came out of the Oro above this point. The contract also allowed water which plaintiff was selling to the Oro Company, from his own ditch, to be run into the reservoir of the Dardanelles Company, and mingle with the water of the Dardanelles ditches, and run in the Dardanelles pipe from the reservoir down on to the claims, where, from the lower end of the pipe, it was used in both the Oro

Statement of Facts.

claims and the Dardanelles, along with the water that came through the Dardanelles ditches. Under this contract two thousand three hundred and seventy-nine dollars and thirty cents have come out of the joint tailings of the Oro and Dardanelles, which is in the hands of said Jones, and of which he charges himself with one thousand nine hundred and six dollars and ten cents, leaving a balance of four hundred and seventy-three dollars and twenty cents, which he claims he must pay to the Oro."

In reference to the reservoir, the referee found, "That during the Spring of 1869, plaintiff entered into a contract with one Story & Co., by which it was agreed that said Story & Co. should wash away the reservoir as a mining claim, and said plaintiff should furnish the water to do so out of his own ditch, called the "Miners' Ditch," and said Story & Co. should have half the gold, and plaintiff the other half; that said plaintiff has now received six hundred dollars under said contract, from Story & Co., and admits that there is considerable gold not cleaned up, which, he says, may amount to one thousand dollars; that one third of the reservoir and ground on which it stood is now washed away, and is destroyed as a reservoir, and Story & Co. are still washing away the remainder of it; that Clark, claiming to act as Superintendent, forbid Jones and Story & Co. from washing it away. The plaintiff has charged in his account of disbursements one thousand nine hundred and thirty-four dollars as cash paid to himself for water which he claims to have furnished to the Dardanelles claims from his own ditch, called the "Miners' Ditch," from the 27th of December, 1868, to the 3d of May, 1869. Clark, as Superintendent, forbid Jones from furnishing any water to the Dardanelles Company. I find, also, that Jones did not furnish but two thirds the amount of water for which he has charged."

Among his conclusions, the referee reported as follows:

Argument for Appellants.

"I find, as a fact, that the working of the bed-rock of the Dardanelles claim, by Jones and Glover, described in paragraph eighteen of this report, was done in a negligent and careless manner, and that the company thereby sustained a loss of seven thousand five hundred dollars; and, as a conclusion of law, that the work done by them was unlawful, and wrongful, and negligent, and Jones should be charged with the loss to the company, to wit: seven thousand five hundred dollars. I find, as a fact, that the Dardanelles Company sustained a loss of one thousand dollars by the washing away of the reservoir described in paragraph twenty of this report; and that, as a conclusion of law, Jones should be charged with that amount."

Upon the coming in of the report plaintiff filed exceptions to it, and especially to the allowance against Jones, above mentioned. To these exceptions defendant objected, on the ground that the only mode of remedying defects or errors (if any existed) in the report, was by motion for new trial. The Court overruled defendants' objections and sustained plaintiff's exceptions so far as they related to the items of seven thousand five hundred dollars for loss by washing the bed-rock, and one thousand dollars for loss by washing away the reservoir. Final judgment was then entered in accordance with the report of the referee, thus amended and in favor of the plaintiff. Defendants moved for a new trial, which having been denied, they appealed.

Charles A. Tuttle, for Appellants.

The note was not the note of the company on its face. It was the promise of Longley alone. The words "Superintendent of company" were mere *descriptio personæ*. (*Skillman v. Lachman*, 23 Cal. 199; *Jaques v. Margnand*, 8 Cow. 497; *Logan v. Bond*, 13 Georgia, 192; 8 Ala. 59.)

Argument for Appellants.

Although a mining and ditch company may be bound for supplies bought by its Superintendent to carry on work, yet it would not be bound to pay a note given for such supplies, when suit is brought on the note alone. (*McConnell v. Denver*, 35 Cal. 365.)

It is true the Court found that the note had been ratified by the company; but it was found not as a fact, but as a conclusion of law. The whole case is thus rested upon a ratification which is nowhere found as a fact. Ratification is an ultimate fact; and if it can be inferred, the acts from which it can be inferred are evidence, and have no place in findings of fact.

Again, Jones here seeks to enforce a lien on the company property for a note given him by the Superintendent four years before he had any interest in the company property. As to this note, he was an outside creditor. It constituted no part of the assets he paid into the firm, nor was it an advance made by him to the firm, or any of its members. He became a partner under the rule that a member of a mining partnership may bring in a new partner without the knowledge of the old partners; but when he came in a new partnership was created, and it was not liable for the old debts, unless it expressly made itself so. Here an outsider seeks to enforce a lien on the entire property as against the present partners, but one of whom was a member when the debt was created. A creditor has not the lien, but it is worked out through the partner who has it for his protection. (Story on Partnership, Sec. 358 et seq.) Here the partnership is solvent, and all those liable on the note at law are solvent. The partner who sold out to Jones lost the right to enforce a lien for the Jones note; and how could Jones, who bought the interest of such partner, acquire a lien?

As the action is for a dissolution and for an accounting back to 1863, all the old partners should have been brought

Argument for Respondent.

in. (Collyer on Partnership, Sec. 712 and notes; *Voorhies v. DeMeyer*, 8 Sand. 614; *Hallet v. Hallet*, 2 Paige, 14; *Bailey v. Judge*, 2 Paige, 278; 3 Barb. Ch. 630; *Elston v. Blanchard*, 2 Scan. 420; *Mallow v. Hinde*, 18 Wheat. 193.)

We were also entitled to have Glover made a party, as it appeared that he owned in the property. (*Harper v. Lamping*, 33 Cal. 649.) But, as a matter of fact, Glover was not properly elected Superintendent; because after the death of Longley, Clark was entitled to the possession and management of the property as surviving partner, and Longley's administrator had no right to vote for Glover as Superintendent. (*Allen v. Hill*, 16 Cal. 113; *Dougherty v. Creary*, 30 Cal. 290.)

It was error to strike out portions of the report of the referee, because such report stood as the finding and judgment of the Court. (Practice Act, Sec. 187; *Bryan v. Maume*, 28 Cal. 337; *Lyons v. Leimback*, 29 Cal. 129; *Gifford v. Carville*, 29 Cal. 589; *Henry v. Everts*, 30 Cal. 435; *Crappe v. Brizolara*, 19 Cal. 609; *Allen v. Hill*, 16 Cal. 113; *McKoney v. Caperton*, 15 Cal. 314.)

James F. Hubbard and Jo Hamilton, for Respondent.

When Jones bought the interest of Mrs. Baker in the Dardanelles Company, he came in as a partner instead of Mrs. Baker, and the partnership continued its existence. (*Duryea v. Burt*, 28 Cal. 569.) As such partner he had a lien upon the partnership property for the debts due the creditors of the firm, which he might enforce in equity. (*Duryea v. Burt*, supra.) When Jones, who was a creditor, became a partner, he was not in any worse condition in regard to his own claim than in regard to the claim of a stranger. Mrs. Baker, when she sold out, lost her right to enforce a lien for the Jones note; but Jones acquired that right, because he purchased it when he bought her note. (Story on Partnership, Sec. 262; *Taylor v. Field*, 4 Vesey, 396.)

Argument for Respondent.

The old partners, who were not beneficially interested in the accounting, were not necessary parties to the action, and the present defendants cannot object to the want of such parties. Nor was Glover a necessary party, as it does not appear when he bought.

There were sufficient grounds for a dissolution of the partnership; but whether so or not, it is plain that when a partnership has no fixed time for its duration, and is the ordinary mining partnership common in the mining region of California, having no agreement among its members as to its continuance, it may be dissolved at the will of either of the parties. (Collyer on Partnership, Sec. 109.)

As to liability on the note, it was sufficient to show a ratification by the members of the partnership; and all the circumstances show that they did ratify. The ratification once fairly made was final, and could not be recalled. (Story on Agency, Sec. 242.) The ratification was sufficiently stated in the findings. (*Swift v. Muygridge*, 8 Cal. 445; *Sears v. Dixon*, 33 Cal. 326.) The additional findings which were asked were not material, because the ultimate fact, to which they all looked, was found.

The doctrine that Clark had a right to the control of the property of the partnership as surviving partner, after Longley's death is not applicable. It applies only in cases of commercial partnerships, not in such a one as this, where a new partner may be brought in without the knowledge or consent of the other partners. (Story on Partnership, Sec. 343; Collyer on Partnership, Sec. 9; *Fereday v. Wightwick*, 1 Russ. & Mylne, 49; *Duryea v. Burt*, 28 Cal. 569.)

The action of the Court below in setting aside portions of the report of the referee was correct, because there was no pretense of fraud in Jones' management of the bed-rock and reservoir; and the Court had a right to correct the errors of the referee, as it did, without adopting it. (*Calderwood v. Peyser*, 31 Cal. 337.)

By the Court, TEMPLE, J.:

On the 1st day of August, 1861, the Dardanelles Mining Company, a mining partnership, was in possession of, and was working, certain mining claims of the class known as hydraulic diggings, at Forrest Hill, Placer County.

At that time the company consisted of seven partners, one of whom, Longley, who owned nearly one half of the mine, to wit, six and one half fifteenths, was manager. On that day Longley, professing to act as the agent of the company, and for the purpose of supplying the company with water to work their claims, purchased certain ditches for the sum of fourteen thousand dollars. The plaintiff held mortgage liens upon the ditches amounting to eleven thousand dollars. By agreement between Longley, as agent of the partnership, and the owners of the ditches, the sum was to be paid to plaintiff. The plaintiff assented to the arrangement, and Longley, acting for the company, executed to him a note for that sum, due one year from date, with interest at two per cent per month. In consideration of this note plaintiff released his mortgages. It does not appear that any members of the company took part in the negotiations for the purchase of the property, or expressly agreed to the transaction, except Longley and one Clark, who at the time owned one and three fourths fifteenths in the company. Clark assisted in negotiating the trade, knew of the note given to plaintiff, and assented to it. The company took immediate possession of the property purchased, and have ever since continued to use the water of the ditches in working their claims. The members of the company must have known of the purchase at the time, and of the existence of the debt, and shortly after, as is proved and found, knew of the fact that the note had been given to plaintiff in part payment, and that the sum of three thousand dollars was paid on account of the purchase from

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the partnership funds. There is evidence tending to show that most, if not all, the members of the company knew of the contemplated purchase before it was consummated; but there is no express finding upon this fact.

On the 19th day of August, 1862, Longley, still acting as Superintendent, took up the first note given, and gave a new note in lieu of it, in the words and figures following:

"\$11,000. For value received, one year after date, for and on behalf of the Dardanelles Mining Company, I promise to pay to Willis Jones, or order, the sum of eleven thousand dollars, with interest at two per cent per month, payable semi-annually.

"WILLIAM RUFUS LONGLEY,

"Superintendent of Company.

"Todd's Valley, August 1st, 1862."

It does not appear that Longley had express authority to execute this note from the company, or any of its members; but there is a finding that each of the members afterward knew of the fact, and assented to the giving of the note. On the 12th day of August, 1862, prior to giving the new note, Clark, at the request of Longley, paid the interest on the note out of the partnership funds.

Longley died in June, 1863. Clark then became Superintendent and manager of the mine, and as such paid upon the note from the partnership funds the following sums, upon the dates mentioned: July 28th, 1863, two thousand five hundred and forty dollars; February 1st, 1864, one thousand two hundred dollars; August 8th, 1864, two hundred dollars; August 27th, 1864, one thousand dollars; February 2d, 1865, one thousand two hundred dollars.

All these payments were known to the other members of the company, who made no objection. It does not appear that any member of the company has ever objected to the purchase, or complained that it was made without authority.

All the members of the company, also, acquiesced in the payment of the interest, and do not seem, even to the last, to have objected to these payments as made without authority; but objection was made that the note was so worded as not to bind the company, for in the answer they admit that Clark, as Superintendent, made the payments because he and the company, not having consulted counsel, supposed that the note was so worded as to bind the company.

The plaintiff, in October, 1866, became the owner of an interest in the company, and afterward commenced this action to obtain a dissolution of the copartnership, to have an account taken, and to have his note paid from the partnership assets. At the time the suit was brought Clark was the only member of the firm who was also a member at the time the purchase was made, or at the time the note was given. All who subsequently became owners by purchase knew at the time of the purchase of the existence of the debt to plaintiff, and of the note given to secure it.

The findings and judgment are in favor of the plaintiff; and defendants' motion for a new trial being denied, this appeal is taken from the order and from the judgment.

The note purports to be executed for and on behalf of the company, and is signed by Longley as Superintendent. The mode of executing it corresponds very nearly with some of the cases mentioned in section one hundred and fifty-four, Story on Agency; and there can be no doubt that it is binding on the partnership, provided Longley had authority to execute it, or it has been subsequently ratified by the company.

The company being a mining partnership, managed by a Superintendent, it follows that the Superintendent could not bind the partnership, except upon such contracts as are usual and necessary in the ordinary prosecution of the work. He could purchase the supplies and materials necessary for

the usual working of the mine upon credit, but could not bind the concern by promissory notes or bills of exchange unless specially authorized. Such authority might, of course, be conferred by the articles of association, or might be established by proof of general usage of similar companies in this country; but no such proof was adduced in this case. Longley, therefore, had no authority, as Superintendent, to purchase the ditch property, or to give the company's note in payment. There must have been special authority for that purpose, or his acts must have been afterwards ratified, or the partnership would not be bound.

The answer of Clark, Winspear, and Miner denies the partnership, but admits that the ditch property was purchased by the persons alleged to be members of it as tenants in common. It denies the authority of Longley to give the note for the company, but avers that he was furnished by some of the parties interested with all the money necessary to pay for the property. It is found that the company was a mining partnership, and the evidence fully sustains that finding. The defendants failed to prove the allegation as to the advance made to Longley to enable him to make the purchase. It may be considered, therefore, as settled beyond controversy, by the admissions and by the evidence, that Longley was authorized to make the purchase, and that there remained due, on account of the purchase from the company, eleven thousand dollars. Plaintiff has not attempted to prove any special authority in Longley to execute the note on behalf of the company, and the only question in regard to it is, whether it is shown to have been ratified. The Court finds several facts, which, in the opinion of the Court, tend to establish the fact of ratification, and then finds, as a conclusion from them, that the note has been fully ratified and confirmed by the company. This was the ultimate fact to be ascertained, and it is now the

less a finding of fact because it is stated as a conclusion from other stated facts.

But it is claimed that this finding is not justified by the evidence. It is true there is no evidence that the note was authorized by the company, at a company meeting, or that it was adopted in that manner after it had been executed by Longley. Nor is there any evidence either of the practice of this particular company, or of usage in similar companies, which would show the necessity of such action. Mining partnerships, where there are no partnership articles, are governed by the law of ordinary partnerships, except so far as the general usage of persons engaged in similar pursuits, or the established practice of the particular company has established a different rule. The only difference generally existing, as established by the decisions of this Court, are such as legitimately flow from the fact that in such partnerships there is no *delectus personarum*. (Bainbridge on Mines, 425.)

The partnership was bound for the money at the time the second note was given, even if the first were invalid. They were using the property, to purchase which the indebtedness was incurred, and the evidence shows that all agreed that the purchase was a beneficial one to the company. All knew, soon after the note was given, of its existence, and certainly then believed it to be a company note, for they aver in the answer that they supposed it was so worded as to bind the company. No one can be supposed so ignorant as to have thought it would bind the company, no matter how it was worded, if given without authority, and in a matter in which the company had no concern. All acquiesced in paying interest upon the note until long after the debt would be barred, if the note were held invalid. Under such circumstances, justice and fair dealing require that they should be estopped from disputing its validity.

The case differs widely, upon the question of ratification, from the cases of *Skillman v. Lachman*, 23 Cal. 198, and *McConnell v. Denver*, 35 Cal. 365. In the first case, it appears affirmatively that Lachman did not authorize the note, and had in no way recognized its validity. In the case of *McConnell v. Denver*, the note was given contrary to the terms of the contract, and had not been recognized as valid in any way. The proceeds of the ditch had been paid on account of the indebtedness, in accordance with the terms of the original contract of sale.

The note being established as a valid contract, binding upon the partnership as such, the partnership continued liable, at least to the extent of the partnership assets, although some members of the company had in the meantime parted with their interests in the concern. The new members purchased with full knowledge of the indebtedness and of the note, and of course took their interests subject to the payment of the partnership debts. (*Duryea v. Burt*, 28 Cal. 569.)

But it is contended that Hensley, Cummings, and Baker, who were partners at the time the note was given, and who sold and transferred their shares before the commencement of this action, ought to have been made parties. If this were an action upon the note there would be some plausibility in this position. Ordinarily, when a partner retires from a firm he continues personally liable for the indebtedness, unless the new firm has assumed the debt and the creditor has taken them for it. If, in the case of a mining partnership, the retiring partner still continues bound, he nevertheless, has parted with his equity to have the partnership debts paid out of the partnership property. The purchaser, however, having taken his interest subject to the debts, has no claim to recover against his vendor for any debts which may be paid out of the partnership assets. The former partners, therefore, have no interest except con-

sequentially, in this proceeding, and, if proper, are certainly not necessary parties to it.

At the time the note was given, it appears that a mortgage was executed by Longley upon the property of the company to secure it. This mortgage, like the note, was executed for and on behalf of the company, and purported to be an incumbrance upon the property of the partnership, and not upon Longley's interest in it. This being a proceeding by one of the partners to obtain a dissolution of the partnership, and to have the partnership assets applied to the payment of the firm debts, and there being no other creditors, it is not material to inquire whether this instrument is valid or not. The plaintiff does not appear here primarily as a creditor, but as a partner seeking a dissolution of the company and a settlement of its affairs. If he is entitled to a dissolution, the other relief must follow. There appears to have been no agreement that the partnership should continue for a fixed term, nor was any custom shown which could affect the question of duration. If it were otherwise, however, sufficient cause for a dissolution was shown. As the partnership was not dissolved by the death of Longley, Clark had no right, as survivor, to take control of the property. This rule can only apply where the *delectus personæ* exists, and the partnership is dissolved by the death of a partner.

The character of the interest which Glover had acquired in the partnership, if any, is not shown. Had it been, it may be that it would have appeared to the Court that he was not a necessary party. He may have had no transfer of any interest, but only a promise, from Jones. At all events, he is not shown to have been a necessary party.

The exceptions to the findings were properly overruled. The additional findings asked for were either immaterial or are the probative facts merely.

It was not necessary, upon a reference, such as was had in

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this case, to move for a new trial, in order to have the report modified by changing some of the findings of the referee. (*Harris v. San Francisco Sugar Refinery*, 41 Cal. 893.)

The facts found by the referee in regard to the inquiry by washing away the bed-rock by the plaintiff show that the damage was altogether hypothetical. There is no evidence of bad faith in the matter. Upon this state of facts the allowance was properly stricken out.

The allowance of one thousand dollars, for washing away the reservoir, seems correct. It was virtually disposing of the property of the company, and Jones should be made to account for the value of it to the company. The allowance of one thousand dollars by the referee seems reasonable, and if it were too much, this would not authorize the Court to reject the demand altogether. The decree should be modified in this particular, by charging the plaintiff with this sum of one thousand dollars, as found by the referee.

Ordered that the case be remanded, with directions to modify the decree in accordance with this opinion.

[No. 2,130.]

EX PARTE PETER FREDERICK BULL, ALIAS PETER WILSON, ON HABEAS CORPUS.

COMMITMENT BY A JUSTICE OF THE PEACE—DISCHARGE.—A commitment by a Justice of the Peace holding a party to appear before a Grand Jury to answer upon a charge of murder, must state the name of the person alleged to have been murdered. But the omission of such name is not such a defect as will entitle the accused to be discharged on habeas corpus.

DISCHARGE FOR FAILURE TO INDICT.—Where a party who has been held to answer upon a criminal charge is not indicted by the Grand Jury at the term of Court next after his commitment, he is entitled to be discharged, unless good cause be shown for his further detention.

GOOD CAUSE FOR DETENTION OF PARTY ACCUSED OF CRIME.—The facts constituting good cause for the detention of a party not indicted at the next

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term, must, in a great measure, be left to the discretion of the Court, to be determined by the particular circumstances of each case; and their sufficiency, or insufficiency, cannot be examined by the Supreme Court through the instrumentality of a writ of habeas corpus.

INSUFFICIENT CAUSE FOR DETAINING A PRISONER.—The mere recommendation of a Grand Jury, that such party be detained to answer before another Grand Jury, is not of itself good cause for his detention.

PRESUMPTION AS TO DISCRETION OF COURT.—Where the record shows that the accused was detained upon the recommendation of the Grand Jury alone, the usual presumption that the discretion of the Court was exercised upon sufficient grounds, cannot be indulged.

APPLICATION to Mr. Justice WALLACE, for an order to discharge the prisoner from the custody of the Sheriff of El Dorado County.

The facts are stated in the opinion of the Court.

George E. Williams, for Applicant.

By the Court, WALLACE, J.:

It appears by the petition and return to the writ, that the petitioner is retained in custody by the Sheriff of El Dorado County:

1. By virtue of an order of commitment in the following words:

“State of California, County of El Dorado. The People of the State of California, to the Sheriff of the County of El Dorado: An order having this day been made by me, that Peter Frederick Bull, alias Peter Wilson, be held to answer upon a charge of murder committed on the 12th day of October, A. D. 1871, at Placerville Township, you are hereby commanded to receive him into your custody, and detain him until he is legally discharged.

“Witness my hand officially, at Placerville, this 24th day of October, A. D. 1871.

“L. D. MARKS,

“Justice of the Peace.”

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2. By virtue of certain proceedings had in the County Court of El Dorado County: These proceedings show that a Grand Jury was regularly impaneled in that Court on the sixth day of November, and sworn to inquire into and true presentment make of all public offenses triable within the County of El Dorado, of which they might obtain evidence; the petitioner, as being a person held to answer, and charged with the commission of a public offense, appearing under the direction of the Court, and interposing a challenge to the panel, which was overruled.

The Grand Jury thus impaneled having entered upon their duties, and subsequently having made their final report to the Court, and not having found an indictment against the petitioner, were discharged from further service. The petitioner, thereupon, moved the Court "that he be discharged from custody, on the ground that the Grand Jury just discharged had failed to find any indictment against him." This motion was resisted by the District Attorney who presented to the Court a recommendation of the Grand Jury just discharged, which recommendation was indorsed upon the warrant of commitment above recited, and was in the following words: "We, the Grand Jury, beg leave to refer the case of Peter Frederick Bull, alias Peter Wilson, to the next Grand Jury, and we recommend that he be held to answer before the next Grand Jury of El Dorado County. H. B. Newell, Foreman of the Grand Jury. George M. Norton, Jr., Secretary." The record then proceeds as follows: "Thereupon the Court, without further or other cause than said recommendation being shown by the District Attorney, denied the motion of said Wilson to be discharged from custody, and granted the motion of the District Attorney; and it is ordered by the Court that the case of the said Peter Wilson be referred to the next Grand Jury, and that he be remanded to the custody of the Sheriff of said county, to await the action of the next Grand Jury."

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1. It is clear that the commitment issued by the Justice of the Peace is insufficient, in that it fails to state the name of the person alleged to have been murdered, or to state that the name of such person was unknown. (Cr. Pr. Act, Sec. 169.) But the petitioner is not entitled to be discharged merely by reason of this defect. (Act of Habeas Corpus, Sec. 21.)

2. The statute provides that "when a person has been held to answer for a public offense, if an indictment be not found against him at the next term of the Court at which he is held to answer, the Court shall order the prosecution to be dismissed, unless good cause to the contrary be shown." (Art. 1,783.)

The case in which a dismissal of the prosecution is *not* to follow upon the non-presentment of an indictment against the accused is exceptional—the accused has a right to depart, "unless *good cause* to the contrary be shown." This general provision of the statute, that the prisoner is not to be held indefinitely, is designed to secure to him a speedy trial, and this right is absolute, except some good cause be shown which may be supposed to take the case out of the operation of the general rule. What is "good cause," may be difficult to define with precision, since it must, in a great measure, be determined by reference to the particular circumstances appearing in each case. There should, undoubtedly, be some fact or circumstance disclosed to the Court upon which its authority in this respect, somewhat discretionary, could be brought into exercise. Its discretion is not to be arbitrary, but should proceed upon such knowledge or information as would enable it to determine for itself whether or not public justice requires the further detention of the prisoner, notwithstanding the delay upon the part of the prosecution. It must be admitted, too, I think, that ordinarily this discretion when exercised by the Court to which the law has intrusted it, is not subject to review, and that

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when exercised, the sufficiency or insufficiency of the grounds upon which it proceeded could not be examined here through the instrumentality of a writ of habeas corpus. The presumption that the discretion had been correctly exercised would ordinarily arise, if the record should state in terms that good cause appeared; so, too, if the record should recite a particular fact, or several facts, as being the facts upon which the Court had proceeded in ordering the detention of the prisoner, the import of such fact or facts as being sufficient or insufficient to amount to "good cause" would not be accurately weighed in this proceeding—it would rather be presumed that there were other existing facts not affirmatively disclosed upon the record which would support the action of the Court in making the order.

But in the case before me there can be no doubt that the circumstance upon which the Court acted in detaining the prisoner, was, in itself, wholly and absolutely insufficient to support the order. The Grand Jury, just discharged, had *recommended* that the prisoner be detained; *therefore*, he was detained. The record, too, states that the detention was "*without further or other cause than said recommendation being shown by the District Attorney;*" so that there is no room here for the indulgence of a presumption of the existence of some other and sufficient ground upon which the order might be supported.

The Grand Jury seem, in this instance, to have assumed the exercise of the discretion which belonged alone to the Court, and the Court seems to have made the order in mere deference to the expressed opinion of the Grand Jury, and without any investigation or information concerning the circumstances of the case before it. The statement that the order was made for no other cause than the mere presentation of this recommendation, is equivalent to the recital upon the record that no good cause—no cause at all — was

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shown, and where that condition appears there is no power to detain the prisoner.

It is, therefore, ordered that the prisoner be discharged from custody, and that a copy of this order be transmitted to the Sheriff of the County of El Dorado forthwith.

RHODES, C. J., and CROCKETT, J., concurring:

We have been consulted by Mr. Justice WALLACE upon the questions discussed by him in the foregoing opinion, and we concur in his views.

[No. 1,967.]

THE PEOPLE OF THE STATE OF CALIFORNIA
ex rel. PLUMAS COUNTY *v.* R. C. CHAMBERS,
W. A. BOLINGER, F. B. WHITING, SAMUEL
GOODWIN, W. C. FAIRCHILD, P. D. SHAW, N.
C. CUNNINGHAM, C. O. BOLINGER, C. F. KAUL-
BACH, AUSTIN CHAMBERS, CREED HAYMOND,
M. TRANOR, AND J. D. GOODWIN.

RAILROAD INCORPORATION — PAYMENT OF "TEN PER CENT" BY CHECK NOT SUFFICIENT.— Under the Act of May 20th, 1861, providing for the incorporation of railroad companies (Stats. 1861, p. 607), and requiring at least one thousand dollars per mile to be subscribed, and ten per cent thereof, in cash, to be actually and in good faith paid in before incorporation. *Held*, that payment of such ten per cent could not be made in a check on a bank, drawn by a person who had not on deposit funds sufficient to meet it, even though it appeared that such check would have been paid if presented.

PAYMENT OF "TEN PER CENT" A CONDITION PRECEDENT TO INCORPORATION OF RAILROAD COMPANY.— The provision of section one of the Act for the incorporation of railroad companies (Stats. 1861, p. 607), requiring payment of ten per cent of the amount subscribed *in cash*, is not merely declaratory; it is a condition precedent, without which the subscribers to a company have no power to incorporate.

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ten per cent on the amount subscribed by him, in money, and goes farther than the railroad Act of this State, for it in express terms forbids any subscriptions to be received or taken, without such payment. But it was expressly held that a check, or sight draft on a banker, is a good payment in money under the section cited. (*Beach v. Smith*, 28 Barb. 261.) The term "cash" payment, in the statute, must be construed according to its common acceptance in the everyday transactions of the business world. Such is the construction given it in the above cited case of *Beach v. Smith*, and it satisfies the spirit and accords with the reason of the statutory rule.

By the Court, CROCKETT, J.:

This is an action of quo warranto against the defendants, claiming to compose the "Oroville and Virginia City Railroad Company," in which the defendants are charged with usurping the functions of a railroad company, without having been duly and properly incorporated as such. The answer sets up the several acts which were performed by the corporators to effect an organization under the general corporation Act of this State, and avers that the statute was complied with, and the company duly organized. Judgment was entered for the defendants, and the plaintiff appeals, both from the judgment and from the order denying a motion for new trial.

Written findings were filed, which were excepted to by the plaintiff as defective; but the exceptions were overruled, to which ruling the plaintiff excepted. This ruling is assigned as error on the appeal from the judgment; and it is further claimed that the judgment is inconsistent with the findings as they were made. The last point will be first considered.

The findings are certainly obnoxious to the objection (so

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repeatedly adverted to by this Court), that the findings of fact and conclusions of law are not separately and distinctly stated. Nevertheless, the facts intended to be found can be sufficiently eviscerated from the mere argument and inferences of the Court to render it apparent what facts were considered proved. Amongst other facts the Court finds that before the certificate of incorporation was signed, ten per cent of the amount previously subscribed "was paid in in cash and bankable checks." In a subsequent portion of the findings the particular manner in which this payment was made is thus explained: "The sum of ten thousand nine hundred dollars was paid by Bolinger for himself and Chambers (being the ten per cent upon the stock subscribed by them), by check drawn upon the Bank of California. The good faith of Chambers is shown by the evidence that in a short time after gold bullion was paid by him to Bolinger for his moiety of that check. The evidence of Bolinger shows that he had, prior to March 27th, 1867, a large bank account with the Bank of California; that oftentimes he overdraw his account, under arrangements with the bank, the bank charging him a certain interest on the overdrawn day's balance. Other witnesses testified that his checks upon the Bank of California had been taken by them as cash, and cash paid for them, and had never been dishonored. Bolinger says he could not now tell what the status of his account was at the bank at the time he drew this check; whether the balance then was two thousand dollars or three thousand dollars for him or against; but says absolutely and positively, that the check would have been cashed on presentation. That it never was presented, amounts to nothing. It, as all other checks drawn upon responsible parties in good faith and with money in the hands of the drawee to meet them, was only a representative of that much money, was paid by the subscribers and received by the company as money, was used by the company as cash assets, and the

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company could have received the money upon it any time it had been demanded. It was, then, an actual payment of money, and in good faith."

It further appears from the findings that ten per cent of the whole amount subscribed amounted to the sum of eleven thousand dollars, of which ten thousand nine hundred dollars was paid in the above named check. It is obvious that the Court intended to find as facts:

First — That the check would have been paid on presentation, whether Bolinger had funds on deposit to meet it or not.

Second — That the company received it as cash, but never presented it for payment.

Third — That when the check was drawn, Bolinger had not to his credit in bank sufficient funds to meet it.

Fourth — That the check was paid to and received by the company in good faith as cash.

Assuming these to have been the facts, the question for consideration is whether the delivery of the check was a compliance with the first section of the Act of May 20th, 1861, providing for the incorporation of railroad companies. (Stats. 1861, p. 607.)

That section requires, as a preliminary to the organization of the company, that stock to the amount of at least one thousand dollars per mile of the proposed road shall be subscribed "and ten per cent in cash so required to be subscribed shall be actually and in good faith paid to a Treasurer to be named and appointed by said subscribers from among their number."

We are not called upon, in this case, to decide whether or not a payment of the ten per cent in good faith by checks payable *in presenti*, and drawn against a sufficient sum on deposit to meet them, would be a compliance with this requirement of the statute, and particularly if the checks were presented and paid within a reasonable time. That is

not this case; and the question here presented is whether the payment can be made in a check drawn by a person who had not on deposit sufficient funds to meet it, and which was never presented for payment, even though it be conceded that the check would have been paid had it been presented. If payment in this method can be substituted for the *cash* payment required by the statute, it is obvious that payment in a promissory note, payable on demand, and which would have been paid on presentation, but which was never presented for payment, or in any negotiable securities, which might at any time have been converted into cash, but were not so converted, would have been equally as valid as the method here adopted. Nothing was, in fact, paid by Bolinger, unless his personal liability as a drawer of the check can be considered payment; for it was not proved, as appears from the findings that he had any funds to his credit in bank of which the check could operate as an assignment; and it would have been purely at the option of the bank whether it would have paid the check or not. If it had refused, it could not have been coerced to pay it. It was under no legal obligation to pay it, and the case stands precisely as if Bolinger had made his promissory note to the company upon an understanding between him and the bank that, as a matter of favor and accommodation to him, the bank would pay the note on presentation; the note, however, never having been presented for payment.

It is a wholly immaterial circumstance that Bolinger was in good credit, and that his check might, and probably would, have commanded the cash in the vicinity. The same would doubtless have been true of his own, or any promissory note by responsible maker, or a good mortgage security, or marketable stocks, or any other kind of property which had a current market value. But none of them would have constituted a *cash* payment in the sense of a statute. The policy which dictated this provision is perfectly appar-

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ent. It was intended to prevent the formation of corporations for the construction of railroads unless the corporators should testify their good faith and earnestness in the enterprise by subscribing for stock to the amount of one thousand dollars per mile of the proposed road, and actually paying in *cash* ten per cent of the amount subscribed before proceeding to incorporate. It was also intended to furnish some guaranty to those dealing with the company that it was not a mere paper corporation, without any substantial basis. But whatever may have been the motive for this enactment, its language is clear and explicit, and the Courts have no authority to disregard it. It requires ten per cent of the subscription to be paid in *cash*; and a check drawn upon a bank by a person who had no funds to his credit, and which was never presented for payment, can in no just sense be deemed *cash*, however good the credit of the drawer. If the statute had intended to permit the *credit* of the subscriber to be substituted for *cash* it would have said so. But it evidently contemplated nothing of the kind. This objection arises on the face of the findings, and in my opinion is fatal to the alleged act of incorporation. The payment of ten per cent in *cash* was a condition precedent, without the performance of which the subscribers had no power to incorporate. An exact and literal compliance with the statute in this respect may not be indispensable. If from accident, inadvertence, or some other unintentional cause, there should be a failure to pay an insignificant portion of the ten per cent, I presume it would not vitiate the act of incorporation. But there must be a substantial compliance with the statute. In this case the whole amount to be paid was eleven thousand dollars, of which ten thousand nine hundred dollars was paid in Bolinger's check, leaving only one hundred dollars to be paid in cash. This cannot be regarded as a substantial compliance with the statute. Counsel insist, however, that the provision in respect to the prior subscription of stock, and

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the payment of the ten per cent, is directory only, and that the payment is not a condition precedent, the performance of which is essential to the validity of the act of incorporation, and in support of this proposition we are referred to the case of *Commonwealth v. Westchester Railroad Company*, 3 Grant, Pa. 200. But that decision was founded on a special statute, in many respects essentially different from ours, and does not sustain the position here contended for. But if it was directly in point, we would not be inclined to follow it. On the other hand, I think it is apparent that without a substantial compliance with this provision the subscribers acquired no jurisdiction to organize themselves into a corporate body, and this view of the law is supported by the following authorities: *Eaton v. Aspinwall*, 19 N. Y. 119; *People v. Troy House Company*, 44 Barb. 634; *Haviland v. Chase*, 39 Barb. 288; *Taggart v. Western Md. Railroad Company*, 24 Md. 588; *People v. Rensselaer Insurance Company*, 38 Barb. 323; *Patterson v. Arnold*, 45 Pa. St. R. 415.

If these views be correct, the act of incorporation is invalid, and the defendants are not entitled to exercise corporate powers.

Judgment reversed and cause remanded, with an order to the District Court to enter judgment for the plaintiff on the findings.

Mr. Justice TEMPLE did not participate in the foregoing decision.

Statement of Facts.

[No. 2,981.]

**IN THE MATTER OF THE ESTATE OF ELIJAH
S. SILVEY, DECEASED.**

HALF THE COMMON PROPERTY LEFT BY DECEASED HUSBAND GOES TO WIDOW ABSOLUTELY.—Where a husband dies, one half of the common property vests in the surviving wife, unaffected by any testamentary disposition he may have attempted to make of it.

WILL OF COMMON PROPERTY — WIDOW'S RIGHTS.—Where a husband, having only common property, left a will devising all his estate to his wife for life, and after her death to be equally divided between the children; *held*, that she was entitled to one half of the property absolutely in her own right, and to a life estate in the other half under the will.

CONSTRUCTION OF WILLS — DEVISES AFFECTING WIFE'S HALF OF COMMON PROPERTY.—A purpose by a husband to attempt the disposition by will of the wife's half of the common property is not to be readily inferred, and especially not where the words employed may have their fair and natural import by applying them only to that moiety of which he has the testamentary disposition.

APPEAL from the Probate Court of Solano County.

The Court below, in its decree of distribution, was of opinion, and adjudged and decreed, "that the said testator intended that said will should operate and take effect upon the whole of the community property, as well so much thereof as is by law subject to testamentary distribution as his wife's interest in the said community, and that it must operate upon the whole or upon none of the said property; that the said wife is not now entitled to take one half of the said property in her own right and the other half for life under the will, but that she must elect whether she will take and hold the whole estate for life, with the remainder to the children mentioned in the said will, or whether she will decline to take under the will and claim her half of the property as her interest in the community, and release all claim to the other half."

It was from the above portion of the decree of distribution that this appeal was taken by Mrs. Susan Riddle

Argument for Respondents.

(formerly Silvey). The estate, at the time of the decree, in June, 1871, was valued at about twenty-two thousand dollars.

John G. Pressley, for Appellant.

The case at bar was not a case of election, and the Court erred in holding that the widow should elect whether she would take the whole of the property for life under the will or her interest of one half absolutely, and renounce all claim to the other half. (See *Jarman on Wills*, 397, 398; 2 Story on Eq. Ju. 1086; *Blake v. Banbury*, 1 Ves. Jr. 523; 4 Kent. 58; *Beard v. Knox*, 5 Cal. 252; *Theall v. Theall*, 7 La. 226; *Payne v. Payne*, 18 Cal. 291; *Morrison v. Bowman*, 29 Cal. 350.)

The acceptance by the widow of the life estate in the husband's half of the community property was not repugnant to the provisions of the will, but strictly in accordance with the intention and purpose of the testator. The terms employed by him can refer to and operate only on his interest in the common property. This the widow takes for life, with remainder to the children; and her title to the other half of the property is absolute under the statute.

Pendegast & Stoney, for Respondents.

Silvey's will could not operate to deprive his widow of her half of the community property without her consent. So far, and only so far, do the authorities go. But the question of the effect and operation of a will is distinct from the question of the intention of a testator, who may, in plain and unmistakable language, undertake to devise property not subject to his testamentary disposition.

It was evidently the testator's intention to give his wife a life estate in all the property, instead of an estate of inheritance in half of it. The will must be read in the light of surrounding circumstances. His words must be

Opinion of the Court — WALLACE, J.

taken to mean just what a person in his condition, at the same time and place, and under the same conditions, would naturally use them to express. He spoke the language of a living man. He spoke of all his property, and meant all the property which he had been managing and controlling, and over which he had the absolute power of disposition. (Hit. Dig. 3571.)

It is not reasonable to suppose that Silvey, having eight children, would leave one half of his property to his wife absolutely, and give her the other half during her natural life.

By the Court, WALLACE, J.:

The entire estate was community property. Silvey left a widow (since his death become the wife of Riddle) and eight children. His will (so far as is claimed to be pertinent to the question here) was as follows:

“Item First — I will that out of my estate all my just debts be paid.

“Item Second — I will and bequeath the entire residue of my property to my dearly beloved wife, Susan, to be held, used, and enjoyed by her during her natural life, and after her death to be equally divided between * * * our children.”

Upon the death of Silvey, one half of the estate vested in his surviving wife, and the will is conceded to be inoperative as to that moiety. The Court below seems, however, to have been of opinion that the surviving wife could not be permitted to claim her moiety as survivor, under the statute, and, at the same time, claim an estate for life in the other moiety under the devise of the husband, and she was accordingly decreed to elect whether she would take one moiety in fee, and no more of the estate, or would take the

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entire estate for life, with remainder over to the children at her death.

It is said, in support of this decree, that though it be true that the devise must in law be confined in its operation to one moiety only, it was, nevertheless, the intention of the testator to dispose, by will, of the whole estate — that he intended to devise to the children an estate in remainder in the wife's statutory moiety at the same time that he purposed to vest her with an estate for life in the other moiety, which, but for the will, would have gone to the children as heirs at law of her father; and it is urged, that if the wife insist upon her right under the statute, she must be considered as thereby repudiating the will, and cannot be permitted to claim the benefit of its provisions in her favor.

There is nothing, however, in the language of the will which evinces an intention on the part of Silvey to dispose of the entire estate. The devise must be read as applying only to that moiety which was within his testamentary power. A purpose to attempt the disposition, by will, of property, which, by statute, would pass to the wife, as survivor of the matrimonial community immediately upon his death, is not to be readily inferred, especially where, as here, the words employed by the testator may have their fair and natural import, by applying them only to that moiety of which he had by law the testamentary disposition.

I am of opinion that the case of *Beard v. Knox*, 5 Cal. 252, is, upon all the points involved, decisive of this case. The general question in that case, as here, concerned the effect upon the right of the surviving wife of a devise by the husband of the community estate. Upon examining the record of that case remaining on file in this Court, it appears that the will of Beard was substantially as follows: "First—I give and bequeath to my mother * * * the sum of three hundred dollars, to be paid by my executors

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out of any moneys which may come into their hands from my estate after my death. * * * Second—I give and bequeath to my wife * * * the sum of five hundred dollars, to be paid by my executors out of any property after my decease. * * * Third—I give and bequeath to my daughter * * * all the property, of whatever kind or species, and all my money, except the amounts already bequeathed to my mother and my wife; * * * and I desire that none of said property shall be sold or disposed of before the 1st day of April, 1855, at which time I empower her guardians to sell all of such property," etc.

It was argued there, as here, that the surviving wife was necessarily driven to her election, whether she would claim under the will or against its provisions; and it appearing in that case that she had already accepted the legacy of five hundred dollars bequeathed to her, it was, therefore, insisted that she had thereby already elected to claim under the will, and, therefore, could not set up a claim to the moiety of the estate under the statute as survivor of the matrimonial community; and in this connection the rule was invoked by the counsel, that "one who takes an interest under the will cannot dispute the will." But whilst recognizing the general principle, that one who takes under a will cannot afterwards dispute its validity, the Court there said: "But the principle does not apply in the present case. The deceased had no authority to dispose of but one half of the property; this he might do to whomsoever he pleased. The plaintiff does not contest that right, but only seeks to withdraw her own property from the operation of a conveyance, which, it is claimed, has despoiled her of it. This she may do with the greatest propriety, as the legacy received by her was part of her husband's estate, and not her own."

In that case, it will be observed, the husband bequeathed to the wife a legacy, which was, of course, to be raised out

Statement of Facts.

of his own moiety of the community estate. In the case at bar, while he made no bequest to his wife, he devised to her an estate for life in his moiety. If the acceptance by the wife of the legacy, under her husband's will in the former case, was consistent with her claim subsequently made to a moiety of the estate as survivor, it is clear that her claim in the case at bar to one moiety in fee, and the other for her natural life, cannot be successfully resisted here.

The decree of the Court below is reversed, and the cause remanded, with directions to enter a decree not inconsistent with the views expressed in this opinion.'

[No. 2,938.]

**HENRY MYERS, ADMINISTRATOR OF THE ESTATE OF
KATY FLORENCE MYERS, DECEASED, v. THE CITY
AND COUNTY OF SAN FRANCISCO.**

EXEMPLARY DAMAGES FOR THE DEATH OF AN INFANT.—Under the Act of April 26th, 1862, a jury may award exemplary damages for the death of an infant by the wrongful negligence of another.

IDEM — INTERFERENCE BY COURT.—The discretion of the jury in fixing the amount of such damages should not be interfered with by the Court, except in cases of the most palpable abuse of such discretion.

MEASURE OF DAMAGES.—The infant daughter of M., seven years old, was run over and killed by a steam fire engine controlled by a servant of San Francisco. In an action for damages M. obtained a verdict for five thousand dollars. *Held*, that the damages assessed were not so excessive as to justify a presumption that the jury was misled by passion, prejudice, or ignorance.

APPEAL from the District Court of the Fourth Judicial District, City and County of San Francisco.

The plaintiff obtained a verdict and judgment for five thousand dollars, and the defendant appealed.

The other facts are stated in the opinion of the Court.

Opinion of the Court — Sprague, J.

W. C. Burnett, for Appellant, argued that where only negligence is shown, compensation for actual loss is all that can be recovered. (*Sedgwick on Measure of Damages*, Sec. 38.) The plaintiff only charges that defendant's servant was negligent and careless, not that there was malice or gross negligence. He also argued that the verdict was so excessive as to justify the presumption that the jury were influenced by passion and prejudice. (*Turner v. North Beach and Mission Railroad Company*, 34 Cal. 594.) The verdict was, therefore, an abuse of discretion.

Quint & Hardy, for Respondent, argued that exemplary damages are allowed under the statute, without any averment of malice or gross negligence. (*Oldfield v. N. Y. and H. R. R. Co.*, 14 N. Y. 314.) Also, that the verdict of the jury was not excessive, the jury having given what they deemed a just compensation. (*Railroad Company v. Barron*, 5 Wallace, 90, 104; *Sherman & Redf. on Neg.*, Sec. 618; *Oldfield v. N. Y. and H. R. R. Co.*, supra; *Bowler v. Lane*, 3 Met., Ky. 311; *Childs v. Drake*, 2 Met., Ky. 146; *Goodsell v. H. and N. H. R. R. Co.*, 33 Conn. 51; *Murphy v. N. Y. and N. H. R. R. Co.*, 29 Conn. 496; *Murphy v. N. Y. & N. H. Co.*, 30 Conn. 184; *Soule v. N. Y. and N. H. R. R. Co.*, 24 Conn. 575.)

By the Court, SPRAGUE, J.:

This is an action for damages under the statute of April 26th, 1862, entitled "An Act requiring compensation for causing death by wrongful act, neglect, or default."

The person whose death is alleged to have been caused by the negligence and carelessness of defendant's employé, was the infant daughter of plaintiff, about seven years of age, who, as is alleged, was run over and crushed to death by a steam fire engine while being driven at a furious and

dangerous rate of speed, and in a negligent and careless manner, the said engine being the property and under the control and management of defendant, and driven by its employee.

The questions of carelessness and negligence of defendant and the contributory negligence of the deceased infant, were fairly submitted to the jury, and, I think, the evidence fully justified the conclusion at which, from their verdict, they appear to have arrived.

The rule, or measure of damages claimed by appellant, is manifestly untenable under the statute.

The jury having determined that the death of the plaintiff's intestate was caused by the wrongful negligence of defendant, the first section of the Act renders it liable to an action for damages; and the third section most clearly authorizes the jury, when such liability is established, to give damages beyond the pecuniary loss sustained by the next of kin. The language of the section is: "In every such action the jury may give such damages, pecuniary and exemplary, as they shall deem fair and just, and may take into consideration the pecuniary injury resulting from such death to the wife and next of kin of such deceased person."

The statute, then, having authorized the jury to give exemplary damages, when the death is caused by the simple negligence of defendant, the discretion of the jury in fixing the amount of such damages should not be interfered with by the Court, except in cases of most palpable abuse of such discretion. The statute supersedes the common law rule, and must control. Most of the States have statutes authorizing actions by personal representatives, or next of kin, of deceased persons against the person or corporation through whose simple or willful negligence the death was occasioned; but our statute upon the matter of damages authorized, is essentially different, and less restricted than

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any cognate statute of other States, so far as I am at present advised.

In New York and Connecticut the *maximum* of damages is limited to five thousand dollars, and in these States, as also in Pennsylvania, Ohio, Indiana, and Illinois, damages are required to be assessed with reference to the pecuniary injury. In Kentucky, by statute, if the death of a person, not an employee, be caused by the negligence or carelessness of the proprietor or proprietors of any railroad, the personal representative of such deceased person is authorized to institute suit and recover damages in the same manner that the person himself might have done for any injury when death did not ensue, and under this statute the Supreme Court of Kentucky holds that exemplary damages may be recovered. (*Bowler v. Lane*, 3 Met. R. 313.)

The damages assessed by the jury in this case, under the circumstances disclosed by the evidence, are not, in my judgment, so excessive as to justify a presumption that the jury was misled, either by passion, prejudice, or ignorance; hence their verdict should not be disturbed on the ground of abuse of their discretion.

Judgment and order affirmed.

[No. 2,880.]

ELIZA JANE HALL v. JOEL S. POLACK AND MARY POLACK.

DUTY OF COURT TO VACATE ORDER INADVERTENTLY MADE.—Where a Court, through its own inadvertence, has prematurely made an order granting a motion for a new trial before the final submission of the motion, it is the duty of the Court, upon its own motion, to vacate the order so made.

EVIDENCE CONTRARY TO ADMISSIONS IN PLEADINGS.—All evidence contrary to the admissions of the pleadings should be disregarded, the admissions being binding on the party making them.

Statement of Facts.

FINDING NOT SUPPORTED BY EVIDENCE.—In a suit to compel the conveyance of land, H. alleged the purchase by herself of an interest in the land, and an agreement by P. to exchange title to other lands for the title to hers; that she had deeded her interest to P. under the agreement, but that P. had refused to deed to her. The answer admitted the purchase by H., but averred that it was made with money loaned by himself to her; admitted the conveyance by H. to himself, but denied the mutual agreement to convey. The referee who tried the case, found that the purchase was made by H. but with P.'s money, and that P. had paid no consideration for the deed from H. Judgment was for P. *Held*, to be error, because not supported by the evidence—all evidence contrary to the admissions of the answer being disregarded.

PRESUMPTION IN FAVOR OF INNOCENT PURCHASER.—In a suit to compel the conveyance of land, where it is alleged that the land was deeded to P. through fraud on the part of her affianced husband, prior to marriage, the findings being silent on the subject, with no exceptions to them as defective, and P. claiming to be a purchaser for value in good faith, without notice of plaintiff's equities, it will be presumed that all the facts necessary to support the judgment in favor of P. were found.

APPEAL from the District Court of the Twelfth Judicial District, City and County of San Francisco.

This was a suit in equity to compel the defendants to convey to the plaintiff an undivided one half interest in two parcels of land—one known as the Geyser Springs tract and the other as the Nicassio Rancho—upon an alleged agreement by the defendant, Joel S. Polack, to so convey. It is alleged in the complaint that in the year 1857 the plaintiff purchased an interest in Goat Island of Frank Pixley, and in the following year purchased another interest in the same island from Edward A. King, and another interest in the island of William Hart, Jr.; that in 1861 the defendant Joel agreed to exchange by deed an undivided one half interest in the Geyser Springs and Nicassio property for the plaintiff's interest in Goat Island; that in pursuance of the agreement the plaintiff gave him a deed to her Goat Island property, and that immediately afterwards he gave her exclusive possession of the Geyser Springs land, but failed and refused to give her a deed to either of the parcels of land; that at

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the time of the agreement the title to the Nicassio Ranch stood in the name of one Pratt, but was really owned by the defendant Joel; that he procured Pratt to make a deed of the ranch to the defendant Mary, who was then unmarried, but to whom the defendant Joel was then engaged to be married, and whom he subsequently married; that the defendant Mary knew of these facts; that the deed to her was made to delay and defraud the creditors of the defendant Joel; and that he is indebted to the plaintiff in the sum of twenty thousand dollars—the value of the Geyser Springs property being ten thousand dollars. The answer denies most of the allegations of the complaint, but makes the following admissions:

“The defendant admits that on the 10th day of February, A. D. 1857, plaintiff purchased of one Frank M. Pixley an interest in the Island of Yerba Buena, for the sum of five thousand five hundred dollars; but denies that the whole purchase money thereof was paid by plaintiff, and alleges that only the sum of six hundred and fifty dollars was paid, and that the balance of four thousand eight hundred and fifty dollars is still due from said plaintiff to said Pixley.

“Admits that said plaintiff did, on the 9th day of April, A. D. 1858, purchase of Edward L. King, for the sum of one thousand dollars, by deed made on that day, another interest in and to said island; but denies that said sum of one thousand dollars, or any part thereof, was paid by said plaintiff, or by any person than this defendant; and alleges the fact to be that said purchase was made for said plaintiff by this defendant as her agent, and that the said sum of one thousand dollars paid by her therefor was money loaned and advanced to her therefor by this defendant, and at her special instance and request.

“Admits that plaintiff did, on the 24th day of June, 1858, purchase of one William Hart, Jr., another interest in said

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Island of Yerba Buena, for the sum of four hundred and sixty dollars; but denies that said sum of four hundred and sixty dollars, or any part thereof, was paid by said plaintiff or by any other person than this defendant, and alleges the fact to be that said purchase was made by this defendant for said plaintiff, as her (said plaintiff's) agent, and that said sum of four hundred and sixty dollars paid by her heretofore, was money loaned and advanced to her therefor by this defendant, and at said plaintiff's special instance and request."

The case was tried by a referee, who reported findings and a judgment for the defendant. The first finding of facts was as follows:

"That the defendant, Joel S. Polack, on the 10th day of February, 1857, in the name of the plaintiff, purchased for the consideration of the sum of six hundred and fifty (650) dollars, of F. M. Pixley, an interest in the Island of Yerba Buena. That on the 9th day of April, 1858, the said defendant, Joel, purchased in the name of the plaintiff, for the consideration of the sum of one thousand (1,000) dollars, another interest in said island. That on the 24th day of June, 1858, the defendant, Joel, purchased in the name of the plaintiff, for the consideration of the sum of four hundred and sixty (460) dollars, another interest in said island. That the several sums of money so paid for said respective interests in said island, was the money of the defendant, Joel, and no part of the same was the money of or furnished by the plaintiff. That the plaintiff, by deed dated September 11th, 1861, conveyed her interest in said island to the defendant, Joel S. Polack; that the expressed consideration in said deed was the sum of one thousand (1,000) dollars, but no part of said consideration was at any time ever paid by the defendant, Joel, to the plaintiff."

Argument for Appellant.

The plaintiff moved for a new trial; the motion was denied, and he appealed.

The other facts are stated in the opinion of the Court.

H. F. Crane, for Appellant.

Where a Court has granted a new trial a party acquires a vested right of which he cannot be deprived, especially without an opportunity of being heard, and in case of failure in his resistance to save his exceptions, and see that some record is kept of the proceedings, and that some intelligible order is entered, from which he may appeal.

The first finding is for the plaintiff, upon the principal issue, to wit: the parol agreement; and is in exact accordance with the pleadings and proofs of the plaintiff, and directly against the pleadings and evidence of the defendants.

The first, second, third, and fourth clauses of the first finding of the referee are against and contrary to the express admissions and averments of the sworn answers of the defendants. The answer admits expressly that plaintiff made the purchase of Pixley, as averred in the complaint, and also avers that plaintiff paid six hundred and fifty dollars of the purchase money. The finding is that Polack made the purchase in the name of plaintiff, and that the money paid was his money. As to the King and Hart titles, the defendant's answer expressly admits that plaintiff made the purchases through Polack, as her agent, and avers that he loaned her the money to pay. The findings on these points are against the averments and admissions of the defendant's answer, because the referee finds that defendant, Polack, purchased these titles in the name of the plaintiff, but paid for them with his own money. Thus, it will be seen, that the referee has found against the sworn admissions of the record, which are conclusive on the defendants. (1 Greenleaf on Ev. Secs. 27, 205; *Mulford v. Estudillo*, 22 Cal. 181.)

Argument for Respondents.

John R. Jarboe, for Respondents.

This Court will not take notice of or review any proceeding, right or wrong, in the Court below, unless that proceeding is embodied or presented in some statement on appeal. (Practice Act, Secs. 338, 333, 195, 346; *Harper v. Minor*, 27 Cal. 109.)

If plaintiff had desired to suggest to this Court that the power of the Court below had ceased with the order made by the Judge on September 21st, 1870, and that the vacating order, and the order of December first was error, he should have made an appeal from the vacating order, and filed a statement setting up the order of twenty-first of September, and the proceedings had in setting it aside, or he should have assigned error in a separate statement on appeal from the order of December 1st, 1870.

On the 21st of September, 1870, the cause was not finally submitted; defendants' brief was not filed, nor due. The argument was not, therefore, closed, and an order disposing of the cause was premature and void. Again, the order was not made by the Court, but was merely filed with the papers, and not copied in the minutes. An order made out of Court without notice, may be vacated without notice.

The answer of the defendants was, in substance, a denial of the fact that plaintiff had purchased the interests in Goat Island with her own money; a denial of any agreement, verbal or written, on the part of J. S. Polack, to convey one half, or any part, of the Geysers to plaintiff; a denial that he had ever put plaintiff in possession of the Geysers, in pursuance of any agreement, or other way, and an allegation on the part of Mrs. Polack, that she had, long before her marriage to defendant, J. S. Polack, and for value, and without notice of any of plaintiff's claims, bought of defendant, J. S. Polack, the Geyser Springs Rancho.

The first finding of the referee is not in conflict with de-

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defendants' answer; because while the answer admits the possession by plaintiff, they set up that all the money was advanced by Polack, except in one instance. And in Polack's testimony he swears that all the moneys were his, and that he took the deeds in plaintiff's name because he supposed she would pay him back the money and keep the island.

Admitting the deed to defendant of Goat Island to have been voluntary, as plaintiff says, yet, as the referee finds that plaintiff had no interest in the island, it would not affect the rights of parties either way. If the finding was defective on this point, plaintiff should have moved to correct.

By the Court, CROCKETT, J.:

This cause was tried before a referee, who reported his findings and a judgment in favor of the defendants, which was duly entered; and thereupon the plaintiff moved for a new trial. The motion was argued, and the defendants' counsel was allowed a certain period within which to file a brief in opposition to the motion. Before the time had expired, the Judge, apparently through inadvertence, wrote and signed an order at chambers granting the motion, and filed it with the papers in the cause, and caused it to be noted in the daily rough minute book kept by the Clerk. But when his attention was called to the fact that the order was prematurely made, he rescinded it on the *ex parte* motion of the defendants' counsel, who was then permitted to file his brief; after which the Court denied the motion, and the plaintiff has appealed as well from the judgment as from the order denying the motion for a new trial.

If we can review this order on the record here presented (a point not necessary to be now denied), I think there was no error in vacating the order upon the facts contained in

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the stipulation of counsel. It was prematurely entered, evidently through the inadvertence of the Judge, and before the motion was finally submitted for decision.. It had not even gone into the engrossed minutes of the Clerk; and it was the duty of the Court, as soon as its attention was called to the fact, to vacate of its own motion, an order prematurely made, through its own inadvertence, before the final submission of the motion.

One of the grounds of a motion for a new trial was that the evidence was insufficient to support the findings of the referee; and as to some of the findings this point is well taken. The first finding is directly against the admissions of the answer of Joel S. Polack. In the answer it is explicitly admitted that the several interests of Pixley, King, and Hart, in Goat Island, were purchased by the plaintiff, and that on the purchase of Pixley, she paid, of her own money, the sum of six hundred and fifty dollars; but the answer avers that Polack loaned her the purchase money paid to King and Hart. The first finding is to the effect that all these purchases were made by Polack in the name of the plaintiff, and that he paid all the purchase money out of his own funds. All evidence contrary to the admissions of the pleadings should be disregarded, the admissions being binding on the party. (1 Greenl. Ev. Secs. 27-205; *Mulford v. Estudillo*, 32 Cal. 131.) This finding was clearly not justified by the evidence; but it is claimed that this finding is immaterial, in view of the subsequent findings, which, it is said, are decisive of the action. This is doubtless true, if it be conceded that the error into which the referee fell in the first finding had no influence upon his mind in deciding upon the conflicting evidence on the other points in the case. The contest turned mainly on two questions, to wit: First—Whether the consideration of the

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conveyance from the plaintiff to Polack of her interest in Goat Island was a promise by the latter to convey to the plaintiff one-half of the Geyser Springs property, or whether the conveyance was made solely on account of the plaintiff's indebtedness to Polack for the advances made by him on the purchase by her of the interests of King and Hart in Goat Island. Second—Whether Polack put the plaintiff into possession of the Geyser Springs, in virtue of his verbal promise, to convey to her one half of the property. On both these issues the referee found against the plaintiff, on the erroneous assumption that the plaintiff held the interests in Goat Island, acquired through Pixley, King, and Hart, not in her own right, but in trust for Polack, who had purchased the property in the plaintiff's name, and paid for it with his own money. But if the referee had assumed as true the admissions of the answer on this point, as he ought to have done, it might, and probably would, have materially influenced his judgment in weighing the conflicting evidence on the contested points above mentioned. At all events, we cannot assume that this error of the referee did not and could not properly influence his mind in deciding on the credibility of witnesses, who flatly contradicted each other as to the most material facts of the case. Assuming that Polack purchased and paid for the Goat Island property, and took the deeds, for his own convenience, in the plaintiff's name, the referee may well have concluded that the plaintiff and her daughter were not worthy of credence when they testified that Polack promised to convey to the plaintiff one half of the Geyser Springs, in consideration of a conveyance to him of the mere legal title to the Goat Island property, of which he was already the equitable owner. But he might have taken a very different view of the credit to which they were entitled, and of the probable truth of their statements, if he had assumed that the plaintiff was, in fact, the owner of the Goat Island property,

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subject only to a debt of one thousand four hundred and sixty dollars due to Polack for the money advanced on the purchases from King and Hart. The defendant Mary Polack, however, claims to have been a purchaser for value, in good faith, and without notice of the plaintiff's equities of the Geyser Springs prior to her intermarriage with the other defendant. The findings are entirely silent on this branch of the case, and there was no exception to the findings as defective. In such cases the rule is well settled in this Court that we will presume all the facts to have been found which are necessary to support the judgment. We cannot, therefore, disturb the judgment as to Mary Polack.

Judgment affirmed as to the defendant Mary Polack, and reversed as to the defendant Joel S. Polack, and remanded for a new trial as to him.

WALLACE, J., concurring:

I concur in the judgment.

[No. 2,021.]

J. M. BOHANNAN v. J. HAMMOND AND C. SCHUTT.

JURISDICTION OF STATE COURTS.—State Courts have concurrent jurisdiction of cases of action cognizable in admiralty where only a common law remedy is sought.

LIABILITY OF COMMON CARRIER.—A common carrier is not only responsible for negligence but is an insurer against any loss not occasioned by act of God, the public enemies, or the fault of the party suffering the loss.

SHIP — BURDEN OF PROOF.—When loss occurs, the burden of proof is upon the carrier to show that it resulted from one or the other of these excepted cases.

LIABILITY FOR DAMAGE TO CARGO OF VESSEL.—Where the cargo of a vessel is damaged in consequence of an accident which results from the falling of the tide, unless it appear that the vessel could not have been so moored as to prevent it being left aground, the owner of the vessel is liable for the damage.

Opinion of the Court — Temple, J.

APPEAL from the District Court of the Fifth Judicial District, County of San Joaquin.

The facts are stated in the opinion of the Court.

Byers & Elliott, for Appellants, argued that the Court had no jurisdiction of the subject matter of the action, and cited 2 Story on Const. Secs. 1663, 1665; 1 Kent's Com. 366, 367; *The People v. The Steamer America*, 34 Cal. 679. They also argued that the damage resulted from an inevitable accident, for which a carrier is not responsible. (2 Kent, 826; *Faulkner v. Wright*, 1 Rice, 107; *Neal v. Sanderson*, 2 Smedes & Marsh. 572; *Eveleigh v. Sylvester*, 2 Brevard, 178.)

J. H. Budd, for Respondent.

By the Court, TEMPLE, J.:

In this case there is no brief on file on the part of the respondent, although there is on file what purports to be a reply to respondent's brief. We are therefore compelled to investigate the case without the assistance of counsel, so far as respondent is concerned.

The complaint charges that defendant is a common carrier, and as such undertook to carry for plaintiff twenty-one tons of wheat from the City of Stockton to San Francisco; that the wheat was delivered to the defendant and received by him, but was, while in transit, damaged through the fault of defendant. To recover this damage is the object of this suit. The answer admits that the defendant was a common carrier. The contract and the loss were proven substantially as alleged. This appeal is by the defendant from a judgment in favor of plaintiff, and from an order denying a new trial.

The defendant contends that the Court has no jurisdiction, because the action arises upon a maritime contract, and is cognizable in admiralty. This position is manifestly unten-

able. The Judiciary Act, which defines the jurisdiction of the District Courts of the United States, and confers upon them admiralty jurisdiction, secures to suitors a common law remedy, where the common law is competent to give it. It has been repeatedly held that the State Courts have concurrent jurisdiction of causes of action cognizable in admiralty where only a common law remedy is sought.

The vessel of the defendant, at the time of the loss, was moored at the wharf at the City of Stockton, where vessels usually lie while loading and unloading. But a portion of plaintiff's wheat had been taken on board, when the tide receding left the vessel upon the mud in the slough. There happened to be under the vessel a piece of cord-wood which was pressed down into the mud, but which, owing to the weight of the vessel, punched a hole in the bottom of the vessel, which caused it to fill with water, and hence the loss.

The Court finds, that the damage was occasioned by a large piece of cord-wood, which had sunk to the bottom of the place where the vessel lay; but whether it came to lie there accidentally, or had been placed there by some person, the Court was unable to determine. The parties were both ignorant of its being there, until after the damage had been done; that at the time of the injury the defendant's vessel was strong and in good condition and sufficient to have safely carried the plaintiff's goods, but for the accident.

Under these circumstances there can be no doubt of the liability of the defendant. A common carrier is not only responsible for negligence, but is an insurer against any loss not occasioned by act of God, the public enemies, or the fault of the party suffering the loss. When loss occurs the burden of proof is upon the carrier, to show that it resulted from one or the other of these excepted cases.

It is not necessary to decide whether defendant would have been liable, had it appeared that the stick of wood had sunk to its place without the interposition of the agency

Statement of Facts.

of man. The falling of the tide, leaving the vessel upon the bottom of the slough, must have been anticipated. There was no sudden, unlooked-for physical event, against which no prudence could guard. It does not appear that the vessel could not have been so moored that it would not have been left aground when the tide receded. It may be claimed, with some degree of plausibility, that the defendant would be liable for want of proper care.

Judgment and order affirmed.

[No. 2,927.]

W. N. CUMMINGS v. W. H. STEWART.

REPLEVIN — ERRONEOUS JUDGMENT.—Where the action was replevin in the detinet, and the Court found that the value of the property was six hundred dollars, that the plaintiff was its owner and entitled to its possession, and that the defendant detained it from him, and then gave judgment in favor of the plaintiff for the property, or for the sum of one hundred and seventy-six dollars and twenty cents, at the option of the defendant; *held*, to be error; first, because it gave the defendant the option to retain the property by paying a named sum; and, second, because the sum to be paid was less than the value, as found.

APPEAL from the District Court of the Third Judicial District, County of Santa Cruz.

On the 12th of October, 1869, Strahle & Hughes leased certain billiard tables to McEwen for one year, under a written agreement that he should pay them a monthly rent of forty-three dollars and eighty-four cents, and at the end of the year should have the right to purchase the property for the sum of five dollars. On the 12th day of July, 1870, McEwen sold the tables to one Otto, informing him that fifty-three dollars and eighty-seven cents of the rent remained unpaid. In the same month Otto sold the property to the defendant for eight hundred dollars, and afterwards

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tendered to Strahle & Hughes fifty-three dollars and eighty-seven cents, which they refused to receive, claiming that there was due them the sum of one hundred and seventy-six dollars and twenty-four cents. In July, 1870, Strahle & Hughes sold their interest in the tables to the plaintiff, who brought this suit to recover the property, or the value of it. The Court rendered judgment in favor of the plaintiff for the property, or for one hundred and seventy-six dollars and twenty cents.

The other facts are stated in the opinion.

Albert Hogan, for Appellant.

Heacock & Adams, for Respondent.

By the Court, WALLACE, J.:

The Court below found that the title to the personal property sued for was in Strahle & Hughes, and was vested in Cummings by the transfer they made to him in July, 1870, and that it had never vested in McEwen, Otto, or the defendant, Stewart; that Cummings, after the transfer to him, and before commencing the action, demanded of the defendant the possession of the property, but the latter refused to comply with the demand; that the rent due upon the lease had not been paid according to its terms; that Otto, from whom the defendant derived the property, had tendered to Strahle & Co. only fifty-three dollars and eighty-seven cents, when the amount really then due for rent was one hundred and seventy-six dollars and twenty-four cents; that Strahle & Co. had refused to receive the smaller amount so tendered; and that the value of the property was six hundred dollars.

Thereupon judgment was rendered that plaintiff recover the property, or one hundred and seventy-six dollars and twenty cents, with interest thereon.

Subsequently to the rendition of this judgment, the de-

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fendant having deposited in Court the amount of the judgment and costs, the Court *ordered* that the property in controversy be redelivered to the defendant, that he be "declared to be the owner thereof," and that satisfaction of the judgment be entered. This appeal is from the *judgment* and the *order*.

The Court having found that the property belonged to the plaintiff, and not to the defendant, and the latter having no right to detain it after the demand made upon him for its delivery, and it being also found that its value was six hundred dollars, it followed by necessary legal conclusion that the plaintiff was entitled to the property, if it could be had, or if it could not, then to its ascertained value — six hundred dollars.

The amended answer of the defendant denied the title of the plaintiff, and denied his right to the possession of the property in controversy. It did not set up the lease from Strahle & Co., under which the defendant had received it, nor did it aver performance or any excuse for non-performance by the defendant, or by McEwen, or Otto, of the conditions and stipulations of the lease, nor offer to pay the rent then due, or due at any time and unpaid, or allege any matter whatsoever entitling the defendant to be relieved from the ascertained forfeiture of the right of possession of the property under the terms of the lease. The defense rested wholly upon the asserted legal right of the defendant to the property and to its possession. There was, therefore, no case presented for relief upon equitable grounds, or by the payment or tender of the rent due upon the lease. That one hundred and seventy-six dollars and twenty cents was due as rent, and not merely the smaller sum of fifty-three dollars and eighty-seven cents, tendered and refused, was only important as establishing that under the terms of the lease the defendant had lost the right to the possession of the property sued for, and was not to be considered for the purpose

Points decided.

of affecting the amount of money for which judgment was to be rendered if the plaintiff should succeed in the action.

Again, the action was replevin in the detinet, and the facts being ascertained that the property was of the value of six hundred dollars, that the plaintiff was its owner and entitled to its possession, and that the defendant detained it from him (no damages for the detention being found), it resulted that the plaintiff was entitled to judgment for the possession of the property, if delivery thereof could be had; otherwise, for its value as found.

But the judgment as rendered, was for the property or for one hundred and seventy-six dollars and twenty cents, with interest, etc., and as thus rendered it gave the defendant *the option* to retain the property by paying a named sum of money, and that sum, too, less in amount than the ascertained value of the property itself.

I think that the judgment and order should be reversed and the cause remanded, with directions to render judgment for the plaintiff, in accordance with the views expressed in this opinion.

Mr. Justice SPRAGUE expressed no opinion.

[No. 2,891.]

E. B. HIGGINS v. JAMES BARKER AND B. W. THOMPSON.

WATER RIGHTS — JUDGMENT CONSISTENT WITH VERDICT.—H. constructed a water ditch, by which he appropriated three hundred inches of water from a running stream, but not all of the stream. B. appropriated the remainder of the water. Subsequently H. made a new ditch, appropriating water from the same stream. In a suit to enjoin B. from interfering with H. in the use of the water, H. obtained a verdict that the second ditch did not diminish the quantity appropriated by B., and judg-

Opinion of the Court — Crockett, J.

ment was rendered enjoining B. from disturbing H. in the use of three hundred inches of water. *Held*, that the judgment was consistent with the verdict and with justice.

APPEAL from the District Court of the First Judicial District, County of Santa Barbara.

The facts are stated in the opinion of the Court.

J. Franklin Williams, for Appellants.

Charles E. Huse, for Respondent.

By the Court, CROCKETT, J.:

The plaintiff alleges that in 1867 he constructed a ditch, whereby he appropriated, and thenceforth continued to use, for milling and other useful purposes, the water of a certain creek flowing along the margin of his land; that afterwards, and whilst he was so using the water, the defendants, with force and violence, tore down his dam, so as to prevent the flow of water in the ditch, and refuse to permit him to maintain the dam, threatening again to destroy it if he should rebuild it; that the defendants are unable to respond in damages, and that the injury which he would suffer, if the dam is abated, would be irreparable. The prayer is for damages and for an injunction restraining the defendants from interfering with plaintiff in the use of the water.

The answer, after denying most of the material averments of the complaint, sets up new matter, to the effect that the first ditch constructed by the plaintiff was a small ditch, carrying only a part of the water of the creek, leaving a surplus, which the defendants appropriated for domestic purposes and irrigation; that after they had so appropriated the surplus water, the plaintiff constructed a new ditch of larger capacity, which carried off and diverted all the water of the creek from its natural bed, and entirely cut off that portion of the water which the defendants had appropriated. As

affirmative relief, they pray for damages against the plaintiff.

At the trial a jury was impaneled, to whom special issues were submitted, and who found, in effect, that the construction of plaintiff's ditch in 1867 was an appropriation of the waters of the creek to the extent of the capacity of the ditch, which was sufficient to carry the greater portion, but not all the water of the creek; that the plaintiff, therefore, did not appropriate *all* the water of the creek; that in the Spring or Summer of 1870 the plaintiff built a new dam or ditch, which diverted a portion of the water of the creek, but not enough to diminish the quantity appropriated by the defendants. The Court entered a judgment fixing the quantity of water to which the plaintiff is entitled at three hundred inches, which it finds to have been the capacity of the plaintiff's first ditch, and enjoining the defendants from disturbing the plaintiff in the use and enjoyment of that quantity of water. But no damages were awarded either to the plaintiff or defendants. From this judgment the defendants appeal on the judgment roll alone, and insist that on the facts found by the jury the injunction ought to have been dissolved and the complaint dismissed. But I discover no error in the record. The plaintiff first appropriated all the water which his original ditch would carry, which the Court finds was three hundred inches; and the defendants afterwards appropriated the whole or a portion of the surplus. Subsequently the plaintiff constructed a new dam or ditch; but the judgment limits the quantity of water to be diverted by the plaintiff to three hundred inches, which is the amount originally appropriated, and leaves all the surplus for the use of the defendants. The judgment appears to me to be entirely consistent with the verdict and with justice, so far as the facts are disclosed in the record.

Judgment affirmed.

Statement of Facts.

[No. 2,744.]

JOHN W. MORRIS v. RENCH ANGLE.

NEW TRIAL STATEMENT TREATED AS SUCH, THOUGH CALLED STATEMENT ON APPEAL.—Where a transcript on appeal showed that a notice of motion for new trial was given and argued in due time, and that the points made on such motion could not properly be considered without a statement on such motion, and that no objection was made on such motion for want of such statement; and the transcript contained a statement manifestly intended as a statement on new trial, but headed "Statement on Appeal:" *held*, that such statement should be treated as a statement on motion for new trial.

PRESUMPTION OF REGULARITY OF PROCEEDINGS OF DISTRICT COURT.—It is not to be presumed that a District Court would proceed to hear and determine a motion for new trial on the ground that the evidence was insufficient to justify the findings, without a settled statement as required by law.

APPEAL — MATTERS NOT PART OF JUDGMENT ROLL MUST BE EMBODIED IN STATEMENT OR BILL OF EXCEPTIONS.—Notices of motion to strike out portions of pleadings, or to dismiss action and orders upon such motions, and judgment rolls in other suits introduced as evidence, do not constitute a part of the judgment roll in a case, and hence are not a part of the record on appeal, unless embodied in a statement or bill of exceptions.

TRANSACTION CONSTITUTING ABSOLUTE SALE AND NOT MORTGAGE.—Where Morris and Angle owned a lot of sheep, and Morris executed a bill of sale of his half to Angle, who was in possession, in consideration of the surrender to him of his own note, previously given to Angle, and the giving to him of Angle's note for the balance; and Angle at the same time agreed in writing to sell back to Morris at a future time, on payment of the money represented by the notes: *held*, that the transaction constituted an absolute sale, and not a mortgage.

APPEAL from the District Court of the Seventh Judicial District, County of Mendocino.

This was an action to recover the one half of eighteen hundred and ninety-seven sheep, being a lot of seven hundred and fifty claimed to have been mortgaged by plaintiff to defendant on May 30th, 1866, and their increase up to the commencement of the suit in October, 1869; and in default of such sheep, for the sum of three thousand seven hundred and ninety-four dollars. The contracts and papers passing

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between the parties, and the surrounding circumstances, are fully stated in the opinion. There was a judgment in the Court below in favor of plaintiff for the sum of four hundred and eighty-nine dollars and twenty-three cents and one half of eleven hundred and forty-five sheep. Defendant appealed from the judgment and also from an order overruling his motion for a new trial.

The statement contained in the transcript on appeal, though called and headed "Statement on Appeal," showed in terms that it was a statement on motion for new trial. The grounds of alleged error were set forth expressly as those upon which defendant would "rely upon the hearing of said motion for new trial," and the document concluded with the words: "Wherefore, defendant asks for a new trial in this cause."

The statement noticed the fact that certain motions had been made to strike out portions of the complaint and to dismiss the action; that they had been overruled, and that defendant excepted; but it did not embrace the papers used in such motions, or show the grounds or the orders made. These notices and orders, as also the judgment roll in a previous suit between the same parties, were printed in the transcript; but not as a part of the statement or of a bill of exceptions.

The testimony on the part of the plaintiff, contained in the statement, tended to show that defendant often talked with plaintiff about the best way to take care of the sheep, that he once asked plaintiff to find a place to keep them, and said that plaintiff must do his part; that he rented the sheep to one Petty, and said to him, "Keep account of the wool, as I have to settle with Morris;" that he said once to Morris: "Let us go down the country and find a sheep range for our sheep;" that on another occasion he said that he had a mortgage on the sheep from Morris; and at another time he said that Morris would have some sheep if he

Argument for Appellant.

paid for or redeemed them. The defendant on his part denied that he had said anything of the kind, or of any such import or meaning.

Leeman Haile, for Appellant.

The note of Morris to Angle having been delivered up by the latter to the former at the time the bill of sale of the sheep was made, it is plain that the transaction did not constitute a mortgage to secure that note. There was then no longer a debt or evidence of a debt owing from plaintiff to defendant. A mortgage is a security for the payment of money upon a subsisting debt; there cannot be a mortgage without a debt, for the one wholly depends upon the other. (1 Hillard on Mortgages, 2; *Wright v. Ross*, 36 Cal. 441.)

The bill of sale is absolute on its face, and was clearly intended as an absolute sale. The agreement cannot be held to have been intended as a defeasance, or have the effect of rendering the sale a mortgage, for the reasons that it does not purport to be a defeasance, or in any manner refer to the bill of sale; it is not for the same sheep conveyed in the bill of sale, but for sheep of the same quality as those "now owned by the said party of the first part;" it is not for the sheep conveyed in the bill of sale, with their increase for one year, but for the same number, to wit: three hundred and seventy-five, to be delivered one year from date; nor does the price to be paid by the terms of the agreement correspond to the debt upon which the pretended mortgage is alleged to have been given — the price to be paid being six hundred and fifty-six dollars and twenty-five cents, in gold coin, and the pretended debt being four hundred and twenty-six dollars.

McGarvey & Carothers, and Thomas B. Bond, for Respondent.

The several motions to strike out and the motion to dis-

miss, the orders made upon them, and the judgment roll in the previous case of *Morris v. Angle*, are not properly included in the transcript, for the reason that they are no part of the judgment roll in the case at bar and are not embodied in any statement or bill of exceptions. They should, therefore, be stricken out. (*More v. De Valle*, 28 Cal. 174; *Harper v. Miner*, 27 Cal. 109.)

There is also no statement on motion for new trial, or anything purporting to be such a statement, in the transcript. There is nothing but a statement on appeal. In the absence of a statement on motion for a new trial, the insufficiency of evidence to justify the decision cannot be inquired into, and if it could, the evidence being conflicting, the Court would not disturb the decision. (*Hagar v. Lucas*, 29 Cal. 310; *Gayliard v. Hoberlin*, 18 Cal. 895.)

There is no finding, it is true, of any indebtedness from Morris to Angle; but there is nothing to show that all the evidence is before the Court, and the presumption is that there was evidence to sustain the judgment. (*Tewksbury v. McGraff*, 33 Cal. 237.)

The transaction, though it may be strictly speaking a mortgage, has all the properties of a pledge. Not only is that the effect of the documents taken together, but the testimony shows that the parties had frequent settlements concerning the expenses of taking care of the sheep and the profits from the sale of wool and mutton, and that in said settlements defendant presented accounts against Morris for salt, shearing, herding, and other expenses, subsequent to the execution of the bill of sale, and told Petty to "keep account of the wool, as he had to settle with Morris."

By the Court, SPRAGUE, J.:

The statement found in the transcript with the caption "Statement on Appeal," is manifestly the statement of ap-

pellant on motion for a new trial; the matters therein contained clearly indicate that the same was intended as a statement on motion for a new trial; and further, the transcript discloses that defendant in due time and form gave notice of his intention to move for a new trial, and that the motion was in due time and form made by him, which motion was argued before the Court by the counsel of the respective parties, and no objection appears to have been made by plaintiff to the hearing of such motion for want of a proper statement on which to base the same; and it is not to be presumed that the Court would proceed to hear and determine a motion based upon the ground "that the evidence is insufficient to justify the findings," without a settled statement as required by law.

The appeal is by the defendant from the judgment, and also from the order denying his motion for a new trial.

The notices of motions to strike out and to dismiss, and the orders of the Court upon such motions, also that portion of the transcript denominated the judgment roll in a former suit between these parties, do not legitimately constitute a portion of the record in this case on appeal. They are not embodied in any statement or bill of exceptions, and constitute no part of the judgment roll in this case, hence cannot be regarded on this appeal.

The plaintiff claims, and the Court below so found, that the transactions between the parties of May 30th, 1866, constituted a mortgage by plaintiff to defendant to secure an existing indebtedness of plaintiff to defendant. Defendant insists that the evidence does not sustain this finding, but that such finding is against the evidence. If this point is well taken, there is no necessity for considering other points urged by appellants. The transaction of May 30th, 1866, is evidenced by two separate instruments in writing; and to these instruments, and the surrounding circumstances of the parties thereto, at the time of their execu-

tion, we must look for a true interpretation of what the parties intended to accomplish by the execution of these writings. From these writings, and the surrounding circumstances attending their execution, as disclosed by the evidence, the parties, in my judgment, most clearly intended to accomplish an absolute sale of an undivided half of seven hundred and fifty sheep, by the plaintiff to the defendant, in consideration of six hundred and fifty-six dollars and twenty-five cents then paid by defendant to plaintiff, as follows: Four hundred and twenty-six dollars by the surrender of his note for that sum held by defendant, and the balance, two hundred and thirty dollars and twenty-five cents, by defendant's note, then executed and delivered to plaintiff; and further, to arrange the terms for a purchase of three hundred and seventy-five sheep of a specified quality, by plaintiff from defendant, to be consummated on the 1st day of June, 1867. The circumstances attending the making and execution of these two instruments of writing on the 30th of May, 1866, most conclusively demonstrate that the terms of each instrument fully and plainly express the intention of the parties thereto. These circumstances and facts are substantially as follows: Prior to the 30th day of May, 1866, plaintiff and defendant had been joint owners of seven hundred and fifty sheep, which were then on defendant's ranch. Plaintiff, on that day, was indebted to defendant in the sum of four hundred and twenty-six dollars, for which defendant held his note, bearing interest at the rate of two per cent per month; and for the purpose of paying and taking up that note he made an absolute and unconditional sale of his interest in the herd of sheep for the sum of six hundred and fifty-six dollars and twenty-five cents, which he received by taking up his note to defendant for four hundred and twenty-six dollars thereof,

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and taking the promissory note of defendant for the residue. This part of the transaction between the parties is partially evidenced by a bill of ~~sale~~ executed by plaintiff, in the following language:

"For and in consideration of the sum of six hundred and fifty-six dollars and twenty-five cents, I have this day sold to R. Angle all the right, title, and interest that I own and have in and to the certain flock of sheep now in the possession of R. Angle, and which said flock of sheep the said R. Angle and myself have heretofore jointly and equally owned. This sale is made upon the basis of one dollar and seventy-five cents per head. The number sold estimated at three hundred and seventy-five sheep. No allowance made to either party for any actual variation of the estimated number. The receipt of the purchase money, to wit: six hundred and fifty-six dollars and twenty-five cents, is hereby acknowledged.

"Signed,

JOHN W. MORRIS."

Upon the execution of this bill of sale by plaintiff, the defendant delivered to him the promissory note of four hundred and twenty-six dollars, heretofore referred to, and made and delivered to plaintiff his (defendant's) promissory note for the residue of the purchase price of said sheep; and thereupon, on the same 30th day of May, 1866, plaintiff and defendant made and executed in writing and in duplicate an agreement in language as follows:

"This article of agreement, entered into this 30th day of May, A. D. 1866, between R. Angle, party of the first part, and John W. Morris, party of the second part, witnesseth: That the said party of the first part, for and in consideration of the promises and undertakings of the said party of the second part hereinafter set forth, doth agree with the said party of the second part to deliver to the said party of the

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second part, on the 1st day of June, A. D. 1867, at Walker Valley, in the County of Mendocino, three hundred and seventy-five sheep, of the same quality as those now owned by the said party of the first part. And the said party of the second part doth agree with the said party of the first part, that he, the said party of the second part, will, at the time and place aforementioned, to wit: on the 1st day of June, A. D. 1867, and at Walker Valley, in Mendocino County, pay to the said party of the first part the sum of six hundred and fifty-six dollars and twenty-five cents, in gold coin of the United States of America.

“In witness whereof we have hereunto set our hands, this 30th day of May, 1866. [Signed.] R. ANGLE, JOHN W. MORRIS.”

Such are the writings and attendant circumstances evidencing the character of the transactions between plaintiff and defendant, on the 30th May, 1866, in reference to plaintiff's undivided half interest in the flock of seven hundred and fifty sheep. The fact that the defendant surrendered to plaintiff, on the receipt of the above bill of sale, the only evidence of indebtedness he then held against plaintiff, and at the same time executed and delivered to plaintiff his own promissory note for the residue of the purchase price of the sheep as named in the bill of sale, and did not retain or hold any evidence of an indebtedness on the part of plaintiff to him, most strongly and conclusively tends to show the intention of the parties was to absolutely and unconditionally transfer the title and property of plaintiff in the sheep to defendant. The subsequent agreement, in writing, above set forth, given in evidence on the trial by plaintiff, did not in the slightest degree tend to indicate any other or different intention in the transaction evidenced by the bill of sale than such as is indicated by its terms; and subsequent expressions of defendant, given in evidence on

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the trial by plaintiff, even if perfectly understood and related by the witness, were entirely inadequate to change or modify the terms or effect of a deliberate agreement previously made, or to convert what, at the time, was intended to be an absolute sale, into a mortgage. Had all the seven hundred and fifty sheep died upon the hands of defendant before the 1st day of June, 1867, the entire loss manifestly would have fallen on him; and had the market value of sheep, of like quality, advanced to two dollars and fifty cents per head by the 1st day of June, 1867, the plaintiff could rightfully have insisted upon the delivery to him, by defendant, of the three hundred and seventy-five sheep on tender of six hundred and fifty-six dollars and twenty-five cents, or damages for failure so to do. The total loss of all his sheep, by defendant, would not have discharged him from the obligation under his agreement of May 30th, 1866; nor would the plaintiff have been relieved from his obligation to pay defendant six hundred and fifty-six dollars and twenty-five cents, in gold coin, on the 1st of June, 1867, for three hundred and seventy-five sheep, of the specified quality, had the market value of sheep of like quality at that time fallen to one dollar per head.

With these views, it becomes unnecessary to notice other questions discussed by counsel.

The judgment and order denying defendant's motion for a new trial should be reversed, and cause remanded for further proceedings. So ordered.

Points decided.

[No. 2,461.]

JOHN REEDY AND JOHN BIXBY v. J. WESLEY SMITH, WALTER L. SMITH, HOSEA E. DUDLEY AND D. CONRAD.

COMPLAINT ON CONTRACT—DEMURRER FOR UNITING SEVERAL CAUSES OF ACTION.—Where a complaint set forth a contract by defendants to build a dam, and their failure to comply therewith; alleged damages to plaintiffs, on account of loss of profits which they would have made by their ditch, if the dam had been built, and demanded a judgment for damages; *held*, that a demurrer on the ground that it united two causes of action would not lie.

CONTRACT HELD BINDING THOUGH SIGNED BY ONLY ONE PARTY.—Where a contract by which one party was to build a dam and the other to pay therefor in certain installments, was signed only by the first party; but it appeared the other party paid his installments as therein provided, and both acted upon it as binding; *held*, that a finding of a District Court to the effect that it was executed and binding, should not be disturbed.

CONSTRUCTION OF CONTRACTS.—The object of construction of a contract is to ascertain the intention of the parties in entering into it.

MEANING OF STIPULATION TO DO A THING "AS SOON AS PRACTICABLE."—A contract to do a thing "as soon as practicable," implies that circumstances may occur which will delay the completion of it. The word "practicable" cannot be understood with regard to the means at the command of the contractors, for they may be entirely inadequate; but in ascertaining what was intended, the nature of the contract, the difficulties to be overcome, and the importance to the other party of an early completion of it, are to be considered.

"PRACTICABLE" DOES NOT MEAN "WITHIN THE RANGE OF HUMAN MEANS."—Where, in an action on a contract to build a dam "in the year 1867, or as soon thereafter as practicable," the Court instructed the jury: "If you believe it was practicable, or if it was within the range of human means to have constructed it, then defendants are liable for not doing so; the word practicable means that which can be accomplished by human means;" *held*, error.

DAMAGES UNDER CONTRACT AS DISTINGUISHED FROM DAMAGES FOR BREACH OF CONTRACT.—Where a contract for building a dam, and guaranteeing it to stand for five years after completion, and the payment of installments therefor as the work progressed, provided that if within the five years it washed away it was to be rebuilt, or the installments, or a proportional part thereof, according to the time the dam stood, should be refunded; *held*, that the rule of damages laid down by the contract had reference solely to the guarantee, and that damages for failure to build at all must be ascertained by the ordinary rules.

Statement of Facts.

APPEAL from the District Court of the Thirteenth Judicial District, County of Mariposa.

This was an action upon an alleged contract between the parties, entered into June 21st, 1867, by which the defendants agreed to build a dam across the Tuolumne River, about a mile and a half above the Town of La Grange, sufficiently high to cause the water of the river to flow in ordinary requirements in the ditch owned by plaintiffs—said dam to be completed in the year 1867, or as soon thereafter as practicable, and guaranteed to stand five years after completion; in consideration whereof plaintiffs agreed to pay one thousand five hundred dollars on August 1st, 1867, two thousand five hundred dollars when the dam should be half done, two thousand five hundred dollars when it should be completed. six thousand five hundred dollars with interest in twelve months after completion, and providing for repairs or rebuilding or repayment of the installments paid, or a proportional part thereof, according to the time the dam might have stood, if it should be washed away within the five years. It appears that plaintiffs paid the first two installments, amounting to four thousand dollars, and defendants proceeded to build the dam; but in November, 1867, and before the completion of the labor, all their work was washed away, and nothing further was done. The complaint averred that defendants could readily and easily have built the dam in 1867, or in 1868, but had neglected to carry on the work with proper energy; that plaintiffs were thereby deprived of realizing profits to the amount of ten thousand dollars from their ditch, and it prayed for damages in that amount, and for costs.

Defendants demurred to the complaint on the ground, among others, that several causes of action had been improperly joined; that is to say, a cause of action on the express contract, a cause for general damages for breach of

Argument for Appellants.

contract, and a cause for damages for being deprived of the value of the ditch. This demurrer was overruled, and defendants then answered, denying the allegations of the complaint and the execution of the contract, and setting up, among other things, that there was a verbal contract between the parties to the same effect, and that there were various modifications of it afterwards.

It appeared in proof on the trial that the written contract set out in the complaint had been signed by the defendants only, and they objected that it was therefore not binding upon them for want of mutuality. The objections were overruled and the contract admitted in evidence, against their objections. There was also evidence tending to show a verbal contract to the same effect.

Among the instructions given by the Court to the jury before whom the cause was tried, besides the one quoted in the opinion, was one to the effect that the plaintiffs must recover, if at all, not only the amount of money advanced by them, but all damages in addition, which they had sustained by reason of the defendants' non-compliance with their contract.

The verdict and judgment having been in favor of plaintiffs for five thousand five hundred dollars, defendants appealed.

C. Dorsey, P. D. Wigginton, and L. F. Jones, for Appellants.

The complaint contains several causes of action improperly united. It claims the money paid under the contract by plaintiffs to defendants, which was all the damages that plaintiffs, under any circumstances, could claim in case defendants violated the contract, and also claims damages on account of the water ditch.

The contract was an executory contract, containing mutual and dependent promises and conditions, and it does not ap-

Argument for Appellants.

pear ever to have been signed by plaintiff. Such a contract does not become the contract of any of the parties, until they all sign it. (*Tewksbury v. O'Connell*, 21 Cal. 60; *Lockhart v. Ogden*, 30 Cal. 554; *Livingston v. Rodgers*, 1 Caines, 584; *Emery v. Neighbor*, 2 Halstead C. L. 145; 2 Parsons on Con. 582; *Arnold v. Richmond Iron Works*, 1 Gray 434; *Orcutt v. Nelson*, Id. 536; *Whitestone v. Stodder*, 8 Mart., La. 95; *Weston v. Genesee Mutual Insurance Company*, 2 Kern. 258.) The fact that defendants went on and built the dam would give them a right of action against the plaintiffs for the value of the work done; but they could not sue plaintiffs on the written contract, if they never had signed it. The right of action would be on a parol contract; on the implied promise to pay for the work ordered to be done. Because defendants performed the work believing that plaintiffs had signed the contract, could not make the contract under which the work was done a written contract, so far as plaintiffs were concerned. The plaintiffs could only be bound on a parol contract, and the written contract set out in the complaint could avail none of the parties, except so far as it might be evidence tending to show what the terms of the parol contract were.

The instruction as to the meaning of the word practicable was clearly not law. Any act which may be done by human means may be perfectly practicable and possible to one person, and impracticable and impossible to another person. But the meaning which the parties intended to attach to the word was that the dam should be built in the year 1867, or within a reasonable time thereafter, due regard being had to the defendants' means, their engagements, and the nature of the work to be performed. (See 2 Parsons on Con. 497; *Atwood v. Emery*, 1 C. B. 110; Paley's Moral Philosophy, 104; *Potter v. Ontario and L. M. Ins. Co.* 5 Hitt. 147; Webster's Dictionary, words Possible and Impracticable.)

There was also error in the instruction as to damages.

Argument for Appellants.

The contract contains within itself the measure of damages in the event that it was not complied with by the defendants. If the dam was washed away within five years the defendants were to rebuild it, or repay to the plaintiffs the amounts advanced by them; and this provision of the contract limits the measure of damages, in case it is violated by defendants, to the amount of money paid by plaintiffs.

J. B. Campbell and Alexander Deering, for Respondents.

The complaint is not demurrable. It sets out a contract, and the acts of plaintiffs under it. It is not the "depreciation of the value of the ditch," but the use of the water running through the ditch, that plaintiffs urge as a ground of damages; and it was the very purpose of the dam "to cause the water to flow, in ordinary requirements, in the ditch." If the complaint was deemed indefinite in its statement of damage, an objection should have been made that could have reached it, in a proper way, in the lower Court. It cannot be raised by demurrer. (1 Van Santvoord's Eq. Practice, 190.) But the respondents had a right to set forth all the facts of the case, and if, in so doing, they established a right to recover on two different grounds, it is no cause for demurrer. (*Mills v. Barney*, 22 Cal. 240.)

The authorities cited by appellants, as to contracts void for want of mutuality, go to the extent only that they can be avoided if both parties have not acted. But it has been repeatedly held that when both have acted under the contract, though executed by one only, they can be sued, and want of mutuality is no defense. (*Chitty on Contracts*, 17; *Worrall v. Munn*, 1 Selden, 229.)

As to the instructions of the Court to the jury, there is but a partial statement of evidence; and we submit that such being the fact, this Court will not reverse the case

Points decided.

their contract. What would be reasonable, as I have said, would depend, in a great measure, upon the nature of the difficulties to be overcome and the importance of an early completion to the plaintiffs, in reference to which the defendants must have contracted. I think, therefore, the instruction was erroneous.

The rule of damages laid down in the contract has reference solely to the guarantee that the dam shall stand for five years from the date of its completion. The damages for failure to construct the dam according to contract, if any, must be ascertained by the ordinary rules upon the subject.

Judgment reversed, and cause remanded for a new trial.

Mr. Justice CROCKETT did not participate in the foregoing decision.

[No. 2,390.]

JOHN KEYS v. THE BOARD OF SUPERVISORS OF MARIN COUNTY.

AUTHORITY OF DISTRICT COURTS AS TO CERTIORARI.—The District Courts and the Judges of those Courts have authority to issue the writ of certiorari. The amendments to the Constitution do not affect the question.

PROCEEDINGS OF SUPERVISORS SUBJECT OF REVIEW.—The proceedings of a Board of Supervisors, in laying out a highway, involved the exercise of judicial functions in the sense of rendering such proceedings the subject of review through the instrumentality of a writ of certiorari.

JUDICIAL DISCRETION AS TO CERTIORARI.—The granting or refusal of a writ of certiorari for the purpose of reviewing the action of a Board of Supervisors, is within the sound discretion of the Court, having due regard to public convenience.

CERTIORARI BARRED BY THE LAPSE OF A YEAR.—Unless circumstances of an extraordinary character be shown to have intervened, the remedy through a writ of certiorari should be held to be barred by the lapse of one year.

EXPENDITURES OF PUBLIC MONEY TO BE CONSIDERED.—The Board of Supervisors of Marin County made an order opening a highway, and, under

Argument for Appellant.

the belief that the proceedings were final, considerable sums of the public moneys were expended in improving the road. Held, that parties injured by the road, who failed to complain for more than a year after the order was made, should be remitted to their ordinary remedies.

APPEAL from the District Court of the Seventh Judicial District, Marin County.

The facts are stated in the opinion of the Court.

E. B. Mahon, for Appellant.

Under the constitution of the State, as amended, the District Court, and much less the Judge at chambers and on ex parte application, has no power or jurisdiction to issue such writ. By Article VI, section four, of that instrument, original jurisdiction to issue this writ and to hear and determine proceedings under it, was given to the Supreme Court. (*Tyler v. Houghton*, 25 Cal. 28; *Miller v. Sup. of Sac. County*, 25 Cal. 95.)

The remedies by action are adequate. If the proceedings are void, trespass will lie (2 Hill, 28, 29), and there is a remedy provided by the statute under which the road was laid out. (Statutes of 1866, p. 715, sec. 18.)

The application for the writ is too late—it is nearly two years after the order was made, and after large expenditures have been incurred. If the defendant was dissatisfied with the proceedings of the Supervisors, and not content with the remedy given him by the statute, he should at least commence his proceedings to set aside their action within a reasonable time. (17 Abb. P. R. 324; *People v. Mayor of N. Y.*, 2 Hill, 13; *Elmendorf v. Mayor of New York*, 25 Wend. 673; *People ex rel. Finch v. Overseer of Poor of Berne*, 44 Barb. 467; *People v. Supervisors of Queens*, 1 Hill, 198.)

The writ of certiorari does not lie to review the action of the Board of Supervisors in laying out a highway. It is the exercise of the right of eminent domain, executive in its character and not subject to review. The office of the writ

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of certiorari is to bring in review the proceedings of Boards, etc., when acting judicially. An examination of the decisions of this Court will show that it has always been confined to that office. (*In re George M. Hanson*, 2 Cal. 262; *Wilson v. Supervisors of Sacramento*, 3 Cal. 386; *Gray & Johnson v. Schupp*, 4 Cal. 185; *People ex rel. Church v. Hesten*, 6 Cal. 679; *Chard v. Harrison*, 7 Cal. 113; *Coulter v. Stork*, 7 Cal. 244; *People ex rel. San Francisco Fire Department*, 14 Cal. 479; *Milliken v. Huber*, 21 Cal. 166; *Walter v. Wilson*, 22 Cal. 465; *Murray v. Supervisors of Mariposa County*, 23 Cal. 492; *Fall v. Paine*, 23 Cal. 302; *Miller v. Supervisors of Sacramento County*, 25 Cal. 93; *People v. Shepard*, 28 Cal. 115.)

Shafter, Southard & Seawell, for Respondent.

By the Court, WALLACE, J.:

This appeal is taken from the judgment of the District Court of the County of Marin, rendered upon the return to a writ of certiorari, issued by the Judge of that Court upon the petition of Keys, and vacating certain proceedings of the Board, by which it had located and established a public road, commencing near the Town of Tomales. The order of the Board brought under review was entered upon its records on the 5th day of November, 1868, and the application for the writ was made on the 7th day of October, 1870, nearly two years after the entry of the order.

We are of opinion that the District Courts, and the Judges of those Courts, have authority to issue the writ of certiorari (Pr. Act, Sec. 456, and Act of April 20th, 1863, concerning Courts of justice, etc., Sec. 25), and that the late amendments to the Constitution of the State do not affect the question.

We think, too, that the proceedings of the Board, in establishing the road, involved the exercise of judicial functions in the sense of rendering those proceedings the

subject of review, through the instrumentality of the writ of certiorari. (Pr. Act, *supra*.) The objections urged by the appellant in each of these respects must, therefore, be overruled.

But the granting or refusal of a writ of certiorari, for the purpose of reviewing such proceedings as those here in question, is to be determined by the exercise of a sound judicial discretion. Considerations of the public convenience are not to be overlooked in its determination. In *The People ex rel. Church v. The Supervisors of Allegany*, 15 Wend. 206, the Court said: "In the exercise of the superintending power of this Court over inferior jurisdictions, the writ of error is a writ of right, and issues on conforming to such regulations as have been prescribed by law. But the writ of certiorari, especially in those cases where it is used for the purpose of reviewing the acts and decisions of the special jurisdictions which are created by statute, and do not proceed according to the course of the common law, such as Boards of Supervisors, Commissioners of Highways, and the like, does not issue *ex debito justitiæ*, but only on application to the Court and special cause shown. The reason is, that these bodies exercise powers in which the people at large are concerned, and great public detriment or inconvenience might result from interfering with their proceedings."

So, too, in *The People ex rel. Agnew and others v. The Mayor, etc., of New York*, 2 Hill, 12, which was a certiorari to review the proceedings of the corporation of the City of New York in constructing a public improvement, BRONSON, J., in delivering the opinion of the Court, said: "The allowance of the writ rests in the sound discretion of the Court, and it has often been denied where the power to issue it was unquestionable, and where there was apparent error in the proceedings to be reviewed." In the same case he further observed that it was "important to notice that the

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ordinance for making the improvement was passed, the work done, and the assessment made and confirmed more than three years before the certiorari was sued out. The time for bringing a writ of error from a final judgment is limited by law to two years; and I think a case can rarely happen when it would be proper to allow a certiorari after the lapse of a longer period. This is a sufficient ground for quashing the writ, aside from other considerations tending to the same result."

It has been observed already that in the case at bar nearly two years were permitted to elapse after the entry of the order complained of before application was made for the writ. An appeal to this Court from a final judgment of a District Court, is barred by the lapse of one year; and we are of opinion that, unless circumstances of an extraordinary character be shown to have intervened, the remedy through a writ of certiorari should be held to be barred by the lapse of a like period of time.

It appears by the record before us, too, that after the entry of the order complained of by which this public road was established, or supposed to have been, considerable sums of the public moneys have been expended in the erection of bridges and otherwise rendering the road suitable for the use for which it was intended, doubtless in the belief that the proceedings were free from question as to their legal sufficiency. Under such circumstances, and after such great delay, it is better that parties injured by the proceedings of the Board, or supposing themselves to be so, should be remitted to the ordinary remedies afforded them by the law, rather than allowed to seek redress through the instrumentality of this writ.

The judgment of the Court below must, therefore, be reversed, and the cause remanded, with directions to dismiss the writ; and it is so ordered.

Argument for Appellant.

Neither Mr. Justice SPRAGUE nor Mr. Justice TEMPLE participated in this decision.

[No. 2,442.]

**A. C. BROWN AND FRANCES BROWN, HIS WIFE, v.
THE CENTRAL LAND COMPANY, SHERMAN
DAY, O. T. H. PALMER, CYRUS H. BRADLEY,
FREDERICK B. HASWELL, EDWARD McLEAN,
AND JACOB HARDY.**

For CROCKETT, J., SPRAGUE, J., concurring:

POWER TO SELL ON CREDIT, WHEN TIME OF CREDIT NOT SPECIFIED.—Where Brown and wife authorized Taylor to sell their land on credit, without specifying the time of such credit, and Taylor sold on a credit of seven years; *held*, that Taylor could only sell upon a reasonable credit, and that the question of the reasonableness of the credit was to be determined only after testimony heard.

APPEAL from the District Court of the Third Judicial District, Alameda County.

This was an action to quiet title to certain lands in Oakland Township, Alameda County. The defendants Day, Palmer, Bradley, Haswell, McLean, and Hardy, disclaimed. To the answer of The Central Land Company, setting up the contract between Brown and wife and Taylor, the plaintiffs demurred. The demurrer having been sustained and defendant declining to amend, there was a judgment for plaintiffs. The defendant appealed.

Charles A. Tuttle, for Appellant.

If the Central Land Company has an equitable interest in the land by virtue of the facts set out in the answer, the judgment is erroneous. The contract contemplates that

Argument for Respondents.

Taylor might make sales, giving credit for a portion of the purchase money beyond September 12th, 1869, without limiting the time of the credit. As it is expressly provided that the sums on credit should bear interest after that date, the intention was that the length of credit might be whatever Taylor saw fit to give.

Again, the contract gave Taylor and his assigns an equitable interest in the land. It was an executory contract. There was no forfeiture provided for on it, except as to all lots not sold, or contracted to be sold, within two years from its date. No money was paid down, but there were mutual promises. "A promise is a good consideration for a promise, and it is so previous to performance and without performance." (1 Parsons on Con. 373, 400.)

The plaintiffs' relation to the land after the contract was made, was an equitable lien upon the purchase money, holding the legal title as security for the enforcement of the lien. (*Ellis v. Jeans*, 7 Cal. 409.)

The plaintiffs come into a Court of equity seeking to set aside their own contract, but making no equitable averments in their complaint to authorize it to be set aside. They might have made averments (if any such existed), which, if proved, would have entitled them to equitable relief as against their own contract. But under the form of pleading which they have adopted, they must rely on their title, and let us rest on our contracts as they stand. They knew of the existence of our contracts, and if any reasons existed why they were entitled to have them set aside or declared void or forfeited, they should have averred them.

Montgomery & Evans, for Respondents.

The contract cannot be treated as a sale vesting any present interest in Taylor, for the reason that there is no mutuality, inasmuch as Taylor does not agree nor in any manner

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bind himself to take the property. (1 Parsons on Con. 373; 1 Bouvier's Inst. 245.)

Taylor was not clothed with unlimited power to extend the time of credit. Whatever discretionary powers were intrusted to him for the extension of credit beyond the two years, were so intrusted, not in his capacity of purchaser, but in his character of agent of Brown and wife, to be exercised for their benefit when selling the premises for them to a third person. They might with safety have been willing to allow him, as their agent, to fix the time of payment, when he was interested with them in fixing upon a reasonable time; but it does not follow, because they were willing to trust to his discretion while his interests were identical with their own, that they were equally willing to trust that discretion when his interests were in direct antagonism to theirs.

Considering Taylor in the light of an agent, the defendant acquired no interest in the property, because the one half of the purchase money was not paid within the two years, and because there was no power of substitution in the instrument under which Taylor derived his authority. He could neither sell his agency to Haswell, nor delegate it to Bradley. (2 Kent, 633; Smith's Mer. Law, 147; 1 Parsons on Con. 71; Story on Agency, Secs. 18, 29; *Sayre v. Michael*, 7 Cal. 535.)

Again, at the time that Haswell and Bradley, the former as assignee, and the latter as sub-agent of Taylor, undertook to sell Brown's land to The Central Land Company, they were simply selling to themselves, being stockholders in the company.

By CROCKETT, J., SPRAGUE, J., concurring:

The substance and legal effect of the contract between Taylor and plaintiffs may be summed up as follows: That

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the plaintiffs agreed that at any time within the two years next ensuing, Taylor might purchase for himself, or sell to others, the whole or any portion of the land now in controversy, at a price not less than one thousand dollars in gold coin per acre; but if sold for a larger price, the excess over that sum should go to Taylor; and on receiving the said sum of one thousand dollars per acre in ready money they would surrender the possession and execute a conveyance to the purchaser; but Taylor was not limited to sales for ready money, and might sell on credit, the term of which is not specified in the contract; and the conditions on which credit sales could be made, were: First — That ten per cent of the purchase money should be paid to the plaintiffs in ready money at the time of sale; Second — That the notes or bonds of the purchaser for the remainder of the purchase money, bearing interest after the two years limited in the contract between Taylor and the plaintiffs, at the rate of one and a quarter per cent per month, should be assigned and delivered to the plaintiffs for their security; but they were not to be required to surrender the possession or to convey any title until the whole purchase money and interest were paid, except that, in case one half of the purchase money was paid within the two years next succeeding the date of the contract between Taylor and the plaintiffs, they would, in that event, surrender the possession and convey the title to the purchaser, taking from him a mortgage on the property sold, to secure the remainder of the purchase money with interest. This is the substance of the contract, as I interpret it, or of so much of it as it is necessary to recite.

It will be perceived that the duration of the credit, if sales of that character should be made by Taylor, is not expressly specified or limited in the contract. Nevertheless, the law will presume in such cases that it was the intention of the parties that the time of credit should be reasonable, and such as was usual and customary on sales

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of real estate in that vicinity. The law will not impute to the plaintiffs the intention to enter into an absurd contract, whereby they delegate to another the authority to sell a valuable estate on credits to be absolutely fixed by the uncontrolled discretion of the agent, unless that intention is clearly expressed in the contract. When the plaintiffs entered into the contract with Taylor, it evidently never occurred to them that they were authorizing him to sell this valuable property on a credit of fifty or one hundred years, during all which time no interest was to be paid on the purchase money until the expiration of the credit. I think it is obvious that none of the parties could have understood the contract as conferring on Taylor an authority so absurd as this, under which he might, practically, have sequestered the property and withdrawn it from commerce for an unlimited period. But his discretion in this respect was either absolute and unlimited, or it was subject to the condition that the credit must be reasonable and such as was usual and customary on sales of real estate in that vicinity. The latter is clearly the correct construction of this branch of the contract. The answer avers that the sale to The Central Land Company was made within the two years, at a price exceeding one thousand dollars in gold coin per acre; that ten per cent of the purchase money was paid in cash, and promissory notes given for the remainder, payable seven years after date, with interest at one and a quarter per cent per month; and that the notes, properly indorsed, together with ten per cent of the purchase money, were tendered to the plaintiffs within the two years. The transaction appears to have been in strict accordance with the authority conferred upon Taylor, unless the term of credit was unreasonably long, and in excess of the time usually allowed on credit sales of real estate in that vicinity. Whether a credit of seven years was unusual, and contrary to the general custom in that vicinity, is a question of fact to be decided on the testimony; and

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whether it was unreasonable, under all the circumstances, is a mixed question of law and fact, to be determined after the testimony is heard.

There is nothing in the point that the contract was not mutual. Taylor covenanted to cause the property to be subdivided, and a map of it to be made and recorded, at his own expense, and that he would use his best efforts to effect sales within the two years. This was a sufficient consideration on his part to support the contract. Nor did the contract establish between Taylor and the plaintiffs a relation of personal trust and confidence which precluded him from executing the contract of sale to The Central Land Company by an attorney in fact. Taylor's powers were strictly defined by the contract. He had no discretion to exercise in respect to the plaintiff's rights or interests, except in regard to the term of credit; and, as to that, the law restricts it to a reasonable period, with which the plaintiffs must be content, such being the legal effect of their contract. There was no relation of personal trust or confidence between them. The sale by Taylor to Haswell of one half his interest under the contract, cuts no figure in the case. They both united in the contract of sale to The Central Land Company, and it is immaterial whether Haswell had any interest in the contract or not.

As the facts are presented by this record, I think there is but one question in the case requiring a solution, to wit: Whether the credit allowed to The Central Land Company was in accordance with the usage and custom in that vicinity in credit sales of real estate, and was reasonable under all the circumstances. This question can only be decided after the testimony is heard.

Judgment reversed and cause remanded, with an order to the Court below to overrule the demurrer to the answer.

Opinion of Wallace, J., dissenting.

RHODES, C. J., concurring:

I concur in the judgment.

Mr. Justice TEMPLE did not participate in the decision.

WALLACE, J., dissenting:

This action was instituted by the plaintiffs (in possession of certain lands in Oakland Township, Alameda County), who allege that the defendant, a corporation, incorporated under the laws of this State, claims title to the premises adversely to the plaintiffs, by which claim, they aver, their title is clouded, etc.; and they pray that the claim made by the corporation be adjudged invalid, etc.

The defendant filed its answer, setting up a claim to the premises and averring that its interest therein was derived as follows: That on the 12th day of September, 1867, Brown and wife, as parties of the first part, and one George B. Taylor, as party of the second part, mutually entered into a contract as follows:

"This agreement made and entered into this 12th day of September, A. D. 1868, by and between A. C. Brown and Frances Brown, his wife, parties of the first part, and George B. Taylor, party of the second part, all of the County of Alameda and State of California, witnesseth: The said parties of the first part, in consideration of the sum of fifty thousand dollars, in United States gold coin, to be paid as hereinafter set forth, do hereby covenant and agree to sell and convey to the said party of the second part, and to his heirs, representatives and assigns, upon the terms and conditions hereinafter expressed, certain premises lying and being situate in the Township of Oakland, County of Alameda, and State of California, bounded and described as follows, to wit:" (here follows the description of the premises). "The said party of the second part hereby covenants and agrees,

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at his own proper cost and expense, to procure a survey of said premises and a division thereof, for purposes of sale, into not less than two hundred distinct lots or parcels, and to procure a map to be made of such survey and divisions, on which said lots and parcels shall be suitably numbered and designated, and to file such map in the office of the Recorder of Alameda County.

“And the said party of the second part does hereby further covenant and agree, for the space of two years from the date hereof, to make diligent effort to effect a sale of said lots and parcels, and of all the said premises, at prices which shall not be less than one thousand dollars, in United States gold coin, for each acre sold, including the streets and any other parts given up to public use. And in case that sales shall be made of said lots or parcels, or any part of said premises, and time extending beyond two years from this date shall be given on any portion of the purchase money, the minimum price at which the same shall be sold shall be at the said rate of one thousand dollars per acre, in gold coin, together with the interest thereon from and after the expiration of two years from the date hereof, at one and one quarter per cent per month, in like gold coin.

“And the said party of the second part does hereby further covenant and agree, that the money proceeds of all sales by him made shall immediately, upon the receipt thereof, be paid over to the said A. C. Brown, one of the said parties of the first part; provided, however, that the money proceeds in excess of the minimum price above fixed for each lot, parcel, or part of said premises, need not be thus paid over, but may be retained by the party of the second part to his own use; and that all bonds and notes taken by the said party of the second part, in security for those portions of the purchase price on which time may be given, or for the security of any contracts of sale entered into, shall be

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assigned and delivered to the said A. C. Brown for the security of the said parties of the first part.

"And the said party of the second part does hereby further covenant and agree, that no contract for the sale of any portion of said premises shall be entered into unless at least ten per cent of the purchase price agreed upon, in United States gold coin, shall be paid at the time of such contract, nor unless bonds or notes shall be taken from the purchaser for those portions of the purchase price on which time may be given, payable in United States gold coin; and that all bonds and notes in which the time of payment shall extend beyond two years from the date hereof, shall bear interest at not less than the rate of one and one quarter per cent per month, payable in gold coin.

"And the said parties of the first part do hereby covenant and agree with the said party of the second part, his heirs, representatives, and assigns, that if at any time within two years from the date hereof, the said sum of fifty thousand dollars, in United States gold coin, shall be paid to them, or to either of them, they will immediately upon the receipt thereof execute to the said party of the second part, his heirs, representatives, or assigns, a conveyance of the premises hereinbefore described.

"And the said parties of the first part do hereby further covenant and agree, that they will execute and deliver to purchasers from the said party of the second part conveyances of the premises purchased according to the terms of the several contracts of sale entered into, provided that such contracts shall be such as are herein authorized to be made, and the said party of the second part shall do and perform all the acts and things herein required by him to be done and performed; and provided further, that all acts of conveyance shall be at the expense of the said party of the second part, or of said purchasers.

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“ And the said parties of the first part do hereby further covenant and agree to execute to the party of the second part, his heirs, representatives, or assigns, or to purchasers from said party of the second part, his heirs, representatives, or assigns, upon the written request of the latter, conveyances of any lot, parcel, or portion of said premises; provided, that within said two years the minimum price of one thousand dollars per acre, in United States gold coin, shall have been paid to the said parties of the first part, or either of them, on the lots or parcels to be conveyed.

“ And the said parties of the first part do further covenant and agree that whenever, within two years from the date hereof, in the case of any lot or parcel sold, the purchaser shall have paid one half of the purchase price thereof, they will convey to such purchaser the lot or parcel by him purchased, upon receiving from him bonds or notes for the balance of the purchase price then remaining unpaid, according to the terms of the contract of sale made with him, and a mortgage on the premises conveyed to secure the same; provided, that the contract of sale shall be such as is herein authorized; and that they will receive such bonds or notes and mortgages to the amount thereof as payments *pro tanto* upon the said sum of fifty thousand dollars. It is further understood and agreed, that in the case of all sales made or contracted, the said party of the second part may retain to his own use five per cent of the price agreed upon, to be deducted out of the first payment of purchase money; provided, however, that at least ten per cent of the purchase price shall always be collected at the time the contract of sale is made, and shall be paid over to the said A. C. Brown, as hereinbefore recited; and provided further, that the sum so retained shall not be included in any estimate of said fifty thousand dollars, or of said minimum of one thousand dollars, on the payment of which deeds become due from said parties of the first part.

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"All acts of conveyance required by the terms of this agreement shall be at the expense of said party of the second part, or his purchasera.

"At the expiration of two years from the date hereof, this agreement shall become void as to all lots, parcels, tracts, and parts of said premises not then sold, or contracted to be sold; but all contracts of sale then remaining executory shall be carried into execution, provided they shall conform to the requirements herein expressed; and from the proceeds thereof one thousand dollars per acre, with interest thereon from and after two years from this date at the rate of one and one quarter per cent per month, all in United States gold coin, shall be paid to the said parties of the first part, including what may have been theretofore paid on such contracts, and the remainder shall become the property of said party of the second part.

"And it is further understood and agreed, that until such times as deeds shall be executed in pursuance of this agreement, the said parties of the first part shall remain in possession; but on executing a deed of any part of said premises they shall deliver up the possession of such part."

The defendant further avers that in May, 1868, Taylor sold and assigned to one F. B. Haswell an undivided half of his interest in said contract, and in the property and rights held by him thereunder; and that in August, 1869, Taylor appointed one Cyrus Bradley to be his attorney in fact, with authority to enter into contracts on his behalf, etc.

It is then alleged in the answer that in September, 1869, Haswell and Taylor (the latter acting by his attorney in fact, Bradley) made sale of the premises, or the greater portion of them, to the defendant, for fifty-one thousand dollars, in gold coin, five thousand one hundred dollars of which was paid in hand at the time, and the balance to be paid on or before *seven years thereafter*, with interest, etc.

Opinion of Wallace, J., dissenting.

At the time this sale was made, the defendants Day, Palmer, Haswell, McLean, Hardy, and the defendant Cyrus H. Bradley (the said attorney in fact of Taylor), were stockholders in the Central Land Company.

It is important to ascertain *in limine*, whether or not, under the contract in question, Taylor was intrusted by the plaintiffs with the exercise of a discretion in making sales upon credit, and in the proper exercise of which discretion by him they had an interest. There is no doubt that the contract as made permitted Taylor to become the cash purchaser of the property for himself. In case, however, that he should become such purchaser, the plaintiffs would, of course, receive in hand the stipulated price of one thousand dollars per acre for the premises. But it was also stipulated that sales might be made by Taylor involving the cash payment of no more than ten per cent of the purchase price. In that event it was distinctly provided that bonds and notes should be taken from the purchaser for the balance of the purchase price, on which time might be given, and that such bonds and notes, unless falling due within two years, should bear interest at a rate fixed in the contract; that Taylor, in the event of a sale upon credit, was invested with discretion as to the *extent of the credit to be given* upon the deferred payments, necessarily results from the fact that no limit to the credit he might give was prescribed by the terms of the contract itself, and it certainly requires neither illustration nor argument to show that this discretion was one, in the correct exercise of which, by Taylor, the plaintiffs, as the vendors of a valuable estate, situate in a highly improved and rapidly advancing region, would necessarily have a deep interest. Indeed, this is the view upon which I understand the opinion of Mr. Justice CROCKETT to proceed, for it is there laid down that the plaintiffs are entitled to be protected against the *unreasonable* exercise of this discretion by Taylor, and that, should it appear that the credit,

Opinion of Wallace, J., dissenting.

as given, exceeded that which was usual and customary upon sales of real estate in the vicinity of this property, the plaintiffs may be relieved.

I. It being ascertained that Taylor was intrusted by the plaintiffs with the exercise of a discretion as to the length of credit, to be given, it is clear that he could not delegate his discretion to Bradley — the trust was personal, for the Browns had not confided it to any stranger whom Taylor might select.

II. But supposing that he could be permitted to confide it to Bradley, the latter could not, in any event, exercise it in a transaction in which he was himself the beneficial purchaser. As the substitute of Taylor, it was obviously his duty, in conducting the sale, to obtain for the principals of the latter the most favorable terms in his power — *quam maximo potest*. But how was he to be expected to do this in a sale to himself — to the corporation in the stock of which he was personally interested as an owner? His position, upon either hand, involved him in that conflict between his duty to others and his apparent interest for himself, which the law will not countenance or permit. The salutary rule which would forbid Taylor purchasing for himself, upon credit fixed by himself, must also forbid Bradley, the nominee and substitute of Taylor, from doing so, and the interests of the plaintiffs should be as sedulously protected in the one case as in the other.

I, therefore, dissent from the views of my associates, and am of the opinion that the demurrer to the answer of the Central Land Company was correctly sustained by the Court below, and that its judgment should be affirmed here.

Statement of Facts.

[No. 2,621.]

D. ROBINSON v. C. ROBINSON.

DEFECTIVE FINDINGS — PARTNERSHIP.— D. R. sued C. R. for the recovery of money alleged to be due as part of the purchase price of land held in common; C. R. denied the debt, alleged a copartnership and an indebtedness by D. R. to him; he demanded judgment for a dissolution of the copartnership, an accounting, and a sale of the land. The Court decreed a sale of the land and a payment of a sum of money to D. R., the remainder of the proceeds to be equally divided between the parties. The record failed to show findings as to the existence of the copartnership, or as to the tenancy in common. On appeal from the judgment upon the judgment roll alone: *held*, that the judgment must be reversed and the cause remanded for a restatement of account between the parties, or for a new trial, as the Court below may direct.

APPEAL from the District Court of the Second Judicial District, Plumas County.

The complaint alleges that the plaintiff and defendant own a tract of land in common; that the plaintiff desires a partition, but the partition cannot be made without prejudice to the rights of the parties; that the defendant purchased his interest from the plaintiff, and that part of the purchase money remains unpaid; wherefore, he prays that the defendant's interest be sold to pay the debt.

The answer denies the tenancy in common, or that the defendant purchased from the plaintiff, or that he owes him anything; and alleges a partnership in the purchase of the land, with an agreement to cultivate it and share the profits; that the defendant paid his portion of the purchase money; that the deed was given to the plaintiff alone subject to the agreement; that since the purchase the defendant has expended large sums of money for labor, materials, improvements, and cultivation, and that the plaintiff has received the profits and failed to account for them; wherefore, the defendant demands judgment for a dissolution of the copartnership, an accounting, and a sale of the land.

Statement of Facts.

The case was tried by the Court without a jury, and the following findings were filed:

" That plaintiff bought the real estate set out in the complaint in the Spring of 1867, on the joint account of himself and the defendant, and that plaintiff took the deed to said premises in his own name by consent of defendant. That in 1867 it became necessary to the use of said premises that a good and substantial barn should be erected thereon, and that plaintiff did erect such a barn, at the cost of one thousand one hundred dollars; that the cost of the premises was the sum of one thousand six hundred and twenty dollars, as purchase money. That in 1867 the rents, issues, and profits of said land or farm were equal to the expenditures made by plaintiff in the gathering and sowing the crops thereon. That in the year 1868 plaintiff received from said farm rents, issues, and profits to the amount of four hundred dollars. That in the year 1869 defendant and the plaintiff, by his tenant, jointly occupied and farmed said land and divided the proceeds thereof. That the accounts of plaintiff for advances and expenditures in connection with the purchase and improvement and management of the same are as follows:

" Cash paid as purchase money.....	\$ 810 00
" Cash paid for necessary improvement (barn). ..	1,000 00
" Cost of corral about the barn.....	25 00
" Cash paid for taxes for 1867 and 1868.....	52 00
" Cost of making door and window frames.....	17 50
" Cost of harrow for farm.....	16 00
	<hr/>
	\$2,020 50
" Amount received by plaintiff from ranch, all sources, all items.....	\$400 00

" That the account of defendant for advances and expen-

Statement of Facts.

ditures in connection with the purchase, improvement, and management of said land or farm is as follows:

"Cash paid as purchase money.....	\$ 875 00
"Cash paid plaintiff for advances for improvements	100 00
"Cash paid plaintiff for advances.....	84 00
"Cash paid plaintiff for advances.....	10 00
"Cash paid plaintiff for advances.....	50 00
"Cash paid plaintiff for advances.....	45 00
"Order to plaintiff.....	39 00
"Order to plaintiff, advance.....	20 00
"Other advances, in hauling hay, baling, board hands, etc.	100 00
"The increased value of the farm by the erection of dwellings by the defendant.....	400 00
"One half the receipt from farm in 1868.....	200 00
	<hr/>
	\$1,923 00
 "Plaintiff's advances, etc., brought down.....	 \$2,020 00
"Balance due plaintiff.....	\$97 50
 "Defendant purchased for the farm, at various times, a wagon, value.....	 \$ 125 00
"One plow	10 00
"Shovel, hoe, etc.....	4 50

"These articles are still on the farm, and in use by the defendant, and can be retained by him, and require no sale or distribution.

"All other matters given in evidence do not, in the opinion of the Court, warrant the equitable consideration insisted upon by counsel. They are matters, under all the circumstances and situation of the parties, in a great measure compensated or set off in the various farm matters.

"The value set for the house is from all the evidence as

Opinion of the Court — Sprague, J.

to cost and present increased value of the land, and under the fact that defendant erected it more in view for his own convenience than with regard to the increased value of the land."

The Court rendered a decree for the sale of the land, and ordered that from the proceeds ninety-seven dollars and fifty cents be paid to the plaintiff, and that the remainder be divided equally between the parties. The defendant appealed.

H. L. Gear, for Appellant.

J. O. Goodwin, for Respondent.

By the Court, SPRAGUE, J.:

From the record in this case, I understand the Court in its findings of fact, to state an account of the respective parties, plaintiff and defendant, with a partnership or firm, composed of plaintiff and defendant as equal partners. If I am correct in this, and assuming the second, third, fourth, fifth, sixth, seventh, and eighth items, credited to defendant in his account as stated, to have been advances by him on partnership account, and not advances by plaintiff to him individually (as indicated by these items as entered in the account), then the account, as presented in the findings, discloses upon its face three manifest errors:

First — In not charging plaintiff, in his account with the partnership, with the four hundred dollars received by him of the proceeds of the ranch;

Second — In crediting defendant, in his account with the partnership, with two hundred dollars — the one half of plaintiff's receipts from the ranch; and

Third — In not crediting the defendant, in his said account,

Opinion of the Court — Sprague, J.

with one hundred and thirty-nine dollars and fifty cents expended by him for farming utensils used upon the ranch.

With these corrections the plaintiff's account with the partnership would show advances on partnership accounts in excess of his receipts of partnership funds in the sum of one thousand six hundred and twenty dollars and fifty cents, and the defendant's account with the partnership would show advances by him on partnership account to the amount of one thousand eight hundred and sixty-two dollars and fifty cents, and no receipts; and, thus corrected, would show a balance in favor of defendant of two hundred and forty-two dollars, which he should receive from the proceeds of the sale of all the partnership assets after payment of the costs and expenses of this proceeding; and the residue of the proceeds of such sale should be equally divided between the plaintiff and defendant.

But from the entries in defendant's account with the firm, as found in the record, it would appear that the second, third, fourth, fifth, sixth, seventh, and eighth items credited to him as advances on partnership account, were really advanced to plaintiff individually, and not for the use, or on account of the partnership. With these seven items, and the item of two hundred dollars (half of plaintiff's receipts from ranch), left out of defendant's account with the firm, such account would show the aggregate of defendant's advances on partnership accounts to be one thousand five hundred and fourteen dollars and fifty cents.

It is, however, by no means clear from the record presented, that the Court below, in its findings and decree, proceeded upon the basis of a partnership between plaintiff and defendant in the purchase and conduct of the ranch. There is no direct finding of the existence of such a partnership, nor is it found that the ranch was held and owned by the parties as tenants in common, and not as partners.

This appeal is taken simply from the judgment upon the

Statement of Facts.

judgment roll alone, and by reason of errors apparent upon the record, as presented, the judgment must be reversed and the cause remanded for a restatement of account between the parties, or a new trial, as the Court below may direct.

And it is so ordered.

RHODES, C. J., concurring specially:

I concur in the judgment.

Mr. Justice CROCKETT expressed no opinion.

[No. 3,000.]

WILLIAM ARAM, TRUSTEE OF THE ORCHARD STREET DISTRICT PUBLIC SCHOOL, AND JAMES MURPHY, BERNARD S. FOX, MARK FARNEY, AND JOHN R. MERRITT v. MOSES SHALLENBERGER, HENRY ROBINSON, AND SAMUEL Q. BROUGHTON.

FILING UNDERTAKING ON APPEAL.—An undertaking on appeal must be filed within five days after the notice of appeal is filed.

NOTICE AND UNDERTAKING ON APPEAL.—The Supreme Court has no authority to relieve a party from the consequences of a failure to comply with the statute in relation to the service and filing of notices and undertakings on appeal. The statute of 1861 applies only to insufficiencies in point of mere form of such notices and undertakings.

Per RHODES, C. J. CROCKETT, J., concurring:

CONTEMPT OF COURT.—An order of Court adjudging a party guilty of contempt is not appealable.

APPEAL from the District Court of the Third Judicial District, County of Santa Clara.

In February, 1869, the plaintiffs sued out a temporary injunction restraining the defendants, their agents, and servants, until the further order of the Court, from obstructing or closing a certain traveled way described in the complaint.

Argument for Appellant.

The defendants filed a demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled; the defendants were allowed to answer, and after trial of the case the Court ordered that the temporary injunction be made perpetual. A new trial was denied and the defendants appealed. At the April Term, 1871, the Supreme Court ordered the Court below to sustain the defendants' demurrer to the complaint. On filing the remittitur, May 17th, 1871, the District Court sustained the demurrer and granted the plaintiffs leave to amend their complaint within ten days, but made no order in regard to the injunction. On the 22d day of May the defendant Shallenberger, by advice of his counsel, closed the way by running a fence across it. Plaintiff Fox filed his amended complaint on the 27th of May and served a copy of it upon the defendant. Subsequently, he filed an affidavit setting out the facts as to the defendant's action in closing up the way; and the defendant Shallenberger was required to show cause why he should not be punished for contempt of Court. After a hearing of the matter, the Court made an order adjudging him guilty of contempt for a violation of the temporary injunction, and he appealed.

The other facts are stated in the opinion.

Moore, Laine & Leib, for Appellant.

The question of contempt or no contempt may be reviewed. The law of the land governs as to what is or is not a contempt, and not the arbitrary opinion of a Judge. (*Calderwood v. Peyser, ante*, p. 110.) It is provided in the Practice Act that an appeal may be taken from "any special order made after final judgment." (Pr. Act, Secs. 336, 347.)

This, we submit, is a special order made in this case after final judgment.

Our appeal was from the whole judgment, and the reversal

Opinion of Wallace, J., Temple, J., concurring.

of such judgment carried with it the injunction. In other words, the injunction fell with the judgment in the case, and the bill itself fell when the demurrer was sustained, and as the Court did not revive the temporary injunction, nor issue a new restraining order, there was no injunction in being to be violated on the 22d. of May, 1871; when the defendant did the act complained of. (*McGarrahan v. Maxwell*, 28 Cal. 75; *Calderwood v. Peyser*, *supra*.)

J. Alexander Yoell, for Respondent, relied upon the point that, no notice of appeal having been served on the respondents, or either of them, nor upon their counsel, the appeal was not taken according to law, and must be dismissed.

By WALLACE, J., TEMPLE, J., concurring:

The appeal is taken from an order of the District Court entered in the cause. It is claimed by the respondent that the order itself is not the subject of appeal, and that if it were, an appeal has not been properly taken and perfected. It is unnecessary, however, to consider the question as to whether or not the order is the subject of an appeal, as I think the appeal must be dismissed upon the other ground.

The order was made and entered on June 5th, 1871; and on the seventeenth of June a notice of appeal was filed, but had not been served at or before the time at which the undertaking on appeal was subsequently filed. Of course the filing of an undertaking on appeal, without service of the notice of appeal, was utterly nugatory. It seems to have been so considered by the counsel for the appellant, for on the second day of August following (and within sixty days from the entry of the order in question), he caused a copy of the notice of appeal (which had remained on file ever since June seventeenth), to be served upon the respondent's attorney, and within five days after such service he filed an un-

Opinion of Wallace, J., Temple, J., concurring.

dertaking on appeal in proper form. But as the filing of the first undertaking was inoperative, because filed before service of the notice of appeal, so the filing of the second undertaking was also inoperative to perfect the appeal taken, inasmuch as the last undertaking, though filed within five days after *service* of the notice, was not within five days after the *filing* of the notice of appeal. (Pr. Act, Sec. 348.)

The times at which, and the successive order in which the several steps are to be pursued to take and perfect an appeal, are distinctly prescribed by statute, and must be observed; otherwise the appeal must fail here, if timely objection be taken by the respondent. We have no authority to relieve a party from the consequences of a failure in these respects. Under the Act of 1861, p. 589, Sec. 3, it is true that relief may be had against the insufficiency, in point of mere form, of the notice filed and served, or of the undertaking filed; in other words, an appeal, if taken, may, upon compliance with the provisions of the Act of 1861, be supported, though it had been *insufficiently taken* in the first instance; but there is a clear distinction between an appeal insufficiently taken and one not taken at all. Were the statute of 1861 construed to afford relief in cases in which the steps as pursued were themselves utterly abortive, it is obvious that the provisions of the Practice Act prescribing the modus of taking and perfecting an appeal would be practically abrogated. The filing of the notice of appeal must always precede the service — the service of the notice must precede the filing of the undertaking, which filing must itself be within five days after the *filing* of the notice of appeal. (Pr. Act, Sec. 348.)

Because the undertaking in this case was not filed within five days after the notice of appeal was filed, the appeal should, in my opinion, be dismissed; and it is so ordered.

Opinion of Rhodes, C. J., CROCKETT, J., concurring.

By RHODES, C. J., CROCKETT, J., concurring:

We concur in the judgment on the ground that the order in question is not the subject of an appeal.

Mr. Justice SPRAGUE expressed no opinion.

[No. 2,392.]

JOHN C. WHITE v. WILLIAM H. LYONS.

COMPLAINT EITHER LEGAL OR EQUITABLE NOT DEMURRABLE.—If a complaint states facts which entitle the plaintiff to relief, either legal or equitable, it is not demurrable on the ground that it does not state facts sufficient to constitute a cause of action.

EQUITABLE COMPLAINT SETTING OUT LEGAL CAUSE OF ACTION.—Though a complaint purporting to be a bill in equity is insufficient as such, yet if the facts alleged are cognizable in a court of law, the proper relief will be administered; and a demurrer for want of facts sufficient to constitute a cause of action will not lie.

RECOVERY BACK OF MONEY RECEIVED FOR ALLEGED ILLEGAL PURPOSE.—Where, in a suit to recover money in the hands of defendant, it appeared that he had been employed as an attorney, and furnished with money to purchase school land warrants, and therewith to procure title to certain lieu lands, and that at his advice some of the certificates of purchase were taken in the names of third persons and assigned to plaintiff, and defendant set up in defense that (the taking of the certificates in that way being contrary to law) the money was paid to and received by him for an illegal purpose, and could not be recovered back; *Held*, that the contract under which the money was received was not unlawful, and that though the purchase of the certificates referred to might have been illegal, yet, it appearing that he had been fully credited with all moneys paid for them, his defense could not avail him.

COMPUTATION OF INTEREST—REDUCTION FROM TEN TO SEVEN PER CENT.—The Act of March 30th, 1868 (Stats. 1867-8, p. 553), reduced the rate of interest, in case of the absence of a contract, from ten to seven per cent per annum; and the effect was that, though ten per cent might be computed up to the taking effect of that Act, only seven per cent was allowable afterwards.

STATUTE REDUCING INTEREST PROSPECTIVE IN OPERATION.—The Act of March 30th, 1868 (Stats. 1867-8, p. 553), reducing the rate of interest, was only prospective in its operation, and was not intended to take away or impair rights which had already accrued under the prior statute.

Argument for Appellant.

APPEAL from the District Court of the Fifth Judicial District, San Joaquin County.

The complaint in this case, after setting forth facts entitling him to judgment at law against the defendant, prayed for an accounting that defendant might be adjudged to pay to plaintiff, in gold coin, what might appear on such accounting to be due, and for general relief. To this defendant demurred, on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer being overruled, and an answer put in, there was a trial before the Court, and a judgment rendered on November 18th, 1863, in favor of plaintiff, for the sum of one thousand six hundred and thirteen dollars and seventy cents, and interest at the rate of ten per cent per annum on nine hundred and thirteen dollars and seventy cents thereof from November 18th, 1863, and on seven hundred dollars thereof from July 1st, 1864 — in all two thousand three hundred and seventy-six dollars, in gold coin — the judgment to draw interest at seven per cent per annum. Findings were filed sustaining the judgment. The defendant moved for a new trial, which was denied, and he then took this appeal from the judgment.

Hall & Montgomery and S. P. Scaniker; for Appellant.

We must look to the relief sought, as well as to the facts stated in a complaint, to determine the forum to which the plaintiff has brought his case for redress. Here he has appealed to a Court of equity, and he must show that he has an equitable cause of action. But on the facts alleged no foundation is laid for equity jurisdiction for accounting — a relief afforded only where mutual or complicated accounts and dealings exist between the parties. The exact amount of money placed in defendant's hands is fixed at three thousand three hundred dollars, and the exact amounts ex-

Argument for Respondent.

pended by him are fixed with the same certainty. It is true there is a charge of fraudulent conversion; but such a charge will not sustain an action in equity for an account. There was a plain and complete remedy at law; and it is a familiar principle and well established, that in such case there is no foundation for the interposition of a Court of equity, and no equitable jurisdiction. The demurrer ought, therefore, to have been sustained.

In the procuring of the certificates both parties manifestly coöperated for overreaching the law and securing forbidden and unjust advantages — a purpose immoral and illegal, whatsoever may have been the moral sense that prompted them. The fund was committed to the one party by the other, dedicated to the procuring of title from the State for the latter's lands, by methods contravening the letter and spirit of the State's land system. As between principals and agents in all such cases, the guilt is deemed to be equal, and the maxim is: *In pari delicto potior est conditio defendentis*. The money, thus situated, is not recoverable by the principal. (Story on Agency, Sec. 235, and note 2, Sec. 344; *Perkins v. Savage*, 15 Wend. 412; *Morgan v. Graff*, 5 Den. 365; *Gregory v. Haworth*, 36 Cal. 653; *Martin v. Wade*, 37 Cal. 168.)

The judgment was also against law in allowing interest at any rate greater than seven per cent per annum — that being the rate fixed by law at the date of the judgment.

J. H. Budd, for Respondent.

The old distinction between the forms of legal and equitable pleadings are done away with, and the code requires only a statement of the facts constituting a cause of action. (Practice Act, Sec. 39; *Piercy v. Sabin*, 10 Cal. 27; *Goodwin v. Hammond*, 13 Cal. 169; *Payne v. Treadwell*, 16 Cal. 243.) A demurrer will not lie to the prayer of a complaint.

Opinion of the Court — CROCKETT, J.

The contract between plaintiff and defendant was one between an attorney at law and his client, and was not illegal. Plaintiff understood that the land was to be secured to him by the location of school land warrants. In this there was nothing illegal or against public policy. Under this contract, and with this understanding, the money was paid by the plaintiff to the defendant, and whatever was done after this was done by defendant, and by and through his advice as the attorney of plaintiff. It is the first case, and will, probably, be the last, in which an attorney at law has taken his client's money and then advised him to do and have done acts (which the attorney now claims is against law), and then coolly claimed that he had a right to retain the money, for the reason that his client acted under his advice.

If defendant can be held for the money as received by him to the use of plaintiff, then there was an implied contract to repay the same to plaintiff with legal interest from the time the defendant converted the money to his own use. And the rate of interest, as it was fixed by statute at the time of the conversion, became a part of this implied contract.

By the Court, CROCKETT, J.:

The demurrer to the complaint was properly overruled. Under the code there is but one form of action in this State, and if the complaint states facts which entitle the plaintiff to relief, either legal or equitable, it is not demurrable on the ground that it does not state facts sufficient to constitute a cause of action. If the facts stated are such as address themselves to the equity side of the Court, the appropriate relief will be granted by the Court, sitting as a Court of equity. On the other hand, if the facts alleged are purely cognizable in a Court of law, the proper relief will be administered in that form of proceeding. But a complaint

Opinion of the Court — Crockett, J.

which states a sufficient cause of action, either at law or in equity, is not demurrable as not stating facts sufficient to constitute a cause of action. In this case the defendant does not question the sufficiency of the facts alleged to constitute a cause of action in a proceeding at law, but insists that this complaint is a bill in equity, and that a Court of equity has no jurisdiction of the case. In that event, the Court will treat it as an action at law, and administer the proper relief in that form of proceeding.

Nor can we disturb the judgment on the ground that the findings are not justified by the evidence. If the evidence does not preponderate in support of the findings, there is at least a substantial conflict in it; and in such cases it is the well settled practice of this Court not to disturb the judgment.

The defendant, however, insists that the plaintiff is not entitled to recover, because the transaction between the parties was illegal, and the money which is sought to be recovered was paid by the plaintiff and received by the defendant for an unlawful purpose, and that no cause of action can arise out of a transaction which was in itself illegal and contrary to public policy. But the answer to this point is, that the contract between the parties under which the money was received by the defendant was not unlawful or contrary to public policy. The plaintiff desired to secure for himself the title of the State to certain lands, and employed the defendant, as an attorney at law and as a person skilled in that branch of business, to procure the title. The plaintiff appears to have been ignorant of the particular method by which the title of the State was to be obtained, except that it was to be effected by means of school land warrants, or certificates of purchase, for what are termed "lieu lands;" that is, lands to be selected by the State in lieu of sixteenth and thirty-sixth sections, as authorized by law in certain cases. It appears from the findings that the defendant ac-

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cepted this employment, and undertook to procure the title in this method. The money was paid by the plaintiff for this purpose. But subsequently, under the advice of the defendant, and at his suggestion, certain of the certificates were taken in the names of other persons, for the use of the plaintiff, and were afterwards assigned to him. This part of the transaction is claimed to have been illegal, and a fraud upon the law. If this be conceded, it does not aid the defendant. He has been credited in the judgment with all sums paid by him on account of these certificates, and there is no proof that any portion of the money which he received from the plaintiff, except that which was paid on account of these certificates, was to be, or was, in fact, applied or used in any illegal transactions. On the contrary, after crediting the defendant with all his disbursements and a reasonable compensation for his services, there remains in his hands a large sum, which the findings show he has converted to his own use. No reason, founded either in law or justice, is perceived, why this money should not be refunded with interest. But, I think, the Court erred in fixing the rate of interest at ten per cent per annum up to the date of the judgment. When the conversion occurred that was the rate fixed by statute in transactions of this character. But the Act of March 30th, 1868, reduced the rate from ten to seven per cent per annum; and from the time when this Act took effect the interest should have been computed at seven per cent per annum. In the absence of a contract for interest, it is only allowed as damages for a failure to pay the money due (15 Wend. 80); and it is competent for the Legislature to fix the amount which shall be recovered. But the Act reducing the rate was only prospective in its operation, and was not intended to take away or impair rights which had already accrued under the prior statute. In *Bullock v. Boyle*, 1 Hoffman, N. Y. Ch. R., 294, the effect of statutes modifying the rate of interest is fully and elaborately dis-

Statement of Facts.

cussed, and the authorities collated by the Vice Chancellor; and the conclusion at which he arrived is, that a change in the rate, as a general rule, operates only prospectively, and does not affect rights already accrued. On this point, see, also, *Thornton v. Fitzhugh*, 4 Leigh R. 209.

The judgment is affirmed, except as to the rate of interest; and in respect to the computation of interest, the Court below is directed to modify the judgment by computing the interest at ten per cent per annum up to the time when the Act of March 30th, 1868, took effect, and thereafter at the rate of seven per cent per annum; and it is further ordered that neither of the parties recover costs on this appeal.

Mr. Justice WALLACE did not participate in the foregoing decision.

[No. 2,929.]

SAMUEL SOULE, ADMINISTRATOR, ETC., OF THOMAS R. HOPE, DECEASED, v. FRED. BILLINGS, J. STEARNS, L. D. ALLEN, C. C. BUTLER, PETER DONAHUE, WILLIAM PIERCE, AND MANY OTHERS.

A STRANGER TO AN ACTION CANNOT MOVE TO DISMISS IT.—In an ejectment case for a large tract of land, and in which many fictitious defendants were named: *held*, that a person, not named nor served as a party, and who had neither appeared, answered, or demurred, nor asked to be made a party, was a stranger to the proceedings, and could not, though an owner of land embraced within the tract sued for, maintain a motion to dismiss the action as to such land.

APPEAL from the District Court of the Fourth Judicial District, City and County of San Francisco.

This was an action of ejectment for an undivided fourth part of a tract of about eighty acres of land in the City and County of San Francisco. The suit was originally commenced in the name of William A. Quarles, Administrator

Argument for Appellant.

of the Estate of Thomas R. Hope; but afterwards, Soule being appointed administrator in his place, he was substituted in this case. The defendants embraced about seventeen persons well known, and a great number of fictitious names, alleged to be unknown.

The action was commenced on April 17th, 1868. On July 18th, 1870, a motion was made by George Turner, on behalf of himself and his wife, Sarah R. Turner, to dismiss the action as to them and as to lots one, two, five, and six, in block two hundred and seventy-one, of the Western Addition of San Francisco, and included in the tract sued for, on the grounds that Sarah R. Turner, the owner of such lots, was a citizen, well known upon the records as such owner, but was not named as a party; that no suing by a fictitious name was proper as to lands of such well known owner; that no summons had ever been served upon said owner, though the suit had been brought for so long a period; that the action was evidently intended to cloud and embarrass the title of the said owner; and that it was not prosecuted properly or in good faith or with proper diligence. A supplemental motion to the same effect was made on January 23d, 1871, and affidavits were presented sustaining the grounds upon which the motion was urged.

After argument, the Court below sustained the motion as to Mrs. Sarah R. Turner, and the action was dismissed as to her. Plaintiff appealed from the judgment.

Estee & McLaurin, for Appellant.

The summons had not been served, nor had any answer, demurrer, or written notice of appearance, been served or filed in the cause. The Court, therefore, had not acquired jurisdiction, and could not entertain the motion. (Practice Act, Secs. 35, 523.)

Sarah R. Turner, not being a party defendant in the action, was not entitled to make the motion to dismiss.

George Turner, for Respondents.

The motion to dismiss was an appearance; and whether it was a special appearance for the motion or a general appearance in the cause, the court below had jurisdiction. (*Glidden v. Packard*, 28 Cal. 649; *Deidesheimer v. Brown*, 8 Cal. 339.)

The dismissal of the action was a proper exercise of the discretion of the Court below. (*Grigsby v. Napa*, 36 Cal. 588.)

By the Court, SPRAGUE, J.:

The respondents do not appear to have been made or ever to have become parties to the suit in which, upon their motion, the order appealed from was made; neither of them was named as a party plaintiff nor defendant, and no service of summons appears to have been made upon them or either of them, nor has any appearance been entered in the suit for either; neither of them has answered nor demurred, nor have they asked to be made party thereto or to intervene therein; but without right or authority derived from any code of civil procedure with which I am acquainted they intrude a motion in a proceeding to which they are strangers, which results in an order of the Court dismissing the suit as to a portion of the subject matter thereof.

This novel and summary mode of quieting title may be convenient, but is without legal sanction.

The Court, in my judgment, should not have entertained respondents' motion, and its judgment based thereon, dismissing appellant's suit as to certain lots named in his complaint, is clearly erroneous, and should be reversed and cause remanded, with directions to deny the motion; and it is so ordered.

Argument for Appellant.

[No. 2999.]

IN THE MATTER OF THE ESTATE OF JOSEPH
MARIE GASQ, DECEASED.

ALLOWANCE OF ATTORNEY'S FEES IN SETTLEMENT OF ESTATES.—A ruling of a Probate Court, in fixing the amount of compensation to be allowed an administrator in payment of counsel in the settlement of an estate, will not be disturbed, unless there is a plain abuse of discretion.

ADMINISTRATOR USING ESTATE FUNDS CHARGEABLE WITH INTEREST.—Where an administrator did not keep the funds of the estate separate from his own money, but used them for his own purpose; *held*, that he was properly chargeable with interest.

APPEAL from the Probate Court of the City and County of San Francisco.

Letters of administration upon the estate of the deceased were issued to William A. Quarles, Public Administrator of the City and County of San Francisco, in November, 1868; In April, 1871, he filed his account, in which, among other things, there was a charge of one thousand dollars in favor of his attorney in settlement of the estate. Exceptions were made to this account by the heirs at law, on the ground that one thousand dollars, or any sum in excess of two hundred and fifty dollars, was an unreasonable compensation for an attorney under the circumstances, and, it appearing that the Administrator had used the funds of the estate for his own purposes, that he should be charged with interest. The Court found that the charge in favor of the attorney was excessive, and reduced his compensation to five hundred dollars; and the Administrator was required to pay interest on the amount in his hands due the estate. From the order to this effect the Administrator appealed.

Bartlett & Pratt, for Appellant.

The item of one thousand dollars to the attorney should have been allowed. The payment was made in good faith, and could not be recovered back by the Administrator from

Argument for Respondents.

the attorney. It would be unwise to compel administrators to accept the cheap services of poor attorneys by too rigidly scrutinizing the fees paid.

The Administrator should not have been charged interest. It was his duty to keep the funds of the estate in hand, ready to meet any emergency. During that time he could not put the funds to earning anything for the estate. Neither does it appear that during that time the Administrator used the funds in any way; and in the absence of such express proof and finding, the presumption is strong that he properly performed his official duty, and held the funds in reserve for such exigencies as might arise. It does not follow because the Administrator, after the expiration of the year, used the funds for his own purposes, that he should, therefore, be charged interest during that year.

Sawyer & Myrick, for Respondents.

The findings of the Court on the attorney's fee, and on the question of interest, were conclusive. Witnesses were examined, and the action of the Court was based upon the testimony given. The Administrator, in paying the attorney one thousand dollars, assumed the risk of its being allowed.

In reference to the question of interest, it appears that the Administrator did not keep the estate funds separate from his own, but used them for his private purposes, even during the first year. He did not keep the funds on hand at all, but put them out at once, as soon as he received them. He cannot use the moneys of the estate without being charged with their use. (2 Redfield on Wills, 882, 886; *Utica Ins. Co. v. Lynch*, 11 Paige, 520.)

Opinion of the Court — Temple, J.

By the Court, TEMPLE, J.:

This Court will not reverse the ruling of the Probate Court in fixing the amount of compensation, which it would be proper to allow the Administrator in payment of counsel in the settlement of the estate, unless there is a plain abuse of discretion. Such matters are peculiarly within the knowledge of the Probate Judge, and it is very difficult for this Court to form any satisfactory conclusion upon the subject.

It is found that the Administrator had not kept the funds of the estate separate from his own money, but has used them for his own purposes. He was, therefore, properly chargeable with interest. (*Utica Ins. Co. v. Lynch*, 11 Paige, 525.)

Order affirmed.

[No. 2,089.]

J. E. DE LA MONTAGNIE v. THE UNION INSURANCE COMPANY.

SALE OF WARD'S PROPERTY BY GUARDIAN, WITHOUT ORDER OF COURT, VOID.—Where shares in an insurance company belonging to an infant, but were issued to his guardian, under the name of "Augusta R. Josephi, Guardian," and she afterwards, in the same name but without any order of the Probate Court, sold and assigned them: Held, that such sale was void, and that the purchaser could not require the company to recognize him as having any title to such stock.

PURCHASE OF WARD'S PROPERTY FROM GUARDIAN — CAVEAT EMPTOR.—Every alienation of the property of a ward by a guardian, if made without an order of Court, is void; and it is of no import whether the purchaser has knowledge that it belongs to the ward or not.

APPEAL from the District Court of the Twelfth Judicial District, City and County of San Francisco.

The facts, sufficient for an understanding of the points decided, are stated in the opinion. The conclusions of law

Argument for Respondent.

and judgment, rendered in December, 1868, were to the effect that plaintiff should recover two hundred and seventy-four dollars, the deterioration in value of the stock between the time of the demand by plaintiff and the trial, and for a transfer of the stock. The defendant appealed.

Sidney V. Smith, for Appellant.

At common law a guardian could sell the personal property of his ward without application to any Court; but it was always considered safer to obtain the direction of a Court of chancery. (2 Kent, 228.) Under our statute regulating the relation of guardian and ward, the power of the guardian to sell any personal estate of the ward without an order of Court is expressly taken away. (Guardian and Ward Act, Secs. 20 and 25; see also *Kendall v. Miller*, 9 Cal. 591.)

The plaintiff having derived title to the stock through a transfer to and an assignment from "Augusta R. Josephi, Guardian," had sufficient notice, or at least was put upon inquiry, as to the title of the stock not being in Mrs. Josephi. The addition of the word "Guardian" to her name was an indication that she did not hold the stock in her own right; it was enough to excite the suspicion of any prudent man (See *Decan v. Shipper*, 35 Penn. St. 239.)

F. & W. H. Sharp, for Respondent.

The defendant cannot make the defense which it sought to set up, and now urges to defeat the judgment. It issued the stock to Mrs. Josephi, with the simple addition of "Guardian." If it treated this designation as simply *descriptio personæ*, it cannot now question her right to transfer the stock in the same manner and capacity. If the ward interposed no objection to the proceeding, the company cannot. If the guardian in any manner violated the terms of

Opinion of the Court — WALLACE, J.

his trust, it is for the Court; or his bondsmen, or the ward to complain.

Again, the Court found that the plaintiff took without notice; and the company was bound, therefore, to transfer to him. (*George v. Kendall*; 15 Wend. 640.) Having issued the stock to Mrs. Josephi as guardian, it is estopped from questioning any transfer made by her in that capacity. (*Dyer v. Rich*, 1 Met. 180.)

By the Court, WALLACE, J.:

This is an action to recover the value of certain shares of the capital stock of the corporation defendant, which the plaintiff alleges to be his property, and to have been converted by the defendant to its own use.

It appears that one James Michael, deceased, was at the time of his death owner of some thirteen shares of the capital stock of this insurance company, evidenced by a certificate standing in his own name, and that, under the order of distribution of the Probate Court, these shares came to Michael Frank Michael, an infant son of the decedent, and of whose person and estate his mother, Augusta R. Josephi, was the duly appointed guardian; and upon surrender of the original certificate by her a new certificate was issued to her, which ran on its face to "Augusta R. Josephi, Guardian," and she thereupon, and without any order of or authority from the Probate Court, sold the stock to De la Montagnie, "and on the same day assigned the said certificate thereof to him by an indorsement thereon, signed by her 'Augusta R. Josephi, Guardian.'" The corporation defendant refused to recognize the transfer, and declined to issue a new certificate of stock to De la Montagnie, upon his proffered surrender of this one.

The first question is, whether or not the sale and transfer, under the circumstances, vested a title to the stock in De la

Points decided.

Montagnie. The Court below found in this connection that the latter "had no knowledge that the said Augusta R. Josephi held the said stock as guardian of Michael Frank Michael, or that said stock belonged to him;" but that fact, in our opinion, is of no import. In *Kendall v. Miller*, 9 Cal. 591, it was held by this Court, that a sale made by a guardian of a portion of the estate of the ward, without authority from the Probate Court, conveyed no title to the purchaser; and the rule announced in that case was subsequently recognized here, at least by fair implication, in *Schmidt v. Wieland*, 35 Cal. 343, as being the correct exposition of the statute in force, regulating the sale of the property of wards by their guardians. We think, too, irrespective of adjudged cases, that the plain intent of the statute is to make void every alienation of the property of the ward, if made by the guardian without the order of the Court; and that the rule, in itself, is one of wholesome application to such sales, whether of the personal or real estate of the ward.

Judgment reversed, and cause remanded, with directions to render judgment for the defendant.

Mr. Justice TEMPLE, being disqualified, did not sit in this case.

[No. 2,615.]

ELIJAH TRUE v. SIMPSON THOMPSON, WILLIAM
G. MORRIS, AND ROBERT SHEEHY.

SCHOOL OR LIEU LANDS — CERTIFICATE OF LOCATION WILL NOT SUPPORT EJECTMENT.—A certificate of location of school or lieu land, issued under the Act of April 27th, 1863 (Stats. 1863, p. 591), is not evidence of legal title, and will not support ejectment.

VIRTUAL REPEAL OF OLD LAND LAW BY ADOPTION OF NEW SYSTEM.—The Act of April 13th, 1859 (Stats. 1859, p. 227), in so far as it made a certificate of location of school or lieu lands prima facie evidence of title was superseded and repealed by the Act of April 27th, 1863

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(Stats. 1863, p. 591), which inaugurated a new system of land law, intended to be complete in itself.

CERTIFICATE OF PURCHASE AS EVIDENCE OF TITLE.—Under the Act of April 27th, 1863, for the sale of certain lands belonging to the State (Stats. 1863, p. 591), the Registrar's certificate of purchase of School or lieu land is the only *prima facie* evidence of legal title prior to a patent.

APPEAL from the District Court of the Seventh Judicial District, Napa County.

The Court below, on the trial of this action, found that the title of the land involved passed from the United States, by virtue of a patent dated May 20th, 1867, to the defendant Thompson and his associates, and that they were the legal owners thereof; that the Act of Congress of March 3d, 1863, granting the right of preëmption to certain purchasers on the Suscol Ranch took from the State of California all power, right, or authority to sell or dispose of the said land; and that the defendants were entitled to judgment against the plaintiff. Such a judgment having been entered, and a motion for new trial overruled, plaintiff appealed.

M. A. Wheaton and George Cadwalader, for Appellant.

The land sued for is a part of a thirty-sixth section, which was granted to the State on March 3, 1853, just ten years before the Suscol Act was passed. The plaintiff purchased the State title, and paid for it in full, and applied for a patent, when defendants filed a protest, and caused the case to be certified into the Court below for trial, at the same time offering and applying to purchase from the State, if the State owned the land. It is plain that the defendants have managed to keep one step behind the title in their efforts to get it. While it was in the State they went to the United States for it; and after the State has sold it to us, and got our money for it, they try to buy from the State. Unless the defendants can make us their trustees, they cannot reach the title of the land. We have the legal title;

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we got it strictly according to law, and we have a right to its possession.

The statutes have declared, and the Courts have often decided, that certificates of location are evidence of title (See *Richter v. Riley*, 22 Cal. 641.)

Pendegast & Stoney, for Respondents.

Plaintiff's certificate of location was no evidence of title. The Act of April 27th, 1863, under which the certificate issued, denies by implication any weight as evidence to certificates of location. It provides that certificates of purchase shall be *prima facie* evidence of legal title; and as the certificate of location precedes the certificate of purchase in the proceedings to acquire title, and is a lower link in the chain, this provision of the statute excludes the idea that it is to have the same force as evidence upon the principle of the maxim, *expressum facit cessare tacitum*.

Nor does payment of the purchase money to the Treasurer give the certificate of location the dignity of a certificate of purchase. The law attaches no importance as evidence to the receipt of the Treasurer. Payment is one of the steps toward the certificate of purchase; but to avail the applicant in proving title to the land it must have been followed by "the certificate of purchase issued by the Register." (Act of 1863, Sec. 17.)

The plaintiff does not claim under the United States, because he refused to purchase under the Suscol Act. His claim is only under the State, and he can assert no better right than she had. But at the date of the survey the land was all occupied and cultivated, and, consequently, the title to it did not vest in the State, and no title passed to plaintiff.

By the Court, CROCKETT, J.:

The quarter section of land in contest in this case is a portion of a thirty-sixth section, and is included in the general tract known as the "Suscol Ranch." The action is ejectment, and as proof of title the plaintiff relies upon a certificate of *location* issued under the Act of April 26th, 1863, entitled "An Act to provide for the sale of certain lands belonging to the State." (Stats. 1863, p. 591.) The statute requires an applicant desiring to purchase from the State, lands included in sixteenth or thirty-sixth sections, to make his application to the State Locating Agent for the proper district, and if the application is approved, it is made the duty of the agent to apply to the Register of the proper United States Land District for the land on behalf of the State, for the use of the applicant. If the Register approves the selection by the State, the Locating Agent is to forward the papers to the State Surveyor General, and if he approves the location and selection, it is the duty of the applicant, within a specified time thereafter, to pay a certain percentage of the purchase money, or, if he sees fit, he may then pay the whole purchase price to the County Treasurer; and when the whole is paid, it is made the duty of the Register of the State Land Office to issue to the applicant a certificate of *purchase*. Section seventeen of the Act provides that "when a certificate of purchase has been issued by the Register, the same shall be deemed prima facie evidence of legal title to the land for which the certificate of purchase is issued;" and the same section provides that the certificate, all rights acquired thereby, "shall be subject to sale and transfer by deed or assignment executed and acknowledged before any officer authorized by law to take acknowledgments of deeds," etc. The certificate put in evidence by the plaintiff was not the certificate of *purchase* referred to in this section, but the certificate of *location*, issued

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by the State Locating Agent, approved by the United States Register and the State Surveyor General. Having elected to pay the whole of the purchase price in one payment, and to waive the credit allowed by law for a portion thereof, the plaintiff also put in evidence a receipt from the County Treasurer for the whole purchase money. His title, therefore, consists of the certificate of *location* and a proper receipt for the whole of the purchase money. The defendants deny that these will support ejectment; and if this proposition can be maintained, the plaintiff must fail in his action. The plaintiff, however, insists that under an Act passed in 1859 ejectment will lie on a certificate of *location*, such as he has produced in this case. That Act contains but one section, and is in the following words: "The certificate of purchase or of location of any lands in this State, issued or made in pursuance of any of the laws of the United States or of this State, shall be deemed *prima facie* evidence of legal title in the holder of said certificate of purchase or location, or his assignees." (Stats. 1859, p. 227.) If this act remained in force, wholly unaffected by the act of April 27th, 1863, there could be no question of the sufficiency of the plaintiff's certificate to support the action. But by the act of 1863 the Legislature made many important changes and modifications in the mode of disposing of the lands belonging to the State. It, in fact, inaugurated a new system, which was intended to be complete in itself. It provided new agents, who were to receive and pass upon applications to purchase, and established a State Land Office, to be presided over by a Register, to whom important duties are confided. He is in some measure to review the proceedings of subordinate officers, and he alone is authorized to issue a certificate of purchase, the effect of which, as declared by the seventeenth section, shall be to vest in the holder of it,

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ence to any question of estoppel, now for the first time thought of by appellant. The questions asked and testimony given were clearly material, relevant, and competent to explain the nature of the possession Phelps claimed to hold, as well as to contradict his previous statements.

There was no error in refusing to permit Abner Phelps to take the stand for the third time in rebuttal of testimony of Mrs. Pfoff. The proposition was to have him repeat what he had already said in his testimony in rebuttal. His recall was at any rate a matter entirely without the discretion of the Court. No error can be predicated upon a refusal.

By the Court, SPRAGUE, J.:

After a careful examination of the testimony, as presented by the record, I find that upon the question of possession of the demanded premises and the character thereof, from 1853 to 1863, there is direct and substantial conflict between the evidence presented by plaintiff tending to establish actual possession in Abner and Edwin Phelps, through whom she claims title, and that presented by defendants tending to establish actual possession in other parties, through whom they claim title; and as to the years 1854 and 1855, the evidence tending to establish actual possession in Abner Phelps is in direct conflict with that tending to establish such possession in J. F. Hutton, Sr., and one Haraszthy, through whom defendant Brummagim's testator, Beideman, claimed title. The findings, therefore, under the uniform practice of this Court, will not be disturbed on review.

The objection to the evidence of a conversation between Abner Phelps and Hutton, Jr., in 1860, while Phelps was in possession of the premises, was not well taken. This evidence tended to explain the character of possession held by

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Phelps at the time, whether it was as a claimant of the premises, in his own adverse right, or as tenant of Hutton, Sr.

There is nothing in the point urged against the ruling of the Court, refusing to allow plaintiff to recall the witness, Abner Phelps, for the purpose indicated, which was to contradict the evidence of Mrs. Pfoff, formerly Mrs. Bach, so far as the same was in conflict with the testimony already given by the witness Phelps.

Judgment and order denying new trial affirmed.

[No. 2,578.]

THOMAS H. HANSON v. JAMES S. McCUE.

LAW OF UNDERGROUND CURRENTS OF WATER.—Where underground currents of water, flowing in defined channels, are shown to exist, the rules of law which govern the use of similar streams flowing upon the surface of the earth, are applicable to them.

SPRINGS PRESUMED TO BE SUPPLIED BY PERCOLATION.—In a controversy respecting the use of the waters of a spring, where there was nothing to show that it was supplied by any defined flowing stream; *held*, that it must be presumed to be formed by the ordinary percolations of water in the soil.

PERCOLATING WATERS BELONG TO OWNER OF SOIL.—Waters filtrating or percolating in the soil belong to the owner of the freehold—like the rocks and minerals found there; and he may use them as he chooses, free from any usufructuary rights of others.

RIGHTS OF OWNERS OF SPRINGS OF WATER.—Where the owner of a spring of living water, supplied by percolation only, and having no natural channel or outlet, constructed an artificial channel, by means of which he conducted the water over certain intermediate vacant lands to his residence, and a subsequent occupant of a portion of the intermediate land enjoyed the use of the water flowing through the channel for fifteen years; *held*, that such occupant acquired no rights as against the owner of the spring, and could not prevent him from tapping such spring and using all its waters for his own profit.

NO PRESUMPTION OF GRANT OF EASEMENT AGAINST ONE NOT CALLED ON TO COMPLAIN.—Where water, after leaving a spring supplied by percolation alone, was conducted by an artificial channel to premises below and there appropriated; *held*, that as the owner of the spring

Argument for Appellant.

had no right to complain of such appropriation below him, the fact that he did not complain for fifteen years and upwards would not create any presumption of a grant of an easement as against him, nor prevent him from using all the water of his spring as he pleased.

REASON OF PRESUMPTION OF GRANT OF EASEMENT FROM USER FOR LENGTH OF TIME.—The presumption of the grant of an easement, when indulged against a proper party, is because his conduct, in submitting to the use for such length of time without objection, cannot be accounted for upon any other hypothesis.

APPEAL from the District Court of the Seventh Judicial District, Marin County.

The facts are stated in the opinion of the Court.

The spring therein referred to is situated on the hillside north of the Town of San Rafael, and is usually known as the San Rafael or Dixon Spring. The defendant appealed.

E. B. Mahon, for Appellant.

Even if plaintiff had an absolute right to the surface water running in the channel, and if the spring and channel were on plaintiff's land, yet such a state of facts would not entitle him to enjoin defendant from digging for any useful purpose on his (defendant's) own land. How much less can he do so when the spring is on defendant's land, and the grantor of defendant was the maker of the channel; and when plaintiff fails to show a clear right, or in fact, any right, to the water?

If any easement has been acquired by either of the parties, it is the defendant who has acquired a right, namely: to discharge the water of his ditch and spring upon plaintiff's land. Defendant's grantor was the actor; his estate is the dominant estate, and plaintiff's is the servient estate.

The law of surface streams does not apply to unknown subsurface streams or supplies. All the well-considered, and especially all the recent decisions on the subject are to this effect. (See *Ellis v. Duncan*, 21 Barb. 230; *Haldeman v. Burkhardt*, 45 Penn. St. 520; *Acton v. Blundell*, M. & W.

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324; Angell on W. C. 168; *Radcliff's Exrs. v. Mayor of Brooklyn*, 4 N. Y. 200; *Trustees of Delhi v. Youmans*, 50 Barb. 316.) In the latter case it is decided "that the law controlling the right to subterranean waters is very different from that affecting surface streams. In the former case the water belongs to the soil, is part of it, is owned and possessed as the earth is, and may be used, removed, and controlled to the same extent by the owner."

As to the prescriptive right claimed by plaintiff, it is plain that there can be no prescription without adverse user; and there can be no adverse user without creating a right of action. In the case at bar no right of action accrued to defendant as to the percolations through his land. He could not sue plaintiff, and reciprocally plaintiff cannot sue him. (*Wheatley v. Baugh*, 25 Penn. 528.)

C. T. Botts, for Respondent.

Both English and American Judges have drawn the distinction between subterranean streams and percolations; but there is much conflict of opinion and contradiction of authorities as to how far a person may sink a well or shaft, or make any other excavation for a useful purpose, if he thereby incidentally divert the filtration or percolation by which his neighbor's well or stream is fed. On one side *Balston v. Bensted*, 1 Campbell, 403; *Dickinson v. Grand Junction Canal Co.*, 7 Exch. 283; and *Wheatley v. Baugh*, 25 Penn. St. 528, are leading cases; on the other, *Chasemore v. Richards*, 2 H. & N. 186, and *Haldeman v. Burkhardt*, 45 Penn. St. 514.

We claim, however, that there has here been a deliberate attempt made—an attempt which the injunction arrested—to divert a superficial stream by cutting off the same stream in its subterranean flow, and this for no other purpose than

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bona fide the obtaining of water for commercial purposes. Further, it nowhere appears, either in the allegations of the complaint, the findings of the Court, or otherwise by the record, that the spring in question is itself supplied, in whole or in part, by the flow of any defined stream of water, either subterranean or passing along the surface of the earth. Underground currents of water, flowing in defined channels, are known to exist in considerable volume, particularly in limestone regions; and where their existence is shown, there is no doubt, either upon reason or authority, that the rules of law which govern the use of similar streams flowing upon the surface of the earth, are applicable to them. Such a stream, whether emerging or sinking, is in a greater or less degree a fertilizer of the land through which it flows. The right that it should flow "*ubi solebat*" comes *ex jure naturæ* and no one, merely because he is the proprietor of the soil through which it passes, can claim the corpus of the water of the flowing stream, or intercept its natural descent to the lands of the proprietor below. It not appearing that the spring here is supplied by any defined flowing stream, it must be presumed that it is formed by the ordinary percolations of water in the soil. The Court, it is true, as we have already seen, mentions in its findings "the hidden and subterranean veins, streams, and sources of said spring" as being about to be cut off by the excavation; and the counsel for the plaintiff argues that this amounts to a finding that there is a subterranean stream of a defined character, and flowing in a defined channel, which is about to be diverted. But it is evident that the finding means, in substance, that the spring is supplied in some way by hidden veins or subterranean streams; but the Court does not find that there is any stream known to exist at all, or if there is, whether it flows in a defined channel, which is the important point to be found. It amounts only to a finding that the "*sources*" of the spring—be they what they may—are about to be cut

off. I do not understand the finding as establishing the exceptional fact that the spring here is fed by a known running stream of water flowing in a defined channel. The question, then, comes to this: One who is owner of the freehold—*usque ad infernos*—digging in the soil for the lawful purpose of his own profit, and not actuated by the malicious intent to wantonly deprive the plaintiff of the flow of water, is, at the instance of the latter, enjoined from so digging, because he will thereby divert the waters which percolate the soil from the spring from which the artificial water-course leads to the lands of the plaintiff. Water filtrating or percolating in the soil belongs to the owner of the freehold—like the rocks and minerals found there. It exists there free from the usufructuary right of others, which is to be respected by the owner of an estate through which a defined stream of water is found to flow. The owner may appropriate the percolations and filtrations as he may choose, and turn them to profit if he can. To hold otherwise would be to hold that the plaintiff here could lawfully claim a right to convert the lot of McCue into a mere filterer for his own convenience. “Such a claim (said the Supreme Court of Pennsylvania, in 23 Penn. R. 528), if sustained, would amount to a total abrogation of the right of property. No man could dig a cellar or a wall, or build a house on his own land, because these operations necessarily interrupt the filtrations through the earth. Nor could he cut down the forest, or clear his land for the purpose of husbandry, because the evaporation which would be caused by exposing the soil to the sun and air would inevitably diminish, to some extent, the supply of water which would otherwise filter through it. He could not even turn a furrow for agricultural purposes, because this would partially produce the same result.”

I am of opinion that the plaintiff has no such interest in

Opinion of Crockett, J., specially concurring.

the percolating waters found in the defendant's land as will support this action.

It is next argued, however, that the fact that the plaintiff, and those whose estate he has, have enjoyed the stream flowing from the spring for upwards of fifteen years without interruption, and adversely to the defendant and his grantor, will support a presumption of a grant of an easement by the latter to the former.

The presumption of the grant of an easement, when indulged, is because the conduct of the other party, in submitting to the use for such a length of time without objection, cannot be accounted for on any other hypothesis. The acts done by the party claiming the benefit of the presumption, and his predecessors in estate, must, however, have been in themselves such as the other party having the right to object to, or complain of, did neither, but submitted to them without objection or challenge. Such acts, if continued during a sufficient period of time under such circumstances, would raise the presumption relied upon. But it will be seen at once that McCue, or those from whom he purchased, could, in the nature of things, have no right to complain that the water in the artificial channel, after leaving the spring, was appropriated below by the owners of the Hanson lot. If they had no right to complain in the first instance we are not driven to the presumption of the grant of an easement to account for why they did not complain.

Judgment and order reversed, and cause remanded for a new trial.

CROCKETT, J., specially concurring:

I concur with Mr. Justice WALLACE in the opinion that the defendant, who is the owner of the spring, may lawfully divert the percolations by which it is supplied, provided it

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is not done through mere negligence, wantonness, or malice. In *The Trustees of Delhi v. Youmans*, 50 Barb. 316, the law on this subject was carefully and elaborately examined, and the authorities industriously collated and reviewed. The propositions established by that decision, and the authorities cited, are: First—That the use of the waters of subterranean streams, flowing in well-defined channels, is governed by the same rules which apply to surface streams, flowing in natural channels; but mere percolations which feed a neighboring spring or well are subject to a different rule, and may be diverted by the owner of the soil, provided it is not done from mere negligence or malice. Second—That the same rule prevails, even though the spring or well supplied by percolation be on the land of an adjoining proprietor, as was the case in *Trustees of Delhi v. Youmans*. If these propositions be sound (of which I entertain no doubt) the defendant would have had the right to dig upon his own land, for any purpose not proceeding from mere malice, even though he had thereby diverted the percolations from a spring on the plaintiff's premises. If the plaintiff was the owner of the Dixon Spring, with a consequent right to the use of all its water, the defendant would have the clear right to dig upon his adjoining land, for any useful purpose, notwithstanding he might thereby divert the percolations, and thus destroy the spring. He would not be allowed to do it from mere wantonness and malice; but the owner of the soil is entitled to use the percolations through it, for any purpose which he may deem beneficial, or may divert them in another direction, in the prosecution of any work on his own land which he may consider advantageous to him. I deem it unnecessary to inquire into the reason of the ruling, which, however, is fully stated in the carefully considered case already cited, and the numerous authorities therein referred to. I do not understand the

Opinion of Crockett, J., specially concurring.

plaintiff's counsel to deny that the defendant might lawfully divert the percolations from the spring, provided it was only incidentally done in the prosecution of an independent or collateral work on his own premises; but he claims that the sole object of the tunnel is to cut off the supply of the water, and thus destroy the spring, which he insists the defendant has no right to do, by a work expressly prosecuted for that especial purpose. But the findings show that the object of the tunnel is to collect the water for a commercial purpose, to wit: to furnish the neighboring village of San Rafael a supply of fresh water — and this certainly is a proper and useful purpose. If the defendant has the right to divert the percolations by digging a ditch for the mere purpose of drainage, or by sinking a well, essential to the enjoyment of his property, I can perceive no reason why he may not accomplish the same result for any other purpose which he may deem advantageous to him; I think he may do it for any purpose which is not purely malicious. If these views be correct, it is clear that the plaintiff has acquired no rights by prescription which could debar the defendant from exercising his right to divert the percolation from the spring. We have already seen that he could exercise this right, even though the spring was on the plaintiff's premises, and a title founded on prescription, which presumes there was a grant from the true owner, certainly cannot be more available to the plaintiff than a title in fee to the spring itself. But the Court finds that it was the intention of the defendant to tap the spring at the surface, in case he should fail to obtain a sufficient supply of water otherwise. If the plaintiff is entitled to enjoin him from doing this, it will be time enough to restrain him when he is about to put his threat into execution. But if he ought to be enjoined from tapping the spring on the surface, the injunction should, at all events, be limited to that. But I

Argument for Appellant.

express no opinion as to the propriety of such an injunction, on the facts presented by the record. For these reasons I concur in reversing the judgment.

[No. 2,968.]

R. S. THOMPSON v. OWEN CONNOLLY.

DESCRIPTION OF LAND IN JUDGMENT PRESUMED DEFINITE.—Where a judgment divided land as between the parties by a line as laid down upon a certain map annexed to the judgment, and it was objected that the line was too vague and uncertain, and that the map furnished no data for its correct location: *held*, that all intendments were in favor of the judgment, and, in the absence of an affirmative showing to the contrary, it would be assumed that the line could be located with entire precision.

APPEAL from the District Court of the Fourth Judicial District, City and County of San Francisco.

The facts are stated in the opinion.

W. H. Patterson, for Appellant.

The division line of the property awarded to the plaintiff and defendant, respectively, is too indefinite and uncertain to support the judgment against a direct attack in the same proceeding. As will be seen on inspection of the original map attached to the judgment roll, the line is not a line of survey, but simply an imaginary one on paper, without measurement, course, or distance. Not being one of the calls in the description set out in the complaint, it cannot be presumed to have been ascertained and settled in the action. And whenever it becomes necessary to ascertain and settle it to determine the rights of the defendant, he is entitled to contest it.

It is not necessary to claim that the judgment is void, but only that the verdict is insufficient in its recitals to support

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it. (*Riley v. Smith*, 9 Allen, 370; *Atwood v. Atwood*, 22 Pick. 283; *Miller v. Miller*, 16 Pick. 215; *Smith v. Jenks*, 10 Sergeant and Rawle, 153; *Orten v. Noonan*, 18 Wis. 447.)

Elisha Cook, for Respondent.

The verdict is sufficiently certain (and will so be considered unless the record clearly shows that it is not) for the Sheriff to ascertain the land referred to therein. There is nothing in the record showing that the Sheriff could not readily ascertain the property, and every intendment being in favor of the verdict and judgment, the presumption is that every call, mark, line, tract, map, and other thing, referred to in the verdict, can be readily ascertained by the Sheriff. (*Tyson v. Passmore*, 7 Barr. 273; 17 Serg. & Rawle, 393; 5 Watts, 371.)

If, as claimed by appellant, no land is designated or can be ascertained by reason of uncertainty, the verdict and judgment are harmless; no injury has been done and the appeal should be dismissed. If the verdict was informal, the appellant should have excepted to it at the time of its rendition and should have moved the Court below for a new trial and to set aside the verdict. There is no pretense that the verdict is void.

By the Court, CROCKETT, J.:

The action is to recover the possession of a fractional fifty-vara lot situate in the City of San Francisco, and bounded on three of its sides by streets. The verdict of the jury was in these words: "We, the jury in this cause, find a verdict in favor of the plaintiff for the possession of all the lands, being that portion of fifty-vara lot No. 6, in Block No. 214, colored in red and lying west of the Hill tract line as laid down on a certain map filed this day in this cause; and we further find a verdict in favor of the defendant for all the

land colored white and lying east of said Hill tract line, as appears by said above named map." A judgment was entered in accordance with the verdict, and a copy of the map was annexed to and forms a part of the judgment and judgment roll.

This appeal is by the defendant, from the judgment, on the judgment roll, and the only ground relied upon for a reversal of the judgment is that the verdict, in describing and locating the division line between the two parcels of land, awarded to the plaintiff and defendant, respectively, is too vague and uncertain to support the judgment. In support of this proposition, it is said that the line of the Hill tract is a mere imaginary line, and that the map furnishes no data for its correct location, nor for ascertaining the quantity of land awarded to the parties severally, or the precise location of either parcel. But we cannot assume that the line of the Hill tract is a purely ideal line, having no visible existence on the ground. For aught that appears, it may be defined by visible monuments, and its exact location may be a matter of notoriety in the vicinity. All the intendments are in support of the judgment, and there is nothing in the record to raise a reasonable doubt that the land awarded to the plaintiff and defendant, severally, can be located with entire precision.

Judgment affirmed.

Mr. Justice TEMPLE did not participate in the foregoing decision.

Points decided

[No. 1,682.]

**AGLIE STOPPELKAMP v. CHARLES MANGEOT
AND AUGUSTINE CEZAR.**

CHANGING TERMS OF LEASE BY LANDLORD.—The mode of changing the terms of a lease upon notice by the landlord, depends wholly upon the statute; and the cases in which such changes can be made are limited to those in which it is expressly authorized.

ESTATES BY LEASE—TIME SPECIFIED, AND TIME INDEFINITE.—A lease for a specified period of time, as for one month, creates an estate substantially different from that created by a lease for an indefinite period, with rent payable monthly, or by lease from month to month. Where the time is specified, the lease terminates by the mere lapse of time. No notice is necessary to entitle the landlord to re-enter, or to enable him to recover possession. But where the lease is from month to month, the lease does not terminate by the mere lapse of time—neither party can terminate the relation without notice to the other in advance.

TENANCY FOR YEARS, AND FROM YEAR TO YEAR.—If a tenant for years holds over with the consent of his landlord, express or implied, paying yearly rent, without any further arrangement as to time, the tenancy may thus be converted into a tenancy from year to year.

TENANCY FOR YEARS.—A tenancy for the specified period of one month is a tenancy for years, and not a tenancy from year to year, or from month to month.

TENANCY FROM MONTH TO MONTH.—A tenant for the specified period of one month, who holds over with the consent of his landlord, thereby becomes a tenant from month to month.

IDEM — REPUDIATED BY ACT OF LANDLORD.—S. sued M., alleging that he had leased certain lots to M. for one month, for twenty-five dollars; that fifteen days before the close of the month he gave notice, in writing, under the Forcible Entry and Detainer Act of 1863, that the rent for the next month would be five hundred dollars, payable in advance; that M. had held over, and had failed to pay the rent; *held*, that by giving the notice of a change of terms before a tenancy from month to month commenced, and following it up by a demand of rent, and immediately thereafter of possession, he repudiated the holding over on the original terms, and the claims of the parties were adverse, and actually hostile, from the moment of the expiration of the specific terms alleged, and there never was a tenancy from month to month.

CONSTITUTIONALITY OF STATUTE AS TO JURISDICTION OF COUNTY COURT.—The provisions of the statute conferring jurisdiction upon County Courts in actions to recover the possession of premises held over by tenants against the consent of the landlord, are constitutional.

Argument for Appellant.

QUERY.—Whether the provisions of the sixth section of the Forcible Entry and Detainer Act of 1863, as to changing terms of lease by notice from the landlord in the mode therein prescribed, are constitutional?

APPEAL from the County Court of the City and County of San Francisco.

The facts are stated in the opinion of the Court.

P. G. Buchan, for Appellant.

The judgment cannot be sustained, because the complaint does not state facts sufficient to constitute a cause of action. This point can be taken on appeal, and is one of the points made in the statement. (*Barron v. Frink*, 30 Cal. 486; *Russell v. Byron*, 2 Cal. 86; *White v. Pratt*, 13 Cal. 521.)

It will be perceived that this tenancy was for the period of one month, and was not a tenancy "from month to month," in the language of the statute. At the end of that month, the defendant, if he remained on the premises, was a tenant holding over after his term had expired, and was entitled to thirty days notice to quit, if the landlord intended to terminate the tenancy. If he had paid another month's rent and remained in possession, or if he remained in possession over the month, with the consent of his landlord, then he became a tenant from month to month, and fifteen days before the twentieth of August (not fifteen days before the twentieth of July), this notice to change the terms of the lease could have been given. The Court will find the section of the statute under which the notice was given, in 1 Hittell's Dig. par. 3134, Sec. 6, of the Act in reference to forcible entries and unlawful detainers. It provides that in "all leases of lands and tenements, or any interest therein from month to month, the landlord may" give the notice of fifteen days before the expiration of the month, to change the terms of the lease, etc. The last clause of the section itself defines what a holding from month to month is. It says:

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“In all leases of lands or tenements, or any interest therein for a month, or any term less than one year, and the tenant holds over his term by consent of his landlord, the tenancy shall be construed to be a tenancy from month to month, or a tenant for such term less than a year as the case may be.”

This notice was served on the third of July; that is, on the thirteenth day of the term, “and the holding over his term by consent of his landlord” had not, and could not then have occurred, so that he was not then a tenant from month to month. This is too clear for argument. The demand, therefore, for five hundred dollars on the twentieth of July, instead of twenty-five dollars, was illegal, and payment properly refused. The Court, however, not only rendered judgment for restitution of the premises, but for one thousand five hundred dollars, three times the amount of the rent thus demanded.

The County Court had no jurisdiction, because this was not an action for forcible detainer, and it is only in such a case that the County Court has jurisdiction. We are aware that this point conflicts with the opinion of this Court in the case of *Caulfield v. Stevens*, 28 Cal. 118, where the Court decided that the County Court had exclusive jurisdiction in such cases. As to exclusive jurisdiction, that decision is overruled in *Courtwright v. The Bear River Company*, 30 Cal. 573. The question here is not in what Court this case should have been brought, but has it been brought in a Court that had jurisdiction? That depends on the meaning of the words in the Constitution giving the County Court “original jurisdiction (not exclusive jurisdiction) in actions of forcible entry and detainer.” It is perfectly evident that if this language is held to include all unlawful detainers not accompanied by force, it gives the County Court original jurisdiction in all cases of ejectment where the possessor unlawfully, but not forcibly detains the posses-

Argument for Respondent.

sion from the true owner. The Constitution gives the District Courts original jurisdiction "in all cases at law which involve the title or possession of real property."

The Constitution of this State confers upon the District Courts exclusive jurisdiction in all civil cases where the demand in controversy exceeds three hundred dollars. Jurisdiction is conferred upon the County Courts over actions of forcible entry and detainer. Actions may be maintained in those Courts quasi-criminal, to recover the premises forcibly, or, for the sake of the argument, we will admit unlawfully and wrongfully detained, and to punish the wrongful detainer. But actions can not be maintained in those Courts to recover rent, as rent, to the amount of fifteen hundred dollars. In other words, they cannot give judgment for the sum of fifteen hundred dollars for a cause of action arising on contract.

If it is to be held that the fifteen hundred dollars is a penalty imposed by the Court for criminally holding over after the non-payment of rent, and that it is not for a cause of action arising on contract, then we say that the sixth and thirteenth sections of the Act in reference to forcible entries and detainers are unconstitutional and void.

J. M. & D. F. Verdenal, for Respondent.

The first point raised by the appellant is that the complaint does not state facts sufficient to constitute a cause of action.

To us, there seems to be about as much distinction between a tenant from "month to month" and a tenant for "a month" as that between a tenant from "year to year" and a tenant for "years"—a distinction rather in words than substance. (Woodf. L. & J. 113.) The counsel argues that, if the appellant "remained in possession over the month, with the consent of his landlord, then he became a tenant from month to month." We contend that he did hold over

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the premises with his landlord's consent. The amount of rent to be paid was changed, but there was no attempt to change the tenancy from what it then was—a tenancy for a month, or "month to month." There was no attempt to sever the then existing relation of landlord and tenant. The tenant to hold over on the payment of an increased rent; and, by holding over after the termination of the month, the tenant, according to the counsel's own argument, became a tenant from "month to month." Independent of this, the very section quoted by counsel, on page four, expressly declares a tenancy from "month to month" to be "all leases of lands or tenements, or any interest therein, for a month, or any term less than one year."

The Legislature seems to have regarded all tenancies less than a year as tenancies from "month to month," and it would certainly seem absurd, upon its face, that in the case of a tenancy from "month to month" the landlord could change the terms of the tenancy, and that he could not change the terms if it was a tenancy for "a month." In the latter case the landlord could do nothing but give thirty days notice to his tenant to leave, even though both parties were willing that the tenancy should continue. Besides, all the facts in the case show the tenancy to have been one from month to month, and the verdict cures the defect, if any there be. (*Garner v. Marshall*, 9 Cal. 268.)

As to the constitutional objection. In *Caulfield v. Stevens*, the question of jurisdiction is discussed at length, and definitely settled in favor of the full and complete jurisdiction of the County Court in the class of cases of which this is one; and, in the latest forcible entry and detainer case—*Kower v. Gluck*, 33 Cal. 403—a case appealed from the County Court, no point is taken to the jurisdiction of the Court below, nor does the Court even remotely hint at the question being unsettled. If the plaintiff in this case was desirous of obtaining the possession of her property for any

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reason, she would certainly have the right to avail herself of any legal remedy to wrest the possession from a reluctant tenant. Under the sixth section, she duly notified her tenant of the change in the terms of the tenancy, and he remained in possession with the full understanding that he must pay five hundred dollars rent, or leave. No undue advantage was taken of him; he knew the consequences of his action, and no doubt acted upon the advice of his able counsel.

By the Court, SAWYER, C. J.:

This is an action against a tenant holding over, to recover the premises under the Forcible Entry and Detainer Act of 1863. The complaint alleges that plaintiff, on the 20th of June, 1867, "leased, demised, and let to said defendant" the premises in question, "to have and to hold the said premises to said defendant, Charles Mangeot, for the month thence ensuing, at the rent of twenty-five dollars, payable on the twentieth day of the said month of June, in advance. That by virtue of said lease, the said defendant, Charles Mangeot, went into the possession and occupation of the demised premises, and still continues to hold and occupy the same." The complaint then alleges the giving of notice in time, under section six of said Act, that if defendant should hold over after the expiration of the month, the rent would be five hundred dollars per month, in gold coin, a demand and refusal of the rent, and a demand of the possession. The case was tried by a referee; the facts found in favor of plaintiff, and judgment rendered for possession and treble rent, at five hundred dollars per month.

The first point is, that the complaint does not state facts sufficient to constitute a cause of action or to sustain the judgment, in this, that the tenancy alleged is a tenancy for

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a specific time, viz.: one month, and not a tenancy from month to month, and is, therefore, not within the provisions of the sixth section, authorizing a change of the term of the lien by giving notice in the mode therein prescribed. The provisions of the sixth section are as follows: "In all leases of lands or tenements, or any interest therein, *from month to month*, the landlord may, and it shall be lawful for him, upon giving notice in writing at least fifteen days before the expiration of the month, to change the terms of the lease, to take effect at the expiration of said month. Said notice, when served upon the tenant, shall of itself operate and be effectual to create and establish, as a part of the lien, the terms, rent, and conditions specified in said notice, if such tenant shall continue to hold such premises after the expiration of said month."

Without this provision of the statute, of course, the landlord could not change the terms of the lease in the mode prescribed. This mode of changing the terms of the lease, and creating a new contract against the will of the tenant, then depends wholly upon the statute, and the cases in which such changes can be made must be limited to those in which it is expressly authorized. We cannot extend the stringent provisions of the Act to other cases not provided for. Unless a lease for a specified period of time, as one month, is the same identical thing in law as a lease for an indefinite period of time with rent payable monthly, or a lease from month to month, the provisions of section six do not apply to the former. And they are clearly not identical in law. They are different estates, with different incidents, and are designated in law by different technical terms. There is a substantial, not merely a verbal difference. On a lease for a specific time, as one month, the estate terminates by the mere lapse of time, and at the end of the term the lessee must go out. No notice is necessary to terminate the tenancy and entitle the landlord to reënter, or to enable the

landlord to recover in case the tenant refuses to surrender the premises. But in the case of a lease from month to month, the estate does not terminate by the mere lapse of time. Neither party can terminate the relation without giving notice in advance for the time required by law. If a tenant for years holds over with the consent of his landlord, express or implied, paying yearly rent, without any further arrangement as to time, the tenancy may thus be converted into a tenancy from year to year. A tenancy from year to year may be a tenancy for years; that is to say, a tenancy for one year certain, with a right to hold over from year to year thereafter, unless due notice be given; but a tenancy for years, technically so called, is not a tenancy from year to year, and a tenancy from year to year only aims thereon to a further agreement, or by holding over after the term has expired by the consent of the landlord, express or implied.

In this case, the tenancy alleged in the complaint is a tenancy for a specified period of time, to wit: one month. It is technically a tenancy for years and not a tenancy from year to year, or from month to month. And the statute only authorizes a change of the terms of the lease in the mode pursued in the case of a tenancy from month to month. It was not authorized, therefore, in the case alleged in this complaint. The last clause of the section does not aid the plaintiff. It is as follows: "In all leases of lands or tenements, or any interest therein, for a month, or any term less than one year, and the tenant holds over his term by consent of his landlord, the tenancy shall be construed to be a tenancy from month to month, or a tenancy for such term less than a year as the case may be." This clause only enacts in express terms the common law. It simply provides that if the defendant had held over after the expiration of the month for which the premises were demised, with the consent of the landlord, he would from so holding over, there-

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fore, become a tenant from month to month. But in that event the terms of the lease could only be changed by giving the notice in the mode prescribed by the sixth section, for the time commencing after the expiration of the first month of the tenancy from month to month. The notice in this case was given before the holding over commenced, and, therefore, before there was any tenancy from month to month, and it was premature. Besides, the defendant did not hold over with the consent of the landlord. On the contrary, by giving the notice of change of terms before a tenancy from month to month commenced, and following it up by demand of rent, and immediately thereafter of possession, he repudiated the holding over on the original terms, and the claims of the respective parties were adverse, and actually hostile from the very moment of the expiration of the specific terms alleged, and there never was a tenancy from month to month upon the state of the facts alleged in the complaint.

Upon the facts alleged in the complaint, the plaintiff is not entitled to recover five hundred dollars per month rent after the expiration of the term stated. But the complaint states facts sufficient to justify a recovery of the possession of the premises, and consequently states a good cause of action for some relief, although insufficient to justify all the relief asked and obtained.

The evidence upon the question as to whether defendant was in fact a tenant at all of the plaintiff, is very much in conflict, and we think the finding justified. At all events, the case clearly falls within the rule which prohibits us from disturbing the finding of the referee on that issue.

The provision of the statute conferring jurisdiction upon County Courts in actions to recover the possession of premises held over by tenants against the consent of the landlord, are constitutional, for reasons given in *Caulfield v. Stevens*,

28 Cal. 118; see, also, *Courtright v. Bear River Company*, 30 Cal. 573.

Under the views expressed it is unnecessary now to decide the point, whether the provisions of the sixth section of the Forcible Entry and Detainer Act of 1863, providing for changing the terms of the lease by serving notice of such intention on the part of the landlord in the mode therein prescribed, are constitutional or not. For the purpose of this decision we assume them to be constitutional.

The judgment, as we have seen, gives relief to which the plaintiff is not entitled upon the facts alleged in the complaint, and the judgment must be reversed, unless the plaintiff will consent to a modification.

Judgment and order denying a new trial reversed, unless the plaintiff and respondent shall, within fifteen days, file in this court a stipulation, in writing, consenting that the judgment may be modified so as to reduce the judgment for damages to seventy-five dollars; but, upon filing stipulation as herein provided, the judgment will be modified in accordance therewith.

[The foregoing opinion was delivered at the April Term, 1869, at which time Mr. Chief Justice SAWYER and Mr. Justice SANDERSON were members of the Court. A rehearing was granted, and the following opinion was delivered at the October Term, 1871:]

By the Court, WALLACE, J.:

Ordered, that the judgment heretofore rendered in this case, directing a modification of the judgment of the Court below, be and the same is hereby set aside; and it is further ordered that the judgment of the Court below be and the same is hereby reversed, and the cause remanded for a

Points decided.

new trial; the opinion heretofore filed herein to stand as the opinion of the Court, except as much thereof as authorizes a modification of said judgment.

[No. 2,684.]

OLIVER IRWIN v. A. P. TOWNE AND SAMUEL H. TOWNE.

TITLE IN EJECTMENT.—In ejectment, where both parties claim under a common source of title, it is unnecessary for the court to investigate the question of title unless the plaintiff's deed includes the demanded premises.

BETTER TITLE IN EJECTMENT.—Where both parties in ejectment rely on paper title the possession of the defendant cannot be disturbed unless the plaintiff shows a better title.

DEED — DESCRIPTION BY RIGHT ANGLE.—A deed which contains a call describing a boundary as a line commencing one hundred yards below the mouth of a certain creek (naming it) and to run at right angles with the creek, there being nothing on the face of the deed to indicate that the creek does not run in a perfectly straight course, or that a straight line drawn along the thread of the stream would not intersect the beginning point of the contested line, is not void for uncertainty on its face in respect to such line. A perpendicular line drawn from this base would answer the call in the deed.

IDEM — BASE FOR RIGHT ANGLE, HOW ESTABLISHED.—In order to run a line at right angles to a tortuous stream a straight line must first be established as a base. This can be done only by ascertaining and reducing to a straight line either the general course of the stream, from its source to its mouth, or that portion of the stream which shall appear to have been within the contemplation of the parties at the time of the execution of the deed.

CONSTRUCTION OF DEED — LOCATION OF LINE.—A deed from J. to I. contained a call which referred to a creek "running from San Rafael to the Bay of San Francisco." It appeared that the stream above the Village of San Rafael was a running stream but a part of the year, and was not known by the same name as the part below; also, that below the village the stream is navigable a portion of the distance from its mouth. The stream is referred to in another portion of the deed as "the creek running from San Rafael to the Bay of San Francisco;" *held*, that the parties making the deed intended to refer to the portion of the stream below San Rafael only, and that a straight line drawn from the head of the stream to its mouth would establish a base line for a right angle called for in the deed.

Argument for Appellant.

IDEM — DESCRIPTION BY ANGLE AND BY DIRECTION.— I. claimed title under a deed which described a boundary line as "commencing on a line at a point one hundred yards below the mouth of the creek running from San Rafael to the Bay of San Francisco, on the easterly side of said creek; thence running at right angles to said creek to the highest ground on the ridge;" and T. claiming under another deed a line as commencing "at a point about one hundred yards below the mouth of San Rafael Creek, and running thence northwesterly, or at right angles with the said creek, to a point on the top of the main ridge." There being no visible monument called for at the end of the line in T.'s deed to fix its location; *held*, that the term northwesterly," used in his deed, is less definite than the call in I.'s deed to run at right angles.

LINE NAMED IN DEED.— The terms "northwesterly," "northerly," "northeasterly," etc., are only construed as "due north," "due northwesterly," etc., when such construction is necessary to prevent a failure of the deed for want of certainty, and must yield to another more definite description in the deed.

APPEAL from the District Court of the Seventh Judicial District, County of Marin.

The parties owned adjoining tracts of land, and the controversy was as to the location of the boundary line between them.

The plaintiff's deed described the line thus: "Commencing on a line at a point one hundred yards below the mouth of the creek running from San Rafael to the Bay of San Francisco, on the easterly side of said creek; thence running at right angles to said creek to the highest ground on the ridge."

The description in the deed to the defendants was as follows: "Commencing at a point about one hundred yards below the mouth of San Rafael Creek, running thence northwesterly, or at right angles with the said creek, to a point on top of the main ridge."

The other facts are stated in the opinion of the Court.

J. McM. Shafter, for Appellant.

The fact is, the creek is east and west, *i. e.*, its general course, and a right angle is north. The law of this descrip-

Argument for Appellant.

tion is: the natural boundary, a right angle to the general course of the creek, must be preferred. "The rectangular figure will be preferred in preference to any other in fixing localities." (*Massie v. Watt*, 6 Cranch, 148; *Holmes v. Trout*, 7 Pet. 171.) The term "at right angles" to a stream is not unfrequently used in conveyances, and is not regarded as uncertain. It is ordinarily construed to be a right angle to the course of the stream, so far as the same is directly under the eye and observation of the parties. (*Winthrop v. Curtis*, 3 Greenl. R. 103.) The Court state the question to be, whether a certain line is to be ascertained "by measuring at all points at right angles with the general course of the river;" and further say: "Probably meaning according to its direction from the place at which the admeasurement was made." If this word "place" is held to mean the very "point," then Towne would take next to no land at all.

The case cited was decided by taking right angles from every part to get the parallel. Our case requires this angle from the whole creek, that is, from its general course. (*Keith v. Reynolds*, 3 Green. R. 363.) At "right angles" to a crooked brook is spoken of by the Court as being appropriate and operative words in a deed, and no doubt are expressive as to the certainty of such descriptive call. (*Craig v. Hawkins' Heirs*, 1 Bibb. Ky. 53.) "Down stream one mile, and northwardly for quantity;" held, that the mile was a direct line, and that northwardly only fixed the side of the stream where the land lay; and that the side line should be at right angles to the base. And it is said that "the law, the rules of construction, will give figure to the survey without violating the natural import of the expression." Northward is only meant to mean north by necessity. (*Calk v. Stribling*, 1 Bibb. 123.) Same points; and "definite call at right angles not to yield to an indefinite call northwardly." There was a strong effort made to compel "right angles" to yield to "northwardly." Or, in other words,

Argument for Respondents.

"that the expression at right angles must be so taken as to render it consistent with the expression northwardly." But it certainly would be a singular construction to make a definite call yield to one which is indefinite. (*Clarke v. Markham*, 2 A. K. Marshall, 163.) San Rafael Creek had a well-known signification, and was right under the eyes of the parties when the deed was made.

B. S. Brooks, for Respondents.

It is not a fact that the creek is east and west, i. e., its general course, and that a right angle is north. The course of the creek itself is a matter of doubt, dependent upon the construction of the term. It will be different in each of the following cases: 1. Taking the stream at low water; 2. Taking it at ordinary high water; 3. Taking it at Spring tides, or what is the same thing, taking in the salt marsh through which it meanders; 4. Taking the creek from its head to the mouth; 5. Taking the creek from the head of tide water to the mouth; 6, 7. Taking a line from either to the point one hundred yards below the mouth of the creek; 8, 9. Running either of these lines to a point opposite the middle of the mouth of the creek, and the point from which the line is to run; 10, 11, 12. Taking as the creek that part of it only which is in sight from the point from which, etc., and either respectively at low tide, high tide, or Spring tide, and besides all this, it is impossible to run a line at right angles, of a thing it does not touch. There only remained to take the remaining call of the deed, which was to run "northwesterly," which was clear and certain.

There is no general rule that the rectangular figure will be preferred in preference to any other in fixing localities. That rule, and the authorities cited, apply exclusively to locations or State lands, by virtue of special State laws.

Argument for Respondents.

The term "at right angles to a stream" may do very well when the line touches or starts from the stream, and when there is no other call, and the course of the stream is reasonably near a straight line.

There was nothing in this case to show how far the course of the stream was directly under the eye and observation of the parties, nor where they were when they agreed upon the line, or whether they were upon the land at all, or used a map, which is quite as likely. The element which is called in to determine an uncertainty in the deed is itself quite as uncertain.

In *Winthrop v. Curtis*, cited by appellant, no such point was in question, and the only point decided was, "a grant of a tract of land extending the space of fifteen miles on each side of the Kennebeck River," is to be located in such a manner as that a point in the exterior line shall be exactly fifteen miles from the nearest point of the river." That is, instead of drawing lines parallel to the general course of the stream, they draw meandering lines, keeping fifteen miles from the stream.

The case of *Keith v. Reynolds* is to the same effect, and directly against the appellant. If a line parallel to a stream is a crooked line conforming to its meanders, and not a straight line parallel to its general course, it follows that a line at right angles to a stream is not to be drawn at right angles to its general course, but to the stream at the point where it touches.

The cases of *Craig v. Hawkins' Heirs*, *Calk v. Stribling*, and *Clarke v. Markham*, are all decisions in regard to locations made upon State lands by locators under and by virtue of the statute of that State; and even if they touched the point, which they do not, would be no authority.

Manifestly the call for a line at right angles to a crooked stream, which it does not touch, is on its face uncertain, and apparently impossible; while the call "northwest" is

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clear and certain, and *prima facie*, it must govern. If this certain call can be construed at all by parol evidence against the interest of the grantee — which I deny — the solution of it would depend upon the examination of a multitude of facts, of indefinite importance; and as to the truth of the evidence, in support of the facts, and as to the persuasive force of the facts themselves, the jury, or the Judge sitting as a jury, and having the advantage of a “view,” alone could judge.

By the Court, CROCKETT, J.:

The action was tried by the Court, and no written findings were filed. Judgment was entered for the defendants, and the plaintiff appeals from an order denying his motion for a new trial. Both parties claim under a common source of title, the conveyance under which defendants deraign title being prior in time. Each claims that his own deed embraces the premises in controversy, and that the deed of his adversary does not. The defendants being in possession it will be unnecessary to consider their title, unless it appears that the deed to the plaintiff includes the land in contest. He cannot disturb their possession, unless he shows the better title. The first descriptive call in the deed from Jacks and wife to the plaintiff is as follows: “Commencing on a line at a point one hundred yards below the mouth of the creek, running from San Rafael to the Bay of San Francisco, on the easterly side of said creek; thence running at right angles to said creek to the highest ground on the ridge.”

The defendants insist that a line commencing one hundred yards below the mouth of the creek, and to run at right angles with the creek, is incapable of being located with reasonable precision. But there is nothing on the face of the deed to indicate that the creek does not run in a per-

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fectly straight course, or that a straight line drawn along the thread of the stream would not intersect the beginning point of the contested line. In that event a perpendicular line drawn from this base would answer the call in the deed, which is, therefore, not void for uncertainty on its face, in respect to this line. But the proof shows that the creek is exceedingly tortuous throughout its whole course from San Rafael to its mouth, and that, after an abrupt curve towards the north, it enters the bay nearly at a right angle. The tide ebbs and flows in it, and the land on either side is flat and marshy. It further appears that the creek from San Rafael to its mouth is navigable by small craft for a portion of the distance, whilst above San Rafael the stream does not run in the dry season, but during the Winter is supplied by springs rising in the mountains several miles distant. Below San Rafael the general course of the creek is nearly due east and west, whilst above the village the bed of the stream runs in a northwesterly course. The evidence tends to show that at the date of the deeds, under which the parties respectively claim, only that part of the stream which lies below the village was generally called and known as San Rafael Creek, whilst the same term was occasionally, though not generally, applied to that portion of the stream lying above the village.

These being the facts, it is our duty to ascertain, if practicable, what the parties to the deed meant by the phrase, "thence running at right angles to said creek." If we can ascertain the intention, by interpreting the deed in the light of the surrounding circumstances, it is our duty to give effect to it if possible. It is obviously impracticable to run a line at right angles to a tortuous stream, except by first establishing a straight line as a base for the right angle; and this can only be done by ascertaining, and reducing to a straight line, either the general course of the stream from its source to its mouth, or that portion of the stream which

shall appear to have been within the contemplation of the parties at the time of the execution of the deed.

I am satisfied, from all the facts, that when these parties referred to the creek "running from San Rafael to the Bay of San Francisco," they intended only that portion of the stream which lies below the village, and had no reference to the stream above the village, which was not generally known or called by the same name, and which was, in fact, a running stream during only a portion of the year. This inference is strengthened by the fact that the stream is referred to in the deed as "the creek running from San Rafael to the Bay of San Francisco," which tends strongly to show that this portion of the creek only was in the minds of the parties. Assuming this to have been the fact, a straight line drawn from the head of the stream at San Rafael to its mouth would establish the general course of the creek; and this line, if protracted until a line drawn at right angles to it will pass through the beginning point of the survey, would establish the right angle called for in the deed, and determine the location of the first line of the survey. This method of locating a line called for in a deed is not free from objections, and it is not to be commended in practice. In some cases it would be impracticable, owing to the difficulty of ascertaining with precision the sources of the stream, or determining with accuracy its general course. But in this case no such difficulties will arise. The stream is short, running almost due east and west, and its head at San Rafael can be easily ascertained, whilst it empties into the bay through a narrow mouth which can be readily identified.

I am, therefore, of the opinion that the base for the right angle, called for in the deed, can thus be established with reasonable precision. If the first line called for in the plaintiff's deed be located by this method, it will include a portion, and perhaps the whole, of the land in controversy. The plaintiff is, therefore, entitled to recover, unless the

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premises in dispute are included within the deed from the common grantor, under which the defendants claim.

The first descriptive call in that deed commences at the same point called for in the plaintiff's deed, to wit: "At a point about one hundred yards below the mouth of San Rafael Creek, and running thence northwesterly, or at right angles with the said creek, to a point on top of the main ridge." The only variance between this call and that of the plaintiff's deed, consists in the words "*northwesterly or*," which are added to the description in the defendants' deed. But there is no visible monument called for at the end of this line, to fix its location, and the term "*northwesterly*," employed in the deed, is less definite and certain than the call to run at right angles to the creek. It is true, that when the term "*northerly*," "*northwesterly*," "*northeast-erly*," etc., are employed to designate a line, if there be nothing else in the deed to fix its location, these terms will be construed as equivalent to a call to run due north, due northwest, or northeast, as the case may be. But this construction is only resorted to to prevent a failure of the deed for a want of certainty in the location of the lines; and such a call must always yield to visible monuments, or to any other description of a line which locates it with reasonable certainty. As we have already seen, a line running at right angles to a creek can be located with certainty and precision; and if it shall be found that a line running due northwest from the beginning point is variant from a line running at right angles to the general course of the creek, to be ascertained by the method already indicated, the latter must prevail, as the more certain of the two descriptions. I am therefore, of the opinion that a line running from the beginning point, at right angles to the general course of the creek from the Village of San Rafael to its mouth, to be determined in the manner above indicated, will be the proper dividing

Statement of Facts.

line between the lands of plaintiff and those of the defendants.

Order denying a new trial reversed, and cause remanded for further proceedings, in accordance with this opinion.

[No. 2,794.]

JOHN TORMEY, PETER FAGAN, ISAAC LANKERSHIM, AND GEORGE HICKSON v. JOHN PIERCE, M. SAVORY, JOHN THOMPSON, JAMES ELLIS, CYRUS WILSON, AND JOHN WILSON.

IN EJECTMENT BY SEVERAL, RIGHT OF POSSESSION TO BE SHOWN IN ALL.—Where four plaintiffs recovered in ejectment, and it appeared on appeal that no evidence had been offered tending to show any interest or right of possession as to one of them; *held*, that such judgment in favor of all four was not supported by the evidence, and was erroneous.

OBJECTION NOT WAIVED BY FAILURE TO MAKE IT WHEN IT COULD NOT BE MADE.—In ejectment by four plaintiffs, where the defense was that one of them had no right of possession, and the only evidence of title or right of possession offered by the plaintiffs was a patent to the three of them; *held*, that defendant could not interpose his defense, by way of objection to the introduction in evidence of the patent, and that he did not waive the objection by failing to make it at that time.

OBJECTION OF "EQUITABLE DEFENSE NOT FIRST DISPOSED OF" TO BE FIRST MADE BELOW.—An objection by a defendant that his equitable defense was not first disposed of cannot be made for the first time in the appellate Court.

APPEAL from the District Court of the Fifteenth Judicial District, Contra Costa County.

This was an action of ejectment originally commenced in the District Court for the Seventh Judicial District, in and for Solano County, to recover a portion of the Suscol Rancho. It was afterwards dismissed as to the defendants Ellis, Cyrus Wilson, and John Wilson, and judgment was taken by consent against defendants Savory and Thompson. The defendant Pierce, in his answer, besides pleading the general issue

Argument for Appellants.

and plaintiff Hickson's want of interest, referred to and included, by way of cross-complaint, a bill for equitable relief in reference to the same land, which he had previously filed in the Fifteenth District Court for the City and County of San Francisco.

While the case was in this position the Judge of the Seventh District Court caused an order to be entered to the effect that he was disqualified from acting in it, and changing the venue to the Fifteenth District Court for Contra Costa County, where it was tried, and the judgment for plaintiffs against defendants rendered, and motion for new trial denied, as stated in the opinion. Defendants appealed.

M. A. Wheaton, for Appellants.

No connection was made with the title by Hickson; in fact, no evidence at all with regard to him was taken in the case, and the plea of misjoinder of parties plaintiff was well taken by the defendants. (*May v. Slade*, 24 Texas, 208; *Murray v. Webster*, 5 N. H. 391; *Gerry v. Gerry*, 11 Gray, 381; *Rhoads v. Booth*, 14 Iowa, 575; *Vinton v. Welsh*, 9 Pick. 87; *Grozier v. Atwood*, 4 Pick. 234; 1 Chitty's Pl. 66; *Worsley v. Worsley*, Croke, Eliz. 473; *Barrett v. Collins*, 10 Moore, 446; *Ainsworth v. Allen*, Kirby, 145; *Leavitt v. Sherman*, 1 Root, 159; *Jackson v. Richmond*, 4 Johns. 483.)

It is true that, at the trial, plaintiffs made an extraordinary offer to dismiss as to the plaintiff Hickson. What was it they offered to dismiss? Not the suit, certainly, for from that he could not be dismissed without dismissing the entire suit. If he went out of court, the joint title, upon which the suit was based, went out of Court with him. Again, to whom was the offer to dismiss made? Was it to Hickson, to the Court, to the defendants, to some third disinterested party, or to the "man in the moon?" The answer is not material, however, because, notwithstanding the offer, he was not dismissed from the suit nor the suit from him.

The judgment was general against the defendants, and Savory and Thompson particularly object to this as a second judgment against them. And, again, no regard was paid to Pierce's equitable defense. It should have been disposed of before the trial upon the plaintiff's title was had. (*Arguello v. Edinger*, 10 Cal. 160; *Weber v. Marshall*, 19 Cal. 457.)

Wm. S. Wells, for Respondents.

There is no appeal on the part of any other defendant than Pierce, judgment against the others being taken by consent, and their attorney not joining in the appeal.

The record sustains the judgment against Pierce, even without evidence, for the matters set up in the cross-bill, admitted by default, establish as against him adverse possession and ouster, as well as no cause of action or equitable relief. (*Frisbie v. Whitney*, 9 Wallace, 187; *Hutton v. Frisbie*, 37 Cal. 475.)

Defendant having taken no objection to any failure of proof as to Hickson, and not having availed himself of the offer on our part, equivalent to a judgment in his favor had he chosen to have taken it, is not entitled to raise the question on appeal. (*Marshall v. Ferguson*, 23 Cal. 65; *Boyce v. Cal. Stage Co.*, 25 Cal. 473; *Larco v. Casaneuava*, 30 Cal. 560; *Paige v. O'Neal*, 12 Cal. 483; *Mott v. Smith*, 16 Cal. 533.)

By the Court, SPRAGUE, J.:

Tormey, Fagan, Lankershim, and Hickson sue Pierce and others in ejectment. Defendant Pierce answers, denying each and every allegation of the complaint, and further specially alleges a misjoinder of parties plaintiff; that plaintiffs Tormey, Fagan, and Lankershim have no joint interest in the premises sued for with plaintiff Hickson. On the trial, plaintiffs, to maintain the issues upon their part, introduced

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and read in evidence a patent from the United States to Tormey, Fagan, and Lankershim, and oral evidence tending to show that the demanded premises were included within the boundaries of the patent, and that defendant Pierce was in possession of the demanded premises when the suit was commenced. No evidence was offered or given tending to show that plaintiff Hickson ever had any interest in the demanded premises, or right of possession thereof, either jointly with the other plaintiffs or otherwise. Judgment was rendered in favor of all the plaintiffs against defendants Pierce, Savory, and Thompson. Defendant Pierce moved for a new trial upon the ground, among others, of the insufficiency of the evidence to justify the decision and judgment, and specifies, in support of this ground, that the evidence failed to show any title or right of possession in plaintiff Hickson. The Court denied the motion for new trial, and defendant Pierce appeals from the judgment and from the order denying his motion for a new trial.

The judgment in favor of all the plaintiffs is not supported by the evidence, and is erroneous.

The point made by respondents that defendant Pierce, having failed to interpose objections to the patent at the time it was offered as evidence, on the ground that it did not tend to establish title or right of possession in all of the plaintiffs, thereby waived all objection to the judgment, on the ground that no evidence was offered or given tending to show any title or right of possession in one of the plaintiffs, is not well taken. Such objection to the patent as evidence, if taken by defendant, would have been invalid. The patent was pertinent and proper evidence to establish the title and right of possession of the three plaintiffs to whom it was issued, and defendant could not presume that this was the only evidence plaintiffs would introduce or offer tending to establish title or right of possession in each of the plaintiffs.

Appellant's objection that his equitable defense was not

Points decided.

first disposed of seems to be first made in this Court, and comes too late. The record does not disclose the action of the Court below upon defendant's equitable defense, whatever it may have been, nor any objections to such action by defendant.

Judgment and order, so far as the same denies a new trial to defendant Pierce, reversed, and cause remanded for a new trial as to him.

Neither Mr. Justice CROCKETT nor Mr. Justice TEMPLE participated in the foregoing decision.

[No. 2,495.]

JOSEPH K. CORREA v. GEORGE FRIETAS, F. P.
VARGAS, A. G. ROSE, M. R. HOME, AND A. D.
COSTA.

MINING LAW.—EXTENSION OF FLUME ON ONE'S OWN CLAIM NOT A NUISANCE.—Where defendants owned and possessed a hydraulic claim on Dutch Ravine, into which their flume emptied, and plaintiff, being the owner of a claim below, dug a ditch, commencing on defendants' claim but below their flume, for the purpose of appropriating the water discharged therefrom, and thereupon defendants extended their flume further down on their own claim but so as to prevent such appropriation by plaintiff: *held*, that defendants had a right to such extension, though there might be a question, as to whether it served any useful purpose or not, and that it could not be abated by plaintiff as a nuisance.

EXTENT OF RIGHT OF POSSESSOR OF MINING CLAIM.—The owner and possessor of a mining claim on public land has a right to prevent any subsequent comer from erecting or constructing any superstructure, cut, or ditch on his claim, unless the right to construct the same is given by some mining custom or regulation.

CHARACTER OF POSSESSION OF MINING CLAIMS.—The character of the possession necessary to work mining claims will vary with the nature of the mines, the mode adopted in working them, and, perhaps, with the character of the country.

PRESUMPTION AS TO USE OF ENTIRE MINING CLAIM.—If parties are allowed by mining regulations to include within their claim land outside of that which they expect to work, it will be presumed, in the absence

Argument for Appellants.

of proof to the contrary, that it is for the convenience of working the claims, and that its possession is necessary.

RIGHT OF OWNER TO EVERY PORTION OF MINING CLAIM.—Evidence that a portion of a mining claim is not valuable for mining purposes is not admissible, on general principles, to prove that the owner of the claim has no right to hold such portion.

APPEAL from the District Court of the Fourteenth Judicial District, Placer County.

The plaintiff, in his complaint, claimed that the extension of the flume, referred to in the opinion, and which was near the Town of Newcastle, in Placer County, was constructed to annoy and injure him, and prayed that it might be abated as a nuisance and for damages. Defendants set up their ownership of the claim upon which their flume was extended, and plaintiff's unlawful interference therewith; denied that the extension was a nuisance, and averred that it was a proper and necessary means of working their claim. The cause was tried before a jury, which returned a verdict in favor of plaintiff for one hundred dollars damages. Judgment was entered for such damages, declaring the extension of the flume to be a nuisance, and directing it to be abated and removed by the Sheriff. Defendants appealed.

T. B. McFarland and E. I. Craig, for Appellants.

The possessor of public land, being the owner as against all the world, except the General Government, is, as such owner, entitled to the undisturbed enjoyment of it, no matter how valueless it may be; and he alone has the right to determine how he can most profitably use it. (*Doran v. Central P. R. R. Co.*, 24 Cal. 257; *Tartar v. Spring Creek Co.*, 5 Cal. 397; *Merced Mining Co. v. Fremont*, 7 Cal. 320; *McKeon v. Bisbee*, 9 Cal. 141; *Merritt v. Judd*, 14 Cal. 64; *Hughes v. Devlin*, 23 Cal. 505.)

Possession of public land for mining purposes and as mining claims, is as perfect and gives as many rights as the

Argument for Respondent.

possession of land for agricultural or any other purpose. (*English v. Johnson*, 17 Cal. 107; *Atwood v. Fricot*, 17 Cal. 37; *Esmond v. Chew*, 15 Cal. 142.)

There was error in refusing defendants' instruction and in the charge given by the Court below, because said refusal and charge went upon the erroneous theory that although defendants were the owners and in the possession of the land, still the plaintiff might enter upon it, construct a ditch upon it, divert the water away from it, and compel defendants to take down their flume which they had erected upon their own land, if, in the opinion of the jury, defendants were not injured thereby. Such a doctrine is in direct conflict with the authorities, and destructive of the very idea of private property.

Again, the Court below decided that the flume of defendants, erected on their own land, was a nuisance, not because it injuriously affected the land of anybody else, but because it prevented plaintiff from coming upon defendant's land and using it as his own. This is a new definition of a nuisance.

Fellows & Norton, for Respondent.

The question involved in this case — and it is a very important one — is simply whether a person who at one time located a mining claim, and afterwards worked it out, has the right for all time to come, as against everybody except the Government, to prevent the ground so located for mining purposes to be used for other purposes by other parties, not in any way interfering with the proper working of the mining claim.

The doctrine invoked by appellant in reference to the rights of the owner of land to its undisturbed enjoyment, no matter how valueless it may be, may be very good in its place, but it has no application to this case, for the defendants do not claim to own the land. The instructions refused by the Court, as well as those given, all proceed upon the

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These rulings and instructions are assigned as error, upon an appeal from the judgment on the part of defendants.

Ordinarily, when one takes possession of land he is presumed to appropriate it for all purposes. Thus, when one takes possession of a tract for farming purposes, and incloses it, it would not be competent for another to show his right to dig for coal upon it by proving that he does not interfere with the possession necessary for farming purposes on the part of the farmer. Very frequently, however, possession is taken of land for purposes purely temporary, and under circumstances which do not indicate a claim of ownership. Of such a character, doubtless, is the claim of the locator of a mining claim. The possession itself is generally constructive as to a large portion of the mining ground, and is established by the rules and regulations of the district, or by the custom of miners.

The character of the possession necessary to work mining claims will vary with the nature of the mines, the mode adopted in working them, and, perhaps, with the character of the country. Mining claims are limited in extent; and it must be presumed that it was not intended that the first locator should prevent the working of contiguous claims further than is necessary. At the same time he ought not to be controlled in the mode he may wish to adopt in working his claim further than is necessary for the common good. The rights which the owner of one claim will require with reference to other claims differ with the locality and the character of the claims, and are usually regulated by mining rules or local mining customs. Some mining customs of a general nature, which have been repeatedly recognized by judicial decisions, may be said to have become a part of the common law of the land; but I know of no such general custom, upon the point involved in this case.

Upon general principles the fact that the possession of the defendants was a qualified possession, taken for a specific

purpose, would not justify the intrusion of the plaintiff. The flume was extended for the avowed reason that it was necessary to enable the defendants to work their claims to advantage. In the absence of some custom which would restrict their right of possession, they ought not to be deprived of that right, because another may be able to convince a jury that such extension is really not beneficial to the working of their mine. If this could be done, another might deprive them of a portion which was still left, and they would not be able to work their claim according to their own judgment, but might be compelled to vary their operations to suit the whims of witnesses and jurors.

The evidence that the ground was not valuable for mining purposes could not be admissible, on general principles, to prove that defendants had no right to hold it. If the title to mining ground could be defeated by such evidence, no claim which was not paying could be considered secure. If parties are allowed by the mining regulations to include within their claims land outside of that which they expect to work, we must suppose, in the absence of proof to the contrary, that it is for the convenience of working the claims, and that its possession is necessary. The evidence was, therefore, improperly admitted, and the instructions given were erroneous.

Judgment reversed, and cause remanded for a new trial.

CROCKETT, J., dissenting:

I dissent.

Points decided.

[No. 1,648.]

LOUIS BRUCK AND ISADORA B., HIS WIFE, v. REASON P. TUCKER ET AL.

TITLE AS DEFENSE, AFTER GENERAL ISSUE PLEADED.—Where, in an action of ejectment, the defendant pleads the general issue and then sets up title in himself, the plea of title amounts to nothing whatever, and may be omitted.

IMPROPER DEFENSE IN EJECTMENT.—B. sued T. in ejectment, claiming title under a devise of Bale; T. plead the general issue and interposed another defense setting out an alleged agreement by Bale, before his death, to convey the premises (as soon as a Government survey could be obtained to survey the land) to K., the grantor of T., provided K. would bind himself to reserve certain timber for Bale, not to keep wild cattle on the place, and to do all the work he could at Bale's sawmill at current wages. *Held*, first, that as a defense at law the pleading is not to be supported; second, that as a defense in equity it was insufficient, because it failed to show by direct and proper averment that the consideration Bale was to receive was adequate in amount, and not disproportionate to the value of the lands to be conveyed.

EQUITABLE DEFENSE IN AN ACTION AT LAW.—In setting up an equitable defense in an action at law the defendant becomes an actor and the defense interposed a pleading in equity, the sufficiency of which—in matters of substance, though not in point of mere form—is to be determined by the application of the rules of pleading observed in Courts of equity, when relief is sought there in cases of like character.

SUIT FOR SPECIFIC PERFORMANCE OF AGREEMENT TO CONVEY LANDS.—In a suit for a specific performance of an agreement to convey lands, the agreement must be one which in all its features appeals to the judicial discretion as being fit to be enforced in specie, as having been obtained without any intermixture of unfairness.

CONSTRUCTION OF WILL A QUESTION OF LAW FOR THE COURT.—The construction of a devise, like that of a contract in writing, is always a matter of law, and is therefore never to be submitted to a jury.

DEVISE IN WILL CONSTRUED.—Where a deviser, having but one flour mill, made a devise in these words: "To my daughter, Lolita, the flour mill with the land appertaining thereto—a half league more or less:" *held*, that the language was sufficiently accurate in expression and certain in its application to the subject of the devise.

APPEAL from the District Court of the Seventh Judicial District, Napa County.

Statement of Facts.

Dr. E. T. Bale, who was a grantee from the Mexican Government of a rancho in Napa Valley, called Carne Humana, or Coljolwanoc, died in 1849, leaving a will in which there is this clause:

"Para mi hija Lolita [Isidora]. El molino de harina y todo el terreno, etc., que pertenece a dicho molino, media legua, mas o menos."

[To my daughter Lolita. The flour mill and all the land, etc., which pertains to said mill, a half league, more or less.]

The rancho contained four leagues of land, and stretched about fifteen miles up Napa Valley, the Napa River running through its whole length. At the upper end of the rancho was a tract sold to Fowler; next below that was a tract sold to Kilburn, bounded on its lower side by a creek; then came the tract of land in controversy; and below that a tract sold to Kellogg, bounded on the north by a creek. Below Kellogg was another tract, in which stood a sawmill, and this tract was given by the will to another daughter, Mrs. Krug. Below that was land sold to Hudson.

The two small tracts were bounded similarly, that is, by the exterior boundaries of the rancho, on two sides, and above and below by land which had been sold to other parties.

The whole tract upon which the flour mill stood, bounded on each side by the lateral limits of the rancho, and north by Kilburn and south by Kellogg, contained eleven hundred and sixty-nine acres, while a half league contains twenty-two hundred; that is, the entire tract does not contain the quantity which is called for by the will.

A portion of this tract, about two thirds of the land on the west side of the river, was at the date of the will and up to the time of his death, in controversy between Bale and Kilburn, on one side, and one Barnett on the other; and

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the defendant Stark was on the part on the east side of the river.

On a former trial the case was submitted to a jury, who were in effect charged that if they were in doubt as to the intent they should find for the defendants, which they did. On appeal, the judgment was reversed by the Supreme Court, and the cause remanded for a new trial. (See 32 Cal. 424.) At the new trial the plaintiff had judgment, and the defendants appeal.

The other facts are stated in the opinion.

Hartson & Burnell and *Thomas P. Stoney*, for Appellants, argued that it was the intention of the testator to convey only the tract on the west side of the river, below the Barnett line, containing about two hundred acres; and that the question was one of fact — of boundaries — to be determined by the jury.

B. S. Brooks and *W. W. Pendegast*, for Respondents, argued that the testator intended, and that it is the true construction of the will, to convey the whole tract; also, that the question involved is one of law, of construction simply, to be determined by the Court.

By the Court, WALLACE, J.:

The controversy in this case grows out of a devise contained in the will of Dr. Bale, made and published in 1849, in the following words: "To my daughter, Lolita, the flour mill, with the land pertaining thereto — a half league, more or less."

The complaint, not verified, is in the form usual in actions for the recovery of lands. The defendants pleaded the general issue, and, also, as a second defense, set up title in themselves — which second defense, it may be here remarked, in view of the general issue already pleaded,

amounted to nothing (*Marshall v. Shafter*, 32 Cal. 176), and might, therefore, as well have been omitted.

The cause was before this Court upon a former appeal some four years since (32 Cal. 424), when the judgment the defendants had then obtained below was reversed here, and the cause remanded for a new trial. Upon its return to the Court below, the defendants added to their answer a third defense, as follows:

“ And for another and further answer, defendants allege that the premises described in the complaint are a portion of the Bale Rancho, formerly granted by the Mexican Government to Edward T. Bale, the father of Isadora B. Bruck (one of the plaintiffs), and under whom the plaintiffs claim title thereto; that on the 15th day of March, 1847, and while the said Bale was seized in fee, and possessed of the premises, he, the said Bale, and one R. L. Kilburn, entered into an agreement with one E. Barnett, for a valuable consideration by them received from said Barnett, for the conveyance to said Barnett of the premises in possession of the parties defendant in this suit, and also an adjoining tract of land then owned and possessed by the said R. L. Kilburn; which said agreement was in writing, in the words and figures following, to wit: ‘ Know all men by these presents, that we, Edward T. Bale and R. L. Kilburn, of Napa, California, are held and firmly bound unto E. Barnett, of the same, for the following, to wit: We oblige and bind ourselves, our heirs and assigns, for value received, to make and deliver to the said Barnett a good quitclaim deed for a certain tract or parcel of land, on which he now resides, as more particularly specified by the metes and bounds as admitted by us before John Conn and Peter Storm, as soon as Government surveyors can be obtained to survey said land, provided the said Barnett shall bind himself to conform to the following agreement: that all the timber, ex-

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cept fencing timber, and such other as shall be required for improvement on said land, be reserved for us; and that no wild mares or other wild cattle be kept on the place, or in the vicinity, by said Barnett or his assigns. The said Barnett, moreover, binds himself to do all the work he can at the sawmill at current wages. Given under our hands and seals this 15th day of March, 1847. (Signed) EDWARD T. BALE, R. L. KILBURN.' ”

“ That the said Barnett thence continued in possession of the premises described in the complaint, now in the possession of the defendants in this suit, until some time after the death of said E. T. Bale, and that the said Barnett duly performed all the covenants and conditions in said instrument provided to be performed by him, and became and was entitled to a conveyance of the tract so agreed to be conveyed, embracing the lands now in possession of defendants, before the death of said Bale; that said Barnett subsequently thereto, and before the commencement of this suit, conveyed to the grantor of the defendant, Reason P. Tucker, all his right, title, and interest in and to said instrument, as well as in and to the premises described therein, including the premises now in the defendant John S. Stark, as aforesaid. And defendants allege that the said Reason P. Tucker thereafter, for a valuable consideration, acquired title to the same, and as successor in interest of said Barnett, is entitled to the premises against the said Bale, or any person claiming the same under him. That the plaintiffs claim title to the premises under the will of said Bale, the father of the plaintiff, Isadora B. Bruck; and defendants allege that at the time of the making of said will the said Barnett was in possession of the premises, lawfully holding the same under the said instrument herein set forth, and that the said Bale was not seized of any estate in the premises which he could devise to his said daughter.”

The answer concluded with a prayer that the defendants

might have separate trials and recover several judgments for costs. To this third defense a demurrer, interposed by the plaintiffs was sustained.

Before passing to the consideration of other points in the case, we will dispose of the one arising upon the action of the Court below had upon the demurrer to the third defense, and in so doing will consider that defense in two aspects: First, as a defense at law; second, as an equitable defense interposed in an action at law.

As a pure defense at law it cannot be supported upon any rule of pleading known to us. As merely challenging the alleged title of the plaintiffs, it, in view of the general issue already pleaded, amounted to nothing; not only alone for the reasons before assigned in reference to the second defense, but for others. It was a flagrant infringement of the fundamental rule that the facts are to be carefully distinguished, in pleading, from the mere evidence of the facts (*Green v. Palmer*, 15 Cal. 411); it was, therefore, to be demurred to, or even stricken out on mere motion. (*Patterson v. The Keystone Mining Company*, 30 Cal. 360.) It was probably interposed in this form because of the views of this Court expressed on the former appeal (in response to a petition for a rehearing), in the following language: "In the opinion delivered in this action we do not hold that any part of the mill tract passed to the devisee which the deviser conveyed, or *contracted to convey*, in his lifetime. The will, of course, operated only upon so much of the mill tract as legally and *equitably* belonged to Dr. Bale at the time of his death." The proposition of law maintained in this view was, that if it should be established on the new trial that Dr. Bale had parted with the equitable title to any portion of the lands which might otherwise be held to be included in the mill tract mentioned in the devise, then, as to such portion, the title of the plaintiffs claimed under the devise would be thereby, to that extent, defeated. The mere equity,

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if shown to be out of the testator, whether vested in the defendants themselves, or outstanding in a stranger to the action, would, under the views then expressed, here defeat the otherwise sufficient title of the plaintiffs under the devise, with like effect as if it had been shown that the testator had conveyed the legal title in his lifetime. The result was, that under the general issue pleaded, the defendants were already at liberty to prove that Dr. Bale had parted with the *equitable* title to the lands in controversy, or some part thereof, whether in favor of the defendants or of a stranger to the action, made no sort of difference, and there was, therefore, no excuse for the interposition of the third defense in that aspect.

Second — If we look upon that defense as the allegation by the defendants of an *equity upon their* part to be relieved against what must, in this aspect of the case, be regarded as the legal title of the plaintiffs, it is, obviously, lacking in numerous matters of substance indispensable to the sufficiency of such a pleading. Of these, however, we will select but one — that it fails to show by direct and proper averment that the consideration which Bale and Kilburn were to receive was adequate in amount, and not disproportioned to the value of the lands they were to convey.

Since the enunciation of the views of this Court in relation to the setting up of an equitable defense in an action at law in the cases of *Estrada v. Murphy*, 19 Cal. 272, *Lestrade v. Barth*, 19 Cal. 660, *Blum v. Robertson*, 24 Cal. 127, *Downer v. Smith*, 24 Cal. 114, etc., it must be considered as settled, that in interposing such a defense the defendant becomes *actor*, and the defense interposed a pleading in equity, the sufficiency of which — in matters of substance, though not in point of mere form — is to be determined by the application of the rules of pleading observed in Courts of equity when relief is sought there in cases of a like character. Though, as we have seen, the equitable defense, as here in-

terposed, does not in form conclude with a prayer for affirmative relief touching the matters therein alleged, nor look to a decree, that the plaintiffs convey the legal title to the defendants, it nevertheless seeks to estop the plaintiffs by reason of the supposed equities of the defendants, as the beneficiaries of the Barnett bond therein set forth, from the further prosecution of their action at law, and so, in scope and substantial effect, it amounts to an application made to the Court, in the exercise of its equity powers, for a decree of specific performance of the executory contract to convey the lands mentioned in the bond.

It is well settled that an application made to a Court of equity to obtain relief of that character does not proceed *ex debito justitiæ*, as an action at law brought for the recovery of damages upon breach of such an agreement, but is addressed to the sound discretion of the Court, to be determined upon all the circumstances appearing. That the contract concerning which relief is sought is one sufficient in point of mere legal obligation — that it is supported by a *valuable* consideration paid, or agreed to be paid — that it is free from fraud or from such a degree of imposition or surprise upon the defendant as would support an application upon his part to set it aside entirely — these, and the like circumstances, though ordinarily indispensable, are yet far from sufficient, in themselves, as constituting a case invoking the relief — extraordinary in its character — sometimes administered by the Courts through the instrumentality of a decree for specific performance. The agreement alleged must be one which in all its features appeals to the judicial discretion as being fit to be enforced *in specie* — as having been obtained without any intermixture of unfairness. Hence, if it appear that the bargain, though obligatory in point of mere law, and one not to be set aside in equity, is, nevertheless, a

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hard bargain, the Court will not relieve. Of such a bargain Lord HARDWICKE said: "The constant rule of the Court is not to carry it into execution." (1 Atk. 134.) The same view was asserted by the Chancellor in *Seymour v. Delancey*, 6 Johns. Ch. R. 222, where the value, which the complainant was to pay, was, by the estimate of the Court, a little less than one-half that of the estate bargained for, and where the Chancellor, in dismissing the bill, said: "A Court of equity must be satisfied that the claim for a deed is fair and just and reasonable, and the contract equal in all its parts, and founded upon an adequate consideration, before it will interpose this extraordinary assistance."

The Court is to be *satisfied* that the contract is founded upon not merely a *valuable* but an *adequate* consideration. But how are we to be so satisfied here, where there is an absence of all averment upon that point? How are we to indulge the surmise that the defendant's case in this, or any respect, is better than they themselves have alleged it to be? "It is incumbent on every party who brings his case before a Court to state it with reasonable certainty * * * and this is peculiarly necessary upon a bill for a specific performance." (3 Rand. 228.)

The defense pleaded is to be construed *contra proferentem*. This is the general rule by which pleadings are construed in all cases. It is certain, however, that irrespective of this rule of construction, the defense, as it is pleaded here, wholly omits to aver the value of the lands bargained for, and the sum or value of the consideration therefor. There is nothing whatever disclosed by the defense, as pleaded, which would even *afford a basis for a comparison* of values or amounts. We leave out of view, of course, the recital contained in the bond, that it was for "*value received*," and the averment contained in the defense, that the agreement was made for "*a valuable consideration*" — they obviously

amount to nothing in aid of the pleading upon the point considered.

A trial being had upon the return of the cause to the Court below, after its disposition here on the former appeal, the plaintiffs recovered judgment, and from that judgment and an order denying their motion for a new trial the defendants bring the present appeal, and assign some eight supposed errors committed by the Court below, principally in the giving of some and the refusing of other instructions asked.

As we think, however, that the Court might have properly instructed the jury to find a verdict for the plaintiffs, it will not be necessary to inquire to what extent the verdict, as rendered, can be supposed to have been influenced by giving, or refusing to give, particular instructions asked.

The title of the plaintiffs is derived wholly through the devise already recited, and the controversy—the *questio ex qua*—turns wholly upon the interpretation which that devise is to receive—the construction which the Court ought to place upon it, in order to arrive at a correct solution of its meaning, and thus reach the *intention* of the testator, not his intention (if he could, indeed, be supposed to have one), *dehors* the instrument itself, but his intention *as embodied in*, and, therefore, to be *deduced from* the language he has employed in disposing of his property.

The construction of a devise, like that of a *contract in writing*, is always a matter of *law*, and is, therefore, never to be submitted to a jury. This is true, whether such construction is to be reached *ex visceribus* merely, or after proof of the circumstances surrounding the execution of the instrument to be construed—for these latter are but aids and facilities to be availed of in searching for the true sense in which the language has been used, and by the light of which the Court may hope to discover the meaning in-

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tended, notwithstanding the obscurity of the expression in which it is couched.

The controversy is as to the subject of the devise — “*the land pertaining*” to the flour mill — “*a half league more or less.*” On the former appeal a construction was given to the devise, which, we think, virtually decided the cause in favor of the plaintiffs. The language which the testator used is not only accurate in expression, but is certain in its application to the subject of the devise. The subject of the devise is the *flour mill*, with “all the land pertaining thereto, a half league, more or less.” If there had been two flour mills, each with land pertaining thereto, and of such an area as might be fairly designated as “*a half league, more or less,*” then it might have been argued that there being *two distinct subjects found*, to each of which the *entire* description could be applied with an *equal* degree of accuracy, it would have resulted that the devise was ambiguous in the latent sense. But no such proposition can be asserted here, for no question is or could be made as to the flour mill referred to. The testator had but one. This being ascertained, we are next to seek for “*the land which pertains to said mill.*” This is land which bears some sort of relation to the mill. This relation may arise by reason of an inclosure separating a smaller tract upon which the mill is built from the general tract, or from the circumstance that a portion of the general tract, though uninclosed, has been in some way particularly devoted to the business or purposes of the mill; but it does not appear that there was any such inclosure, nor that any part of the general tract was especially used in connection with the mill. It is evident, therefore, under the circumstances appearing, that the testator used the word “*pertains*” (*per-tenece*) in the sense of surrounding and *lying adjacent to* the mill building. There can be but little doubt that the devise, even if considered in the light of these circumstances

alone, would, by construction of law, extend to and include the outer limits of the general tract upon which the mill building stood; for, otherwise, we must either undertake to bound the land devised by the very walls of the mill itself or to fix its limits at some ascertained line intermediate the walls of the mill building and the exterior lines of the general tract; and this, in the absence of any fact or circumstance indicating the existence of such intermediate boundary. But, however this may be, there can be no hesitation, in view of the expression of *quantity* contained in the devise — “*a half league, more or less*” — in arriving at the conclusion that the tract intended to be devised was in extent approximating two thousand two hundred acres. It is evident that the testator himself estimated it as of about that quantity; and though the entire tract lying between Kilburn and Kellogg, and the lateral boundaries of the ranch, will fall short of that quantity by some eight hundred acres, it is to be remembered that the lateral lines of the ranch have been since located by the United States authorities, and that they may have excluded some lands which Dr. Bale supposed to be embraced within the land grant he had obtained. At all events, there is nothing appearing which would satisfy us that the testator was laboring under a delusion of such an extraordinary character as to mistake a tract of only one hundred and ninety-six acres for one of two thousand two hundred acres, or that he estimated the small tract lying west of the river and south of the Barnett line at more than ten times its actual area.

The Court below should, therefore, have construed the devise in the light of the circumstances thus appearing, as including the tract north of the Barnett line — so called — and east of the Napa River, to the eastern line of the ranch; and the necessary result of that construction must have been a verdict and judgment for the plaintiffs.

Statement of Facts.

The judgment and order denying new trial must, therefore, be affirmed; and it is so ordered.

CROCKETT, J., dissenting:

I dissent.

[No. 2,707.]

EMELINE WOODS v. GEORGE E. WHITNEY AND
AMOS WOODS.

BARGAIN AND SALE DEED TO MARRIED WOMAN MAY BE SHOWN TO BE GIFT.—If a husband, who is free from debt, purchase property with community funds and direct the conveyance to be made to his wife, with intent to make it her separate estate, the deed will take effect as a gift; and if the conveyance be on its face an ordinary deed of grant, bargain, and sale, reciting a valuable consideration, it is competent to show by parol the real facts, in order to rebut the presumption that it is common property.

FINDINGS — CONFLICT OF EVIDENCE.—A finding will not be disturbed as not justified by the evidence, if there be a substantial conflict in the evidence.

GIFT FROM HUSBAND TO WIFE — EVIDENCE OF INTENTION.—Where the point in issue in a case was whether a deed, directed by a husband to be made to his wife, inured as a gift to her or not: *Held*, that it was for the Court to decide upon the husband's intentions from his acts and conduct at the time; and that a question to him, as to what his intentions had been, was properly excluded as immaterial.

APPEAL from the District Court of the Fifteenth Judicial District, City and County of San Francisco.

This was an action to set aside a deed made by the defendant Woods, the husband of the plaintiff, to the defendant Whitney. The property mentioned is a lot of ground, with improvements, in San Francisco. It was purchased for nine hundred dollars of one L. W. Fisher, in June, 1853, and at the instance of the husband the deed was made directly to the plaintiff. It was in terms a bargain and sale deed, reciting the consideration paid.

The Court found that the money so paid was community

Argument for Appellant.

property, but that the husband gave the property so purchased to his wife, and directed the conveyance to be made so as to consummate and perfect the gift and vest the title in her as her sole and separate estate. It further appeared that the husband, in January, 1867, made the deed complained of to the defendant Whitney, but the Court found that Whitney had full notice and knowledge of all the facts.

In the course of the trial, which was before the Court, the defendant Woods being under examination, counsel for defendants propounded to him the following question: "At the time of the execution and delivery of the deed from Fisher to Mrs. Woods, was it or not your intention by that deed to vest the title of that property in her as a gift in fee?" Counsel for plaintiff objected to the question on the grounds of immateriality, irrelevancy, and incompetency. The objection was sustained on the ground that it was for the Court to judge from the facts and not from the statement of the witness what he intended. Defendants excepted. Counsel for defendants then asked: "Did you in fact, at that time or any subsequent time, give that property to Mrs. Woods?" Objected to on the same grounds as above. Objection sustained on the ground that it was a question of law. Defendants excepted.

There having been a judgment for plaintiff, and a motion for new trial overruled, defendant Whitney appealed.

George E. Whitney, for Appellant.

Parol testimony will be admitted to vary the legal effect of a deed to a married woman only in cases which arise between the parties to such deeds, their privies in blood, and purchasers without value or with notice, and the only inquiries devolving upon a person dealing with the husband in relation to property *prima facie* belonging to the community, are as to the coverture, and whether the purchase money was community property, or the separate property

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of the wife. (See *Ramsdell v. Fuller*, 28 Cal. 37; *Peck v. Brummagim*, 31 Cal. 441; *Ingersoll v. Truebody*, 40 Cal. 603; *Cook v. Bremond*, 27 Tex. 457; *Pixley v. Huggins*, 15 Cal. 131; *Meyer v. Kinzer*, 12 Cal. 254; *McDonald v. Badger*, 23 Cal. 398; *Smith v. Smith*, 12 Cal. 216; *Kohner v. Ashenauer*, 17 Cal. 580.)

There is no solid distinction between admitting parol testimony to vary the legal effect of a deed for property standing in the name of one spouse, which does not equally apply to the other. While, on the one hand, there can be no hardship in requiring a husband who would make a gift to his wife to evidence that intention to the world by his solemn deed, on the other hand, the adoption of such a rule would go far to close that door to fraud and perjury, which the Court pointed out in *Meyer v. Kinzer*, 12 Cal. 254. (See, also, *Higgins v. Johnson's Heirs*, 20 Tex. 389; *Peck v. Brummagim*, 31 Cal. 441.)

H. E. Highton, for Respondent.

It was early and repeatedly held in this State that a grant, bargain, and sale deed made to the wife during coverture raised the presumption that the property was common, and might be conveyed by the husband alone. (*Meyer v. Kinzer*, 12 Cal. 253; *Pixley v. Huggins*, 15 Cal. 131; *Hart v. Robinson*, 21 Cal. 348; *Tustin v. Faught*, 23 Cal. 241; *Landers v. Bolton*, 26 Cal. 420.) In none of these cases, except the last, was anything said as to the inconclusiveness of the presumption; and, in one case, Mr. Justice FIELD intimated a doubt whether a husband could make to his wife a gift of common property. (*Kohner v. Ashenauer*, 17 Cal. 582.) But it was subsequently decided, after full argument and mature deliberation, that the presumption was only *prima facie*, and might be overcome by proof that the property was in fact purchased with the separate funds of the wife. (*Ramsdell v. Fuller*, 28 Cal. 42, 43.) And ultimately, carrying the

doctrine of this case to its logical conclusion, this Court determined that the consideration of a deed was always a proper object of judicial investigation; that a husband might give common property to his wife; and that, where he purchased real estate and directed it to be conveyed to his wife as a gift, although the form of conveyance were that of grant, bargain, and sale, the title passed, and the property became separate. (*Peck v. Brummagin*, 31 Cal. 441; *Dow v. Gould & Curry S. M. Co.*, 31 Cal. 653.) The last cases cited have been affirmed by the present Bench. (*Ingersoll et als. v. Truebody*, 40 Cal. 603.)

By the Court, CROCKETT, J.:

It is impossible to distinguish this case, in principle, from *Peck v. Brummagin*, 31 Cal. 441, since reaffirmed in *Dow v. Gould & Curry S. M. Co.*, id. 653, and *Ingersoll v. Truebody*, 40 Cal. 603. In *Peck v. Brummagin* it was distinctly decided, after full argument, that it is competent for a husband, who is free from debt, to convey the common property, by way of gift, to his wife; and that if he purchase property which is paid for out of the funds of the community, and direct the conveyance to be made to the wife, with the intent that the property shall thereby become the separate estate of the wife, the deed will take effect as a gift, and vest a separate estate in the wife. And further, that if the conveyance be on its face an ordinary deed of grant, bargain, and sale, reciting a valuable consideration, it is competent to show by parol the real facts of the transaction, in order to rebut the presumption that it is common property.

The case at bar seems to be precisely of this character; and, as between the husband and wife, it was clearly competent for the latter to show, by parol, the facts of the trans-

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action, and that the conveyance was intended to and did take effect as a gift. It is unnecessary to decide whether the defendant Whitney would have acquired a valid title if he had purchased from the husband in good faith, for a valuable consideration, without notice of the rights of the wife.

The Court finds that he purchased with full notice, and we cannot disturb the finding on the ground that it was not justified by the evidence. Viewing the evidence in a light most favorable to the defendant, the most that can be affirmed of it is that there was a substantial conflict in it. If the actual possession of the plaintiff, under a claim of title coupled with the collection of rents, and the exercise of other acts of dominion, was not constructive notice of her rights, there certainly was *some* evidence tending to show actual notice.

There was no error in excluding the questions propounded by the defendant to the Witness Amos Woods, in respect to his intentions at the time of the execution of the deed of the plaintiff. It was for the Court to decide upon his intentions from his acts and conduct at the time. His secret, undisclosed intentions would be unavailing as against his acts and declarations at the time of the transaction.

Judgment affirmed.

[No. 2,727.]

PAULA ROMERO DE GAZE v. S. J. LYNCH, JEROME PORTER, S. L. EAMES, WILLIAM H. PERRY, J. F. BURNS, JOHN KING, AND S. H. MOTT.

MOTION FOR NEW TRIAL.—RIGHT OF PARTIES TO BE HEARD.—Where, upon defendants' motion for new trial, the statement was settled (though not engrossed), and defendant gave notice of hearing, but nothing further was done until afterward, upon the overruling of a like motion in a similar case, plaintiff asked that this motion, also, should be overruled, to which defendants objected, and insisted upon

Argument for Appellant.

being heard; afterward, the Court, without notice to either party, or any formal or actual submission of the motion, granted a new trial; *held*, that the order was prematurely and improvidently made.

GRANTING NEW TRIAL WITHOUT SUBMISSION OF MOTION, ERROR.—Where a motion for a new trial, made by defendant, was granted by the Court without any formal or actual submission of the motion, and without any notice, so as to give the plaintiff an opportunity to be heard; *held*, error.

APPEAL from the District Court of the Seventeenth Judicial District, Los Angeles County.

This was an action of ejectment for a lot in the City of Los Angeles, alleged to belong to the plaintiff, as of her separate property. It was tried before a jury, and resulted in a verdict and judgment for plaintiff. The facts bearing upon the points decided are stated in the opinion. Plaintiff appealed.

Glassell, Chapman & Smith, for Appellant.

The order granting defendants a new trial was improvidently and erroneously made.

1. Because there was no statement before the Judge that could be regarded as a statement on motion for new trial, or as a basis on which such an order could be grounded. Defendants' skeleton statement refers to exhibits which are not on file, and were not accessible to the Judge when said order was made. No engrossed statement was ever made, or in anywise certified as a correct statement, to be used on motion for new trial. (*Cosgrove v. Johnson*, 30 Cal. 509; *Kimball v. Semple*, 31 Cal. 657; *Linn v. Twist*, 3 Cal. 89; *Baldwin v. Frere*, 23 Cal. 461; *Vilhac v. Biven*, 28 Cal. 409; *Marlow v. Marsh*, 9 Cal. 259; *Quivey v. Gambert*, 32 Cal. 304.)

2. Because the said order was premature, for the reasons above referred to, and because it was made before the motion for new trial had been argued or submitted, or agreed to be submitted by any of the counsel in the case.

A. Brunson, for Respondents.

It is objected that the statement is a skeleton statement. That skeleton, however, shows errors which no stuffing can correct, and these errors justify the others appealed from. The object of a statement is simply to present so much of the case as will show the rulings and action of the Court claimed to be erroneous. (*Harper v. Minor*, 27 Cal. 107.) The omission of the exhibits might, probably, deprive respondents of the advantage of other fatal errors, and even weaken their chances of success on appeal; but one error shown in the statement is as effective to gain a new trial as a thousand.

The granting, or refusing to grant, a new trial, rests very much in the discretion of the Court below, and this Court will not interfere with its action, unless there be a clear abuse of such discretion. (*Peters v. Foss*, 16 Cal. 357; *Hall v. Bark Emily Banning*, 33 Cal. 523; *Drake v. Palmer*, 2 Cal. 177.)

By the Court, SPRAGUE, J.:

This is an appeal by the plaintiff from an order granting defendants' motion for a new trial, and also from an order denying plaintiff's motion to vacate and set aside such order granting a new trial.

The record presented by the transcript discloses substantially the following state of facts:

The action was ejectment, and the verdict and judgment were in favor of the plaintiff, and against the defendants. In due time three of the defendants gave notice of their intention to move for a new trial, and subsequently prepared and filed their statement on such motion, which statement was certified by the Judge, as settled by him and correct, on the 12th day of May, 1870. This statement, as settled and

certified by the Judge, contains a very full specification of the grounds upon which the moving party will rely in support of the motion, among which is specified various errors of the Court in giving and refusing instructions to the jury, and in admitting certain oral evidence and various written documents against objections of defendants, as also, that the evidence was insufficient to support the verdict, with particular specification upon this ground. But the statement, as settled and certified by the Judge, does not contain the instructions given or refused by the Court, to which exceptions were taken by defendants, nor any of the documentary evidence given on the trial against objections of defendants, which were essential and necessary to illustrate and explain the particular points specified in the statement as the grounds relied upon in support of the motion. Only a reference to such documentary evidence and instructions is contained in that statement, thus: "Deed from Foster, administrator of the estate of N. M. Pryor, to plaintiff. (Here insert Exhibit A.) (Here insert instructions of plaintiff)," etc.; and the Clerk of the Court, in his certificate to the transcript, certifies that the statement "is the only settled or authenticated statement on motion for a new trial" in the case. This statement appears to have been settled, and certified by the Judge as correct, on the 12th day of May, 1870. On the following day, thirteenth of May, defendants duly notified the plaintiff that upon his statement on file, and upon the files, papers, and records in the action, they will move the Court, at the Court-room thereof, on the 16th day of May, 1870, at the opening of the Court on that day, or as soon thereafter as counsel could be heard, for a new trial in said cause, so far as the same relates to defendants Mott, King, and Burns. The record discloses no further action upon the motion until the 2d day of June, 1870, when, in open Court, a motion for a new trial in another case was overruled by the Court, whereupon the counsel for plaintiff in this case called up

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the motion for a new trial therein, and stated that this motion was of similar character to that just decided; he supposed it would be useless to argue the same; but the counsel for the defendants objected to a submission of the motion without argument, "when the Court stated substantially, that it did not see how it could consistently grant a new trial in this case," whereupon counsel for defendants insisted upon being heard on the motion, to which the Court replied, that counsel could take their own course. No argument was, however, then had, and nothing further was done by either party to the motion, but the Court, without notice to either party, and without any formal or actual submission of the motion to the Court for decision, on the ninth day of June, made and caused to be entered his order granting a new trial, which fact was not brought to the knowledge of plaintiff until about six weeks thereafter; whereupon plaintiff's counsel, upon his own affidavit and certain minutes of the Court, moved the Court to set aside and vacate its order of June ninth, granting defendants' motion for a new trial, substantially on the ground that the motion for a new trial had never been submitted to the Court for its decision; that plaintiff had never had any notice of any such submission, and had not had an opportunity of being heard in opposition to the motion. Upon the hearing of this motion to set aside and vacate, on the fifth of August the Court denied the same.

From this exhibit of the record it is apparent that the order of the Court below granting defendant's motion for a new trial was prematurely and improvidently made.

The statement on motion for a new trial had not been engrossed. It was but a skeleton statement, with a simple reference to exhibits used in evidence on the trial, and instructions given and refused by the Court, which were deemed essential and necessary to illustrate the grounds of the motion specified in the statement. The motion for a

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new trial was never actually or by fair implication submitted to the Court for its decision. When the motion was called up by plaintiff, on the second day of June, and the Court had intimated that the same must be overruled, plaintiff manifested a willingness to submit it without argument, but defendants declined, and insisted upon being heard in support of the motion. No argument was then had, nor was the motion then submitted, and for the Court subsequently, on a change of its views in relation to the merits of the motion, to grant the same without notice to plaintiff, operated a surprise upon her, and practically denied her the privilege of being heard on the motion. (*Morris v. De Celis*, 41 Cal. 331.)

Orders reversed, and cause remanded for further proceedings on the motion for a new trial.

[No. 2,480]

M. C. TAYLOR v. FREDERICK L. CASTLE, ABRAHAM SELIGMAN, A. B. BRADY, A. B. DIBBLE, JAMES K. BYRNE, REUBEN LEACH, JOHN J. SYKES, GEORGE JOHNSON, JOHN VIGNON, HUGHES VIGNON, LEON MOL ROQUIER, E. G. WAITE, AND DONALD FRASER.

MINING PARTNERSHIP.—NO DELECTUS PERSONÆ.—It is well established that in mining partnerships there is usually no *delectus personæ*, and as a consequence that such a partnership is not dissolved by the death of a partner, or a sale of an interest by a partner to a stranger.

PURCHASE OF INTEREST IN MINING PARTNERSHIP MAKES PURCHASER A PARTNER.—As a sale of an interest in a mining partnership, by a partner to a stranger does not dissolve the partnership, such stranger by his purchase presumptively becomes a partner, though he takes no part in the management of the partnership affairs, and does not hold himself out to the world as a partner.

CONTRACT OF MINING PARTNERSHIP, WHERE NO REGULATIONS OR BY-LAWS — USUAL.—Where a contract in writing purported to have been

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made by a mining partnership in its firm name through its Secretary, and it appeared that such contract had been authorized by a vote of a majority of the shares at a meeting of the company, and after being signed by the Secretary had been ratified and approved in the same manner, and it further appeared that though there were no written regulations or by-laws the company usually did business in this way: *Acid*, that the recognized and established usage on the part of the firm should be taken as a part of the contract of partnership.

WHAT MAY BE PLEADED IN BAR AT JUDGMENT IN FORMER ACTION.—A judgment in a former action is well pleaded as a bar in a second action, provided the cause of action is the same, though the form of action has been changed.

WHAT IS "SAME CAUSE OF ACTION."—A cause of action is said to be the same as that in a former suit where the same evidence will support both actions; and a judgment in such former action will be a bar, provided the evidence necessary to sustain a judgment for plaintiff in the second would have authorized a judgment for plaintiff in such former one.

APPEAL from the District Court of the Fourteenth Judicial District, Nevada County.

This was an action to recover the sum of three thousand dollars, the contract price for building a mill, alleged to be due from defendants as a mining partnership, doing business at Grass Valley, Nevada County, under the firm name and style of the New York Hill Mining Company. The defendants Castle and Seligman, in their answers, denied, among other things, that they or either of them were ever members of the partnership, or ever authorized or consented to the contract sued on, or were ever in any manner bound thereby; and they also set up, as a bar to the action, a judgment in their favor in a former action, brought by plaintiff against defendants for the same cause of action.

It appears that previous to the making of the contract for building the mill, the defendant Castle purchased the interest, being a one sixteenth, of P. H. Ford, one of the original partners of the New York Hill Mining Company, and afterwards sold one half of such sixteenth to the defendant Seligman. Neither Castle nor Seligman, however, attended the meetings of the partnership; and there was

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nothing to show that they ever personally approved or consented to the contract of the company with the plaintiff.

The former action, which was pleaded in bar, was a suit by the same plaintiff against the same defendants, to recover the sum of two thousand six hundred and fifty dollars, alleged to be due on an accounting between the parties for building the mill under the same contract set up in this action. In that case there was a judgment in favor of defendants Castle and Seligman for their costs, and it was ordered, on plaintiff's motion, that the cause should be dismissed as to the other defendants, without prejudice to plaintiff's right to a new action.

On the trial the defendants Castle and Seligman rested their defense upon their plea of former recovery, and introduced in evidence the judgment roll in the former action. The Court below decided against their plea, and the cause then proceeded and resulted in a judgment for plaintiff against all the defendants for three thousand two hundred and eighty-five dollars and eighty cents. The defendants Castle and Seligman moved for a new trial, which was overruled, and they then took this appeal.

G. F. & W. H. Sharp, for Appellants.

The allegation of a partnership on the part of the defendants Castle and Seligman in the New York Hill Mining Company, was directly traversed by their answers. It was, therefore, incumbent upon the plaintiff to establish this fact, and, having failed to do so, it is apparent he made no case.

The judgment recovered in a former action was a complete bar. The issues, testimony, and proofs were the same in each; and it was incumbent upon the plaintiff to show that the issues in the present case differed from those in the former. (*Southgate v. Montgomery*, 1 Paige, 41; *Barkhead*

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v. *Brown*, 5 Sandf. 134; *Miller v. Mourrice*, 6 Hill, 114; *Rice v. King*, 7 Johns. 20; *Holmes v. Benson*, 7 Johns. 288; *Baggs v. Clark*, 37 Cal. 237.)

A. C. Niles and J. C. Deuel, for Respondent.

The allegations of partnership on the part of the defendants Castle and Seligman in the New York Hill Mining Company was sustained by the evidence. Upon the law as to mining partnerships, see *Duryea v. Burt*, 28 Cal. 569; *Dougherty v. Creary*, 30 Cal. 290; *Settembre v. Putnam*, 30 Cal. 490; *Skillman v. Lachman*, 23 Cal. 198.

The judgment recovered in the former action was upon an account stated. The complaint in this case was founded upon an original contract, for a different sum of money, and requiring different and other testimony to support it. The issues were entirely different. The averment of contract in the complaint in the first action was merely matter of inducement and not the gist of the action. (See *Carey v. P. & C. Petroleum Co.*, 33 Cal. 696; 1 Chitty on Pl. 358; *Holmes v. DeCamp*, 1 Johns. 34; 1 Greenleaf on Ev. Sec. 528 *et seq.*; *Dutchess of Kingston's Case*, 2 Smith's L. C. 573, and notes and authorities cited; *Hardenburg v. Bacon*, 33 Cal. 375; *People v. Skidmore*, 27 Cal. 293; *Gregory v. Burrell*, 2 Edwards, 417; *Smith v. Weeks*, 26 Barb. 465.)

By the Court, TEMPLE, J.:

It may be a matter of regret that our Courts have gone to the extent they have in excepting mining partnerships from the general law of partnerships. It is very well established now, however, that in such partnerships there is usually no *delectus personarum*, and from this difference many peculiarities arise, the principal of which is that the partnership is not dissolved by the death of a partner, nor as a consequence of

a sale of an interest by a partner to a stranger. As, therefore, the sale of an interest to Seligman did not dissolve the partnership, I think by his purchase he presumptively became a partner, although he took no part in the management of the partnership affairs, and never held himself out to the world as a partner.

The action is brought upon a contract, by which the plaintiff bound himself to erect a mill for the defendants. The contract is in writing, and purports to have been made by the defendants by their firm name, through James K. Byrne, their Secretary. It was proven that the contract was authorized at a meeting of the company, and, after it had been signed by the Secretary, was ratified and approved in the same way. There were no written regulations or by-laws adopted for the government of the company, but it was shown that they usually did business in this way. A majority of the shares at a meeting of the company authorized contracts to be made, and the minority always acquiesced. I think this shows a recognized and established usage on the part of the firm which must be taken as a part of the contract of partnership.

The defendants Castle and Seligman pleaded a former recovery in bar, and, on the trial, introduced the judgment roll of a former action brought by the same plaintiff against the same defendants. In his complaint in the first suit the plaintiff recited the fact of the contract to erect a mill for crushing rock, the performance of the contract on his part, and the non-payment of the contract price, and then averred an account stated between plaintiff and defendant, the ascertainment of a balance due, which was less than the contract price, and the promise on the part of defendants to pay that sum.

The defendants, in their answer, denied specially each allegation of the complaint. Judgment was for the defendants, but it does not appear upon what grounds. No evi-

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dence upon the subject was offered by either party, save the judgment roll, and the admission that the contract sued upon in this action was put in evidence upon the former trial.

Unquestionably the judgment in the former action is well pleaded as a bar in this suit, provided the cause of action is the same, although the form of action has been changed. The cause of action is said to be the same where the same evidence will support both actions; or, rather, the judgment in the former action will be a bar, provided the evidence necessary to sustain a judgment for the plaintiff in the present action would have authorized a judgment for the plaintiff in the former. The present action could be maintained upon proof of the contract, and performance on the part of plaintiff, and non-payment by defendants. This proof would not have sustained the former action. That was founded on the account stated and the agreement to pay the balance ascertained, and not upon the original contract. (*Carey v. P. & C. Petroleum Co.*, 33 Cal. 694.)

Judgment and order affirmed.

Mr. Justice CROCKETT did not participate in the foregoing decision.

[No. 2,619.]

JOHN W. LITTLEFIELD v. JOHN NICHOLS.

TITLE UNDER LATER SALE ON ELDER LIEN SUPERIOR TO TITLE UNDER EARLIER SALE ON JUNIOR LIEN.—A title derived under a lien elder in its origin is *prima facie* superior to a title from a common source, purporting to be derived under a lien junior in point of time, though the judicial sale under the latter may have preceded the sale under the former.

ELDER LIEN UNDER COMMON SOURCE OF TITLE MUST PREVAIL IN ACTION AT LAW.—In ejectment, where both parties claimed under liens upon a common source of title, and no equitable defense was pleaded; *held*,

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that the title originating under the elder lien, provided it had not been allowed to become dormant, and the foreclosure proceedings were sufficient, must prevail.

APPEAL from the District Court of the Fifteenth Judicial District, County of Contra Costa.

This was an action of ejectment for three hundred and sixty acres of land, a portion of the San Pablo Rancho, in Contra Costa County. Both parties claimed under Joaquin G. Castro, in whose name the rancho was finally confirmed by the United States on February 24th, 1858, and final survey approved August 17th, 1864.

The plaintiff claimed as follows: On December 28th, 1854, Joaquin G. Castro executed a mortgage to Martina Perre of all his interest in the San Pablo Rancho, which was recorded on January 6th, 1855; on September 21st, 1855, suit of foreclosure was commenced upon the mortgage; on January 17th, 1856, there was a decree against defendant for nine thousand one hundred and fifty dollars, with interest at five per cent per month; on March 11th, 1856, there was a sale by the Sheriff to Martina Perre for five thousand dollars; on March 23d, 1857, Sheriff's deed to Martina Perre, recorded March 24th, 1857; and there were divers mesne conveyances carrying this title to plaintiff.

The defendant set up among other things, that John Currey recovered judgment against Joaquin G. Castro on October 23d, 1855, for three hundred dollars; docketed October 24th, 1855; execution on this judgment on October 26th, 1855; Sheriff's sale on November 29th, 1855, and Sheriff's deed on April 25th, 1863.

There having been a judgment for plaintiff, and motion for new trial denied, the defendant appealed.

J. M. Seawell, for Appellant.

B. S. Brooks, for Respondent.

By the Court, WALLACE, J.:

The title formerly held by Castro is the true title to the premises in controversy. The plaintiff claims to have acquired it, and the defendant claims that it is outstanding in a third person, who is not a party to the controversy. The title of the plaintiff relates to January, 1855, when the mortgage, through the foreclosure of which it comes, was recorded and became a lien. The outstanding title to October, 1855, when the Currey judgment against Castro, through which that title comes, also became a lien upon the premises.

The lien in which the plaintiff's title originated being thus the elder in its origin, a title derived thereunder is *prima facie* superior to a title from a common source, purporting to be derived under a judgment lien junior in point of time; and in an action of ejectment, where, as here, the controversy must turn upon the mere legal title, and no equitable defense is pleaded, the title originating in the elder lien must prevail over that originating in the junior lien, provided the lien of the former had not been suffered, in the meantime, to become dormant, or the proceedings through which it was foreclosed were not insufficient, in point of jurisdiction, for that purpose.

In *Rankin et al., plaintiffs in error, v. Scott, defendant in error*, 12 Wheat. 177, each party claimed to have acquired the title of John Little to the premises through judgments and Sheriff's sales, etc., resulting in a Sheriff's deed to each. These judgments respectively became liens upon the premises at different periods of time, and the sale under the *junior* judgment preceded that under the other. It was held that the sale under the elder judgment and lien gave the better title, notwithstanding such sale was itself subsequent in point of time to that made under the junior judgment. In delivering the opinion of the Court in that case

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Mr. Chief Justice MARSHALL said: "By that law (of Missouri) judgments are to be a lien on all the lands of the debtor. The lien commences with the judgment, and continues for five years. The principle is believed to be universal that a prior lien gives a prior claim, which is entitled to prior satisfaction out of the subject it binds, unless the lien be intrinsically defective, or be displaced by some act of the party holding it, which shall postpone him in a court of law or equity to a subsequent claimant. The single circumstance of not proceeding on it until a subsequent lien has been obtained and carried into execution, has never been considered as such an act."

Upon these views it results that the plaintiff's title was superior to the outstanding title set up by the defendant; and the judgment is, therefore, affirmed.

[No. 2,180.]

CHARLES B. POLHEMUS (SURVIVOR OF THE FIRM OF ALSOP & Co.) v. WILLIAM M. CARPENTER, REUBEN CLARK, JAMES GEORGE, DAVID SCANELL (SHERIFF OF THE COUNTY OF SAN FRANCISCO AND OFFICIAL ASSIGNEE IN INSOLVENCY OF SAID JAS. GEORGE), AND JAMES P. TREADWELL.

TIME TO MOVE FOR NEW TRIAL WHEN NO FINDINGS ASKED — PRACTICE ACT, SECTIONS 180 AND 185.— When written findings are not requested, and none are filed at the time of the decision of a cause tried by the Court, the time within which a party intending to move for a new trial shall file and serve his notice will commence running from the time of service of written notice of the decision.

TIME TO MOVE FOR NEW TRIAL WHEN FINDINGS DULY REQUESTED.— When written findings are duly requested, as provided in section one hundred and eighty of the Practice Act as amended in 1866, the Court is bound, and on proper proceedings will be required to file them; and a party will have ten days after written notice of the filing to move for a new trial.

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RIGHT OF PARTY TO WRITTEN FINDINGS IF PROPERLY REQUESTED.—A party requesting written findings, under section one hundred and eighty of the Practice Act as amended in 1866, is entitled to have them, and to know the precise facts found and the conclusions deduced therefrom, as a basis of his motion for a new trial in case the decision be adverse to him.

FINDINGS OF MERE CONCLUSIONS DEFECTIVE — REFUSAL TO AMEND DEFECTIVE FINDINGS ERROR.—Where findings, instead of stating facts involved in the issues, contained only general conclusions, and afforded no information as to the particular facts considered by the Court as established: *held*, manifestly defective, and that a refusal to amend them, on proper application therefor, was clearly error.

THE SUPREME COURT WILL NOT ADJUDICATE DISPUTED FACTS.—The Supreme Court, upon reversing the action of a lower Court, will not order final judgment when there appear to be material facts in dispute, upon which the evidence is conflicting.

APPEAL from the District Court of the Twelfth Judicial District, City and County of San Francisco.

This was an action originally commenced July 5th, 1857, by Charles B. Polhemus and George W. P. Bissell, composing the firm of Alsop & Co., to foreclose a mortgage executed in 1854 on certain real estate in the City of San Francisco, by William M. Carpenter to Reuben Clark and James George, to secure the payment of a note for thirty thousand dollars, with interest at the rate of two and one half per cent per month, payable in six months, or in six or twelve months thereafter, at the option of the maker, to be signified in writing within five months. This note and mortgage were assigned by Clark and George to the firm of Alsop & Co.; and at the time of the commencement of the action there was allowed to be due upon it fifteen thousand dollars, with interest thereon from November 16th, 1855, at two and one half per cent per month.

The defendant Treadwell, who was the only one that answered, set up that the assignment to Alsop & Co. was made to defraud the creditors of Clark and George; that it was pretended to be made as a security for the repayment of twelve thousand six hundred and nineteen dollars and sixty-

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five cents borrowed of plaintiffs by Clark and George; that this sum and interest had long before been repaid; that on February 1st, 1855, Carpenter conveyed to Clark and George the mortgaged premises and other property, in full payment and satisfaction of the mortgage debt and interest; that after Clark and George so acquired the fee, Treadwell recovered a judgment against them for three thousand six hundred dollars, docketed March 26th, 1857, under which he subjected the mortgaged premises to sale, and bid them off for two thousand four hundred dollars, and received the Sheriff's deed October 30th, 1857; that after the conveyance by Carpenter to Clark and George plaintiffs entered into the receipt of the rents, and had received and converted to their own use all the rents subsequent to Treadwell's purchase at Sheriff's sale on April 28th, 1857, amounting at the time of answer to ten thousand dollars. Defendant prayed that the mortgage should be declared satisfied; that if anything should be found due plaintiffs, chargeable on the land, he should be let into possession upon paying it; that the rents received by plaintiffs since April 28th, 1857, should be ascertained, and they be decreed to pay them to him before a foreclosure, or out of the proceeds of a foreclosure sale; and for general relief.

The cause was referred to E. W. F. Sloan, who, on March 23d, 1859, reported a judgment that plaintiffs should pay Treadwell the sum of eight thousand one hundred and twenty dollars and fifty-seven cents, and turn over to him the possession of the mortgaged premises. From the judgment entered upon this report the plaintiffs appealed, and at the April Term, 1862, the judgment was reversed and a new trial ordered. In accordance with the intimations of the Supreme Court, contained in their opinion, Treadwell soon afterwards commenced a separate action against Polhemus,

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as survivor of the firm of Alsop & Co., and his tenants, to recover the premises and the value of their use and occupation from the time of his purchase, which then amounted, as alleged, to upwards of fifty thousand dollars. After the trial of this ejectment case had commenced, on July 29th, 1863, the parties entered into a stipulation, by the terms of which it was agreed that the ejectment suit should drop; that the present foreclosure suit should proceed to trial; that when tried an account should be taken of the rents received by plaintiffs after April 28th, 1857, certain disbursements agreed upon deducted, and interest cast on the residue of the rents, from the time received, at two per cent per month with annual rests, or, in other words, compounding annually; that the amount of rents and interest thus ascertained was to be deducted from the amount for which the plaintiffs might at the trial establish a lien on the mortgaged premises as against Treadwell, and the plaintiffs to have a decree of foreclosure only for such balance; but if the amount of plaintiffs' lien should prove less than the amount of rents and interest, it was to be deducted and Treadwell to have judgment for the residue, or for the whole amount of rents and interest if plaintiffs failed to establish any lien as against him. This stipulation was filed and made a rule of Court in this case.

Afterwards plaintiff, apparently finding the stipulation unfavorable, made several attempts to dismiss his action; and, among other proceedings, instituted two mandamus suits—one against the Clerk, and one against the Judge, to compel them to enter a dismissal. These actions will be found reported in 28 Cal. 166, and 29 Cal. 264. On account of them, the trial of the foreclosure suit was delayed until the latter end of 1867; and on January 2d, 1868, the Court below announced its decision, that judgment be entered for defendant, but without costs. The defendant, in the mean-

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while, had requested written findings; and on February 14th, 1868, the following were filed:

"In this cause, the defendant Treadwell's counsel having requested findings by the Court in writing, I now file the same, as follows:

"FINDINGS OF FACTS.

"Under the pleadings and proof, and under the stipulation of the respective parties, dated July 29th, 1863, filed December 9th, 1853, and entered thereafter, as an order of Court in the cause, on the nineteenth day of this same month, I do not find any balance or amount for which the plaintiff has a lien on the mortgaged premises, in the complaint described, as against the defendant Treadwell, after deducting therefrom the rents received from said premises (less amounts paid for repairs, taxes, improvements, and fortifying the title), from and after April 28th, 1857, the date of the said Treadwell's purchase thereof at Sheriff's sale, together with interest on said items of rent, at the monthly rate, and with the annual rests in computing the same, provided for in said stipulation. Nor do I find the amount of said rents and interest thereon so to be deducted, or any part thereof, is not required to satisfy the amount which otherwise, and but for said stipulation, would have been a lien on said mortgaged premises.

"And as a conclusion of law therefrom, I find that neither the plaintiff is entitled to a decree of foreclosure against the lands in the complaint described, nor is the defendant Treadwell entitled to a judgment or decree for any amount whatever against the plaintiff. And it is ordered that neither party recover costs against the other."

The defendant excepted to the above as findings, and requested the defects in particulars pointed out by him to be corrected and remedied; all of which the Court below

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refused. Defendant afterwards filed and served his notice of, and statement on, motion for new trial, as stated in the opinion, which, being overruled, defendant Treadwell appealed from the order and the judgment.

J. P. Treadwell, for Appellant.

The findings are but evasive and nugatory generalities, not warranted; and they imply facts not warranted by the evidence; and the Court erred in overruling the defendant's exceptions for defects in the findings and refusing to make specific findings as requested by defendant. The defendant was, in any event, entitled to a decree for at least sixty-six thousand three hundred and seven dollars and fifty-nine cents. The amount of rents received by plaintiff after April 28th, 1857, less sums paid for repairs, taxes, improvements, and fortifying the title, with interest from the time received at two per cent per month, with annual rests as provided for in the stipulation, was computed to the day of trial, and on the day of the decision amounted to one hundred and forty-three thousand seven hundred and sixteen dollars and forty-one cents; while the plaintiff's whole claim on his own accounts, and adjusted in his own way, amounted to only seventy-seven thousand four hundred and eight dollars and eighty-two cents.

But there being substantially no findings of fact, and the defendant being in no default on this account, the case is open before this Court on the whole evidence; and it should proceed to determine the whole matter pursuant to the course of a Court of equity. The material facts are all either admitted or clearly proved, without there being any material conflict of evidence, except on one point, which occurs between witnesses whose depositions or written testimony only was before the Court below, and are before this Court. It is time, after thirteen years of delays, to end this suit by a final decree in it. This Court should direct the

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Court below for what sum to enter judgment, in favor of defendant against plaintiff.

C. T. Botts and Delos Lake, for Respondent.

The judgment in this case having been rendered on January 2d, 1868, and no notice of intention to move for a new trial having been served until February twenty-fourth following, the statement on such motion forms no part of the record; consequently, the case comes here on the judgment roll alone, which it is not pretended discloses any error.

But, if this be otherwise, it is plain that the issues in this case, as in every other, must be gathered from the pleadings. None of these issues are found in favor of defendant, nor would the evidence support such a finding. A stipulation cannot be substituted for the pleadings, nor can it, *per se*, alter, amend, or modify the pleadings. The particular stipulation in this case does not purport to amend the pleadings in any respect, except by striking out the defendant's counterclaim.

The counterclaim being stricken out, and the stipulation being inserted in its place, it shows no cause of action and no ground for affirmative relief; therefore, the appellant has no cause to complain of the judgment that denied him affirmative relief. If an accounting were to be had between the plaintiff and the defendant Treadwell, upon any basis even hinted at in the stipulation, there is nothing in the findings, or the evidence, to show that any balance would be due the defendant.

The objection that the Judge failed to find specially upon the innumerable points presented by the defendant is untenable, if for no other reason, because there are none of them upon which, in view of the pleadings and the evidence, the findings could, by any possibility, have been in favor of the defendant.

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By the Court, CROCKETT, J.:

The first question for determination is, whether the defendant's notice of his intention to move for a new trial was served and filed in time. On the second of January the Court (which tried the cause without a jury) announced its decision, ordering a judgment to be entered for the defendant; and on the fourth of January the defendant was duly served with a notice of this decision. But when the cause was submitted, the defendant, in due form, requested written findings, which request was entered on the minutes. On the fourteenth of February the Court filed written findings, and within ten days thereafter the defendant filed and served a notice of his intention to move for a new trial. The statement in support of the motion was filed and served on the seventh of March, and within the time granted by the Court for that purpose.

On these facts, the plaintiff insists that the motion for a new trial came too late; that the ten days for serving and filing the notice commenced to run from the fourth of January, when the defendant was notified of the decision, and not from the fourteenth of February, when the written findings were filed.

Section one hundred and eighty of the code requires the Court to file written findings on the request of either party, entered in the minutes at the submission of the cause, and if the Court neglects or refuses to comply with the request, this will be ground of error, on an appeal from judgment, supported by a bill of exceptions or statement on appeal, embodying the necessary facts.

Section one hundred and ninety-five of the code provides that if the cause is tried by the Court without a jury, a party intending to move for a new trial shall file and serve a notice of his intention to do so within ten days after service of a notice of the filing of the findings, if any written find-

ings be filed; and if there be no written findings, then within ten days after receiving a written notice of the decision of the Court.

There is nothing to prevent the Court from filing written findings, even though neither party requests the findings to be in writing; nor is there any provision defining or limiting the time within which written findings shall or may be filed. The question under consideration is not free from grave embarrassments, arising from the vague provisions of these two sections; and particularly from the omission of any limitation as to the time within which written findings shall be filed. It is quite plain, however, if there be no request for written findings, and none be filed when the decision is announced, the time within which a party intending to move for a new trial must file and serve a notice of his intention to do so will commence to run from the time when he is served with a written notice of the decision. The Court, it is true, may, at some future day, file written findings, but is under no obligations to do so, and *non constat*, that it ever will. In such a case, after receiving a notice of the decision, the party intending to move for a new trial would not be allowed to remain inactive for three or six months, speculating on the chance of the filing of written findings by the Court, and if such findings should, perchance, be filed, then proceed with his motion and excuse his delay on the ground that the statute allows him to proceed within ten days after notice of the filing of the written findings. If the statute should be so construed, the successful party would never know when the litigation was ended, as it would be wholly uncertain whether or not the Court would at any time file written findings. Such a practice, if tolerated, would lead to the greatest delay, vexation, and uncertainty in the administration of justice. The only proper and reasonable construction of the statute is, that when written findings are not requested, and none are filed at the time of the decision, the

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time within which a party intending to move for a new trial shall file and serve his notice, shall be held to commence running from the time of service of a written notice of the decision. If any inconvenience should arise from the practice here indicated, it is the fault of the statute, which, on any other construction of it, would lead to still greater embarrassment. It would, however, in a great measure, obviate the difficulty if the Court, when it intends to file written findings, would so state when its decision is announced, and cause them to be promptly filed.

But it remains to be considered whether a different rule prevails, when written findings were duly requested by the party intending to move for a new trial, and when such findings were in fact filed after the decision was announced, and after due service of a written notice of the decision.

Section one hundred and eighty, as it formerly stood, requires written findings to be filed in all causes tried by the Court without a jury, whether such findings were requested or not; and section one hundred and ninety-five, as it stood prior to 1861, required a party intending to move for a new trial to serve and file a notice of his intention to do so within two days "after the trial." Under these provisions it was held that the "trial" did not terminate until the written findings were filed, and, consequently, that the notice of a motion for a new trial was in time, if served and filed within two days after the findings were filed. The Court had no power to render an oral decision, and the trial, therefore, was not ended until written findings were filed.

But in 1866, both these sections were amended; and by section one hundred and eighty, as amended, the Court is relieved from the necessity of filing written findings, unless requested by one of the parties at the time of the submission to do so. But if such request be duly made and entered in the minutes, the duty of the Court to file written findings is as imperative now as if that section had not been amended.

If the Court refuses or neglects to perform this duty, the injured party may assign this as error on an appeal from the judgment, without a motion for a new trial. The same section, as amended, also provides that if the findings be defective, the injured party may except to them, and if the Court refuses to supply the defects, this also will be ground of error on appeal from the judgment.

Section one hundred and ninety-five, as amended, provides that in causes tried by the Court without a jury, a party intending to move for a new trial shall give notice thereof within ten days after receiving written notice of the filing of the findings, "when written findings are filed by the Court, or of the rendering of the decision of the Court when no findings are filed; provided the decision be rendered in open Court, and, if rendered at vacation, then within ten days after receiving written notice of the filing thereof." As we have seen, it is the imperative duty of the Court to file written findings, when requested to do so by either party; and it is a duty which this Court will compel the lower Court to perform, on a proper showing on an appeal from the judgment. A party requesting written findings is entitled to have them, as a basis of his motion for a new trial, in case the decision be adverse to him. He is entitled to know the precise facts found by the Court, and the conclusions of law deduced from them before proceeding with his motion for a new trial, in order that he may be enabled to point out with precision the errors of the Court in matters either of fact or law. This was the chief purpose to be subserved in requiring written findings to be filed on the request of a party; and this would be wholly defeated if he is compelled to proceed with his motion before the findings are filed. There could not well be a more striking illustration of this proposition, and of the embarrassments which

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may result to a party from the want of written findings, which he has requested, than this case afforded. The defendant, in his answer, prays for affirmative relief, and the action involves not only a long account, running through a series of years, but also some perplexing questions, both of law and fact. The oral decision of the Court was, that judgment be entered for the defendant without costs. There was nothing to inform the defendant whether he was to have any, and if any, what affirmative relief; or if such relief was denied, there was nothing to indicate on what theory of the facts, or by reason of what deductions of law the result was reached. If the defendant had not requested written findings, there would have been no obligation on the Court to file them; and on being notified of the oral decision, the defendant would have had no other resource than to proceed with his motion for a new trial upon the lights then before him, and would have had no cause of complaint on that ground, if the Court had never filed written findings. But having requested them, he was entitled to have them before being compelled to proceed with his motion. If the Court had refused to file them the defendant would have had a certain and sufficient remedy in an appeal from the judgment, without being put to the necessity of a motion for a new trial. But when the findings were filed it was competent for the defendant then to inaugurate his motion for a new trial within the statutory time. I am, therefore, of opinion that the motion was in time.

Within the proper time the defendant excepted to the findings as insufficient; but the Court refused to amend them, and this ruling is assigned as error. The findings are so manifestly defective as not to require comment. Instead of stating facts involved in the issues, they contain only general conclusions drawn from the facts. They afford no information whatever as to the particular facts which the Court considered as established in the cause. The defend-

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ant was clearly entitled to have more specific findings on the facts within the issues; and on this ground the judgment should be reversed and a new trial awarded. We are urged by the appellant to look into the accounts, and by ordering a final judgment to put an end to this protracted litigation. But there are several material facts on which the evidence is conflicting, and it is not the practice of this Court in such cases to adjudicate disputed facts. It is the province of the lower Court to pass upon the facts, and when there is a substantial conflict in the evidence we will not disturb its findings on the ground that they are against the weight of evidence.

Judgment reversed and cause remanded for a new trial.

Mr. Justice WALLACE, being disqualified, did not sit in this case.

[No. 2,944.]

**M. P. McCOURTNEY AND J. H. McCOURTNEY v.
H. W. FORTUNE, J. W. COLEMAN, AND EDWARD
BROWN.**

TIME TO APPEAL FROM JUDGMENT RUNS FROM ITS RENDITION.—Where a judgment for defendant, rendered (though not entered) on December 17th, 1869, was afterwards, on December 29th, 1869, vacated on motion of plaintiff, and a judgment rendered (though not entered) for plaintiff, and defendants' motion to set aside the last judgment was denied on July 9th, 1870, and judgment for plaintiff entered on July 12th, 1870, and defendant appealed from the judgment on March 27th, 1871; *held*, that the appeal, not having been taken within a year from the rendition of the judgment, was too late, and that, on motion, it should be dismissed.

APPEAL FROM SECOND JUDGMENT DOES NOT CARRY ORDER VACATING FORMER JUDGMENT.—Where a judgment was rendered for defendant, and afterwards, on motion of plaintiff, such judgment was ordered to be vacated and set aside, and judgment rendered for plaintiff; *held*, that alleged error in the order could not be reviewed on an appeal from the judgment for plaintiff—such order being a special order, made after final judgment and itself appealable.

Argument for Appellant.

APPEALABLE ORDER CANNOT BE REVIEWED ON APPEAL FROM JUDGMENT.—

Upon an appeal from final judgment, an order, which is itself made by statute the subject of a distinct appeal, cannot be reviewed.

APPEAL from the District Court of the Fourth Judicial District, City and County of San Francisco.

This was an action of ejectment for a lot in the City and County of San Francisco. On December 17th, 1869, findings were filed and judgment ordered to be entered in favor of defendant Coleman. A few days afterwards, plaintiffs moved on the same findings for judgment the other way; and on December 29th, 1869, the former judgment was vacated and judgment for plaintiffs rendered. On July 9th, 1870, defendants' motion to vacate the latter judgment was vacated, and on July twelfth judgment for plaintiffs entered. The defendant Coleman appealed, and his appeal purports to be "from the judgment made and rendered against him on July 9th, 1870, and recorded July 12th, 1870."

Z. Montgomery, for Respondents.

The appeal in this case should be dismissed, for the reason that more than twelve months had elapsed between the making and entering of the order for judgment and the taking of this appeal. (See *Genela v. Relyea*, 32 Cal. 159; *Casement v. Ringold*, 28 Cal. 337; *Gray v. Palmer*, 28 Cal. 416; *Peck v. Curtis*, 31 Cal. 207.)

The order for judgment was made and entered on December 29th, 1869. The notice of appeal was dated March 29th, 1871.

B. S. Brooks and *William M. Pierson*, for Appellant.

The only ground for dismissing an appeal, under the statute, is the failure of the appellant to furnish the necessary papers. (Practice Act, Sec. 346.)

The right to have a cause heard in the Supreme Court is

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like the right to have the same cause heard in the District Court, constitutional, and cannot be taken away by a rule of Court, but only by the law.

The motion to dismiss an appeal is based upon an objection to any hearing of it. If the Court have to look into the transcript, then the case will come on in its regular order, and if the objection is well taken it will prevail, and the judgment will be affirmed. (*Ricketson v. Compton*, 23 Cal. 636; *Day v. Walton*, 2 Hill, 403; *Rogers v. Hisack*, 5 Hill, 521; *Beecher v. Conrad*, 11 How. Pr. 181.)

By the Court, WALLACE, J.:

Findings were filed and judgment for the defendant *rendered* (though not recorded or entered in form by the Clerk) on the 17th day of December, 1869.

On the 29th day of December, 1869, upon motion of plaintiff, this judgment was vacated and set aside, and judgment was rendered for the plaintiff (but not recorded or entered in form by the Clerk).

On the 9th day of July, 1870, a motion made by the defendant to set aside the judgment rendered on the twenty-ninth of December, coming on to be heard, was denied; and on July 12th, 1870, under the direction of the Court then given, judgment in favor of the plaintiff was formally recorded and entered against the defendant; and on March 27th, 1871, this appeal was taken from that judgment.

This judgment, as entered, was in pursuance of the order of December 29th, 1869; it recites that "on motion of plaintiff's attorney, made in open Court, which motion was based upon the findings of the Court, now on file herein, and upon the order of this Court duly made and entered on the 29th day of December, 1869, it is now ordered, adjudged," etc. It was therefore but the entry in form of the judgment rendered on the 29th day of December, 1869, and was in effect

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only a special direction to the Clerk to record in form the judgment which by the effect and operation of the order of December twenty-ninth he should have theretofore recorded in form.

The time limited for an appeal from the judgment, thus commenced to run from the 29th day of December, 1869, when the judgment was *rendered*. The appeal taken March 27th, 1871, was, therefore, too late, and the respondent's motion to dismiss it must, for that reason, be sustained.

But even if an appeal had been taken from the judgment within one year from the *rendition* (*i. e.*, the order of December 29th, 1869), the supposed error of the order of that date could not have been reviewed upon such an appeal, for that order was one entered in the cause after the rendition of the judgment of December 17th, 1869, which it purported to set aside, and was itself, as being a special order made after final judgment, the subject of a distinct appeal (Practice Act, Sec. 347), to be taken in sixty days after the making of the order. Upon an appeal from a final judgment an order made in the cause which is itself, by statute, made the subject of a distinct appeal, cannot be reviewed.

The appeal must be dismissed; and it is so ordered.

Mr. Justice TEMPLE did not participate in the foregoing decision.

[No. 2,472.]

THOMAS A. TALBERT v. JOHN SINGLETON AND
E. P. FIGG.

THE SUTTER TITLE OF SACRAMENTO CITY.—The deed of October 14th, 1848, from John A. Sutter, Sr., to John A. Sutter, Jr., has been directly decided to include the site of Sacramento City; and the question is no longer an open one.

POSSESSION OF LAND AS CONSTRUCTIVE NOTICE OF POSSESSOR'S TITLE.—The actual possession of land, with the exercise of the usual acts of owner-

Argument for Appellant.

ship and dominion over it, operates in law as constructive notice to all the world of the claim of title under which the possessor holds.

EQUITABLE TITLE AS DEFENSE TO ACTION UNDER LEGAL TITLE.—Where the owner of land sold the same, and covenanted to execute a warranty deed therefor on payment of the purchase money, and the purchaser took and held actual possession, and afterwards paid the purchase money; *held*, that such purchaser's, or his grantee's, equitable title was a sufficient defense to an action of ejectment under the legal title, by the original owner, or any one holding under him, with notice.

REATTACHING OF EQUITIES ON REVESTING OF PROPERTY.—Where Sutter, Jr., having covenanted to convey land, with warranty, to Holman, conveyed to his father, who afterwards conveyed back to the son; *held*, that whether the father took with notice or not, the son, on receiving the reconveyance, took the land charged with Holman's equities.

APPEAL from the District Court of the Sixth Judicial District, County of Sacramento.

This was an action of ejectment for a lot on the southeast corner of Fifth and K streets, in the City of Sacramento. The facts of the claims of the respective parties are set forth in the opinion; but it may be added that the deed from Sutter Jr., by Burnett to Holman, was a bargain and sale deed of all right, title, and interest of the grantor, with a warranty against the claims of all persons whatsoever. There having been a judgment for defendants, and a motion for a new trial overruled, the plaintiff appealed.

Heard & McConnell and *Haymond & Stratton*, for Appellant.

The deed from Sutter, Sr., to Sutter, Jr., of October 14th, 1848, is a conveyance of a specific tract of land within certain defined boundaries, which do not include the property in controversy.

Again, the deed executed by Burnett, in the name of Sutter Jr., to Holman, was made when Sutter Jr., had no title and conveyed nothing. Being but a quitclaim deed, it did not pass the title subsequently acquired by Sutter, Jr. (*Gee v. Moore*, 14 Cal. 472; *Kimball v. Semple*, 25 Cal. 452;

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Morrison v. Wilson, 30 Cal. 348; *Cadiz v. Majors*, 33 Cal. 289; Rawle on Cov. for Title, 417, 419, note 1; 3 Wash. b. on R. P. 483, and note 1.)

Samuel Cross and Robert C. Clark, for Respondents.

The deed from Sutter, Sr., to Sutter, Jr., does include the premises, as this Court has already decided. (*Mayo v. Marzeaux*, 38 Cal. 442.)

The deed from Sutter, Jr., by Burnett to Holman, is not a quitclaim deed, but a deed with warranty of title, and does not come within the rule laid down in the cases cited by appellant. A covenant of warranty in a deed otherwise quitclaim carries with it an after-acquired title, if such is the intention. (*Sweet v. Green*, 1 Paige, 473; *Gibbs v. Thayer*, 6 Cushing, 30; *Van Rensselaer v. Kenney*, 11 How. 332.)

The plaintiff and his grantors are estopped by the deed and agreement from Sutter, Sr., to Burnett, to deny that defendants' grantors acquired title by virtue of the deed executed by Burnett in the name of Sutter, Jr. (*Davis v. Davis*, 26 Cal. 38.) But whether the last mentioned deed conveyed title or not, the judgment was correct, for the reason that defendants and their grantors purchased in good faith, paid the purchase money, and entered into and have held possession all the time under a bond from Sutter, Jr., for a warrantee deed.

By the Court, CROCKETT, J.:

It is no longer an open question in this Court whether the deed of October 14th, 1848, from Sutter, Sr., to Sutter, Jr., includes the site of Sacramento City. In *Mayo v. Marzeaux*, 38 Cal. 442, we had this precise question under consideration, and held that the deed includes the site of said city. Nothing has since occurred to create a doubt as to the cor-

rectness of that decision. On the contrary, the argument of the present case has but strengthened our former views on this point.

The plaintiff's title to the demanded premises is de-raigned as follows: First — Through a grant to Sutter, Sr., made by the Mexican Government in 1841, and which has been finally confirmed and patented to him. Second — A deed from Sutter, Sr., to Sutter, Jr., dated May 7th, 1850. Third — A deed from Sutter, Jr., to Mesick, dated July 9th, 1855. Fourth — Through regular mesne conveyances from Mesick to the plaintiff. This established a *prima facie* title in the plaintiff.

To rebut this *prima facie* case the defendants set up: "First — A conveyance from Sutter, Sr., to Sutter, Jr., dated October 14th, 1848, and a written contract made subsequently, in the latter part of that year, between Sutter, Jr., and Burnett, by which the former agreed to place all his town property in the hands of the latter for sale, and to give him one fourth of the proceeds of the sale as a compensation for his services. Second — A power of attorney from Sutter, Jr., to Burnett, dated 18th January, 1849, empowering him to sell at his discretion any property of the former situate in Sacramento City, and to convey the premises so sold to the purchasers by good and sufficient deeds, with covenants of warranty. Third — A sale by Burnett, as attorney in fact for Sutter, Jr., of the premises in controversy in this action to one Holman, prior to the 26th of June, 1849, and a title bond from Sutter, Jr., to Holman, whereby he bound himself to convey the property, with warranty, on the payment of the purchase money. Fourth — A deed from Sutter, Jr., to Sutter, Sr., dated June 25th, 1849, whereby the former reconveyed to the latter all the property conveyed by the latter to the former by the deed of

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October 14th, 1848, excepting, however, from the conveyance 'any and all lots of land lying and being within the afore-described boundaries which the said party of the first part may have granted and conveyed by deed or deeds bearing date anterior to that of these presents.' Fifth — An instrument in writing from Sutter, Sr., to Burnett, dated July 24th, 1849, which recites the fact of the conveyance of October 14th, 1848, from Sutter to his son, and the contract between the latter and Burnett, together with the power of attorney and the reconveyance of June 25th, 1849, and the further fact that sales had been made by Burnett for which deeds had not been executed, and then proceeds to authorize Burnett to 'go on and close up all sales made previous to the notification of said reconveyance, * * * and execute deeds for them under the power of attorney given by said John A. Sutter, Jr., the said John A. Sutter hereby confirming said conveyances.' Sixth — That Holman paid the purchase money for the premises in controversy, and on the 15th of January, 1850, Burnett, as attorney in fact of Sutter, Jr., conveyed them to him by deed. Seventh — That Holman, immediately after his purchase, went into possession of the premises, and he and his grantees have ever since continued in possession, and have erected thereon expensive and permanent improvements of great value. Eighth — That whatever title Holman acquired is vested in the defendants." It further appears in the case that, when Sutter, Jr., reconveyed the property to his father by the deed of June 25th, 1849, he also assigned and transferred to him all the purchase money remaining unpaid upon sales previously made by Burnett under the power of attorney from Sutter, Jr.

These being the facts, the first point for inquiry is, whether the plaintiff occupies any other or better position than Sutter, Jr., would have done if he had never conveyed to Mesick, or any one else, the title which he acquired from

his father by the deed of May 7th, 1850, and if he had himself been the plaintiff in the action. If the present plaintiff occupies a more favorable position it can only be because he, or some one of his grantors through whom the title passed, was an innocent purchaser, in good faith, without notice of the defendants' equities. If Mesick and all the subsequent grantees, down to and including the plaintiff, had notice, either actual or constructive, of these equities, the plaintiff stands in no better position than Sutter, Jr., his grantor, would have occupied had he been the plaintiff, holding the title acquired from his father under the deed of May 7th, 1850.

The parties, plaintiff and defendant, claim under a common source of title; and as early as July, 1849, Holman was in possession of these premises under his purchase from Sutter, Jr., and he and his grantees have ever since been in the actual possession, and have erected expensive and valuable improvements thereon. That the actual possession of land, with the exercise of the usual acts of ownership and dominion over it, operate in law as constructive notice to all the world of the claim of title under which the possessor holds, is too well settled to merit discussion. When Mesick took his conveyance from Sutter, Jr., in 1855, Holman, or his grantee, was in the actual and exclusive possession, having fully paid the purchase money, and claiming title, not only under his original purchase, but under a recorded deed made in 1850 by Burnett, as attorney in fact for Sutter, Jr., under a duly recorded power of attorney. The possession of Holman and his grantees, under these circumstances, was constructive notice to Mesick; and all subsequent grantees claiming under him are likewise affected with notice by the continued exclusive possession of the defendants and their grantors holding under Holman. I am, therefore, of opinion that the plaintiff occupies no better position than Sutter, Jr.,

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would have done had he been the plaintiff, holding the title conveyed to him by his father in May, 1850.

What relation, then, did Sutter, Jr., occupy towards the property when he received from his father the deed of May 7th, 1850? Could he have maintained ejectment against Holman, then in possession, who had purchased the property from him, and had paid the purchase money, and with whom he had entered into a covenant that, on the payment of the purchase money, he would convey the title, with a covenant of warranty? It is obvious, for several reasons, that he could not have maintained the action: First—If the legal title passed from him to his father by the deed of June 25th, 1849, his father took it with notice of Holman's equities. If he had not express notice of the sale to Holman, he had information enough to put him on inquiry, which is equivalent to express notice. But, if he had no notice, either actual or constructive, nevertheless, when he reconveyed the title to his son in May, 1850, there can be no doubt that the latter took it, charged with Holman's equities, as fully and to the same extent as if he had not made the conveyance to his father. He was still bound by his covenant to convey, with warranty, and if he had refused to perform his agreement a Court of equity would have compelled him. If he had made no written covenant to convey, nevertheless he had sold the land to Holman, who had paid the purchase money and was let into the possession, and this entitled the latter to a specific performance of the contract. Sutter, Jr., had the legal title in trust for Holman and his successors in interest; and, in a suit for specific performance, a Court of equity would have compelled him to convey in accordance with his contract. Holding the naked legal title, he would not have been allowed to disturb his vendee, who was rightfully in possession, holding the equitable title. (*Love v. Watkins*, 40 Cal. 547.) This view of the case is decisive of it. Sutter, Jr., could not have maintained

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ejectment against the defendants, even though he had never parted with the legal title acquired through the deed of May 7th, 1850; and the present plaintiff, as has been already stated, is in no better position. He has no other or better status than Sutter, Jr., had, inasmuch as Mesick and all his successors in interest purchased with constructive notice of defendants' equities, and, therefore, were not purchasers in good faith.

Second—I have a grave doubt whether these premises were not excepted from the conveyance from Sutter, Jr., to Sutter, Sr., and whether the instrument from the latter to Burnett was not, in its legal effect, a power of attorney, authorizing the conveyance to Holman, and whether, in a Court of equity, the conveyance would not have been treated as the deed of Sutter, Sr. But it is unnecessary to decide these points, and I, therefore, express no opinion upon them.

The point as to the regularity of the term of the Court at which the cause was tried is not tenable. (*Talbert v. Hopper*, decided at the present term.)

Judgment affirmed.

By WALLACE, J.:

I concur in the judgment of affirmance.

[No. 2,470.]

THOMAS A. TALBERT v. WILLIAM HOPPER AND
CHARLES HEINRICH.

JUDICIAL NOTICE OF TERMS OF DISTRICT COURTS.—The Supreme Court will take judicial notice of the regular terms of the District Courts as fixed by statute, and also of the fact that they are authorized by statute (Stats. 1863-4, p. 118), to adjourn any general term in one county within their districts to a day certain within the time prescribed for the

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commencement of the next term in the same county, provided such special term shall not interfere with any general term in such district.

ADJOURNED TERM OF DISTRICT COURT.—Where the general February Term of the Sixth District Court for Sacramento County must have commenced on February first and concluded prior to March fifteenth; and the general March Term of the same Court for Yolo County must have commenced on March fifteenth and concluded prior to April fifth; *held*, that under and by compliance with the Act of 1864, providing for adjourned terms (Stats. 1863-4, p. 118,) such Court could hold a legal session in Sacramento County, after March fifteenth, and up to April fifth.

PRESUMPTION IN FAVOR OF LEGALITY OF SESSIONS OF DISTRICT COURT.—

Where it appeared from a record on appeal from a District Court for a certain county that the trial took place on a day subsequent to the regular general term in such county; *held*, that as by compliance with the statute of 1864, relative to adjourned terms (Stat. 1863-4, p. 118), such Court could be legally held at such time, it would be presumed, in the absence of any showing to the contrary, that it was legally held.

VESTING OF TITLE UNDER DEED UPON CONDITION PRECEDENT.—The instrument executed by John A. Sutter, Jr., to Brannan, Bruce, Graham, and Wetzlar, on June 20th, 1850, in reference to Sacramento and other property, was a deed upon condition precedent; and upon the performance of that condition, which was the payment of the purchase money, the title to the lands described vested in grantees.

EJECTMENT FOUNDED UPON TITLE.—Where a plaintiff relies upon title as the basis of his right to recover possession, and fails to establish his title, the judgment is properly rendered against him.

APPEAL from the District Court of the Sixth Judicial District, Sacramento County.

Ejectment for three building lots in the City of Sacramento. The deed from John A. Sutter, Jr., to Samuel Brannan, Samuel C. Bruce, Julius Wetzlar, and James S. Graham, referred to in the opinion, was, in form, a grant, bargain, and sale deed, coupled with a full power of attorney to take possession of and in his name to sell, twenty-two hundred building lots in the City of Sacramento, and various other property, the consideration for which, one hundred and twenty-five thousand dollars in all, was thereafter to be paid, one-fifth on July 1st, 1850, one-fifth on September 29th, 1850, and the balance on July 1st, 1851; and containing a provision and covenant that in case the said payments should

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be made as stipulated, " then this instrument is to take effect as a full and complete conveyance in fee of all and singular the lands, tenements, hereditaments, appurtenances, and real estate, in the State of California, belonging to or in which the said party of the first part, his heirs, executors, administrators, or assigns is or are in any way entitled or interested; and the said party of the first part, for himself, his heirs, executors, administrators, and assigns, doth further covenant to and with the said parties of the second part, their heirs and assigns, that in case the said party of the first part, his heirs, executors, administrators, or assigns, in any way neglect or refuse to fulfill the above covenants made by the said party of the first part for himself, his heirs, executors, administrators, or assigns, then this instrument is to take effect immediately thereupon as a full and complete conveyance in fee of all and singular the lands, tenements, hereditaments, appurtenances, and real estate whatsoever and wheresoever in the State of California, belonging to or in which the said party of the first part, his heirs, executors, administrators, or assigns is or are in any way entitled or interested."

The cause was substantially the same as that of *Talbert v. Singleton*, reported *ante*, with which, and others, it was tried in the Court below, commencing on March 18th, 1869. There having been a judgment for defendants and motion for new trial overruled, plaintiff appealed.

Heard & McConnell and *Haymond & Stratton*, for Appellants.

Robert C. Clark and *Samuel Cross*, for Respondents.

By the Court, SPRAGUE, J.:

On the reopening of the original submission of this cause, appellant made and now urges the point that on the 18th day of March, 1869, and on the succeeding days, which by

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the record is shown to have been the time when the cause was tried, the Sixth Judicial District Court for the County of Sacramento could have had no legal existence, except upon special conditions, and that the record in the case failing to show affirmatively the existence of these prerequisite conditions the trial is a nullity. This Court will take judicial notice of the regular terms of the District Courts, as fixed by statute, and also of the fact that by statute the several District Courts of the State are authorized to adjourn any general term of their Court in one county composing their district to a day certain within the time prescribed by law for the commencement of the next term for such county; provided such special term shall not interfere with a general term in such district. (Stats. 1863-4, p. 118.) The general terms of the District Court for Sacramento County are fixed by law to commence on the first Mondays of February, April, June, August, October, and December of each year; and for Yolo County, the only other county composing the Sixth Judicial District, on the third Mondays of March, July, and November of each year. The general February Terms of the Sixth District Court for Sacramento County must, therefore, be held commencing on the first Monday of February, and concluded before the third Monday of March in each year; and for the year 1869 such general term must have commenced on the first day of February, and have concluded at some time prior to the fifteenth day of March; and the general March Term of said Court for Yolo County must have commenced on the fifteenth day of March, and have concluded at some time prior to the first Monday or fifth day of April, the day fixed by law for the commencement of the general April Term for Sacramento County.

By the Act of March 1st, 1864, above referred to, it is provided as follows: "It shall be lawful for the District Court sitting in any county of this State, by an order

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entered on its minutes, to adjourn the Court to a day certain within the time fixed by law for the commencement of the next term in such county, notwithstanding a term or terms for some other county within the same district may intervene; provided that such special term shall not interfere with any general term in said district."

It appears by the terms of this Act, it was possible and entirely competent for the Sixth Judicial District Court to have been in session as such Court for the County of Sacramento on the 18th day of March, 1869, and to have continued such session as a legally constituted District Court for Sacramento County up to and including the 3d day of April, 1869, by a compliance with the provisions of the statute of March 1st, 1864. The general March Term of said Court for Yolo County, in the year 1869, must have commenced on the fifteenth day of March, and may have been finally adjourned before the eighteenth day of March. There is nothing in the record before this Court tending to show that the terms and conditions of this Act of March 1st, 1864, had not been fully answered; and in the absence of such showing by the record it must be presumed that what was done by the Court below was properly and legally done; that the prerequisite steps and conditions necessary to constitute a legal District Court in the County of Sacramento on the 18th day of March, 1869, had been taken and existed. Error is not to be presumed, but when alleged it must be affirmatively shown.

The instrument executed by John A. Sutter, Jr., to Brannan, Bruce, Graham, and Wetzlar, dated June 20th, 1850, was unquestionably a deed upon condition precedent, and upon full performance of the precedent condition, to wit: the payment of the purchase price agreed upon by the grantees to the grantor, his title to the lands described

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therein vested in the grantees. The question of fact as to whether the purchase price was fully paid or settled by the grantees, to the satisfaction of and accepted by the grantor, prior to the 9th day of July, 1855, the date of the deed from the same grantor to William Mesick, through whom plaintiff claims title to the demanded premises, must have been found in the affirmative by the Court below. The record discloses no evidence upon this question, except the evidence of Julius Wetzlar, one of the grantees in the deed of June 20th, 1850; and I am not prepared to say that this evidence is insufficient to justify the finding. This deed of June 20th, 1850, included the premises in controversy; and the conditions thereof having been fully performed by the grantees named therein, to the satisfaction of the grantor, prior to the 9th day of July, 1855, the title vested absolutely in the grantees prior to that date; hence, on that date John A. Sutter, Jr., had no title in the demanded premises to convey to Mesick, through whom plaintiff claims. The plaintiff, therefore, having relied upon title as a basis of his right to recover the possession, and failed to establish his title, judgment was properly rendered against him.

Judgment affirmed.

[No. 2,482.]

THOMAS U. SWEENEY v. JAMES REILLY ET AL.

SERVICE OF NOTICE OF APPEAL.—The statute provides no time within which notice of appeal must be served, except that it must be served before the undertaking on appeal is filed.

ABANDONMENT — INADMISSIBLE EVIDENCE.—S. sued R. in ejectment, and proved a prima facie prior possession; in order to show that S. had abandoned the premises for others, R. offered a preemption declaration by S. made under the Act of April 22d, 1852, and the evidence was admitted. Held, that the admission was erroneous.

PRESUMPTION OF INJURY.—Injury will be presumed from error, where the record fails to show that no error was done.

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ERRONEOUS INSTRUCTIONS — BETTER POSSESSION.— In an action of ejectment it is error to instruct the jury that the defendant, being in possession, plaintiff cannot recover unless he prove an earlier and better possession.

IDEM — ABANDONMENT.— In such a case it is not error to refuse to instruct the jury that after the entry of defendant no neglect or omission of plaintiff in taking or exercising possession of the land, can be considered as an indication of abandonment.

APPEAL from the District Court of the Fourth Judicial District, City and County of San Francisco.

This was an action of ejectment commenced in May, 1864. The trial was by the Court with a jury. The plaintiff introduced evidence tending to prove that he had moved upon the land in suit in 1854, had cultivated it, and exercised other acts of ownership over it, continuously, until 1863.

The following paper, duly subscribed and sworn to by the plaintiff, was offered in evidence by the defendant, and was admitted by the Court against the plaintiff's objection:

“Know all men by these presents, that I, Thomas U. Sweeney, of the County of San Francisco, in the State of California, upon my oath do hereby depose and declare that I am now in the occupation of the following described tract or parcel of land, situated in the said county, and bounded and described as follows, to wit: Commencing at a point about two rods northeast of a certain spring, emptying into the adjoining ranch of one ‘Schaat;’ thence running south seven and one quarter ($7\frac{1}{4}$) degrees, west 4 73-100 chains; thence south seven and one half ($7\frac{1}{2}$) degrees east, 10 89-100 chains; thence south nineteen and three quarters ($19\frac{3}{4}$) degrees, west 3 63-100 chains; thence south seventeen (17) degrees west, 7 45-100 chains; thence south twenty-two and one half ($22\frac{1}{2}$) degrees west, 3 33-100 chains; thence south 6 50-100 chains; thence north eighty and one half ($80\frac{1}{2}$) degrees west, 49 chains; thence north 24 16-100 chains; thence north eighty-nine (89) degrees east, 24 80-100 chains; thence north eighty-five (85) degrees east, 27 85-100 chains,

Argument for Appellants.

to the place of beginning. Being the same parcel of land and premises occupied by me. And I further state and declare that the lines of my said claim do not embrace more than one hundred and sixty acres of land.

"That I am a citizen of the United States, and that I have taken no other claim under the Act of the Legislature hereinafter mentioned, to the best of my knowledge and belief, and that the said land is not claimed under any existing title to my knowledge.

"And I further state and declare that improvements partaking of the realty have been made by me upon the said land, and that the same are now existing thereon, to the value of two hundred dollars.

"And that this declaration is made by me pursuant to an Act of the Legislature of the State of California, entitled 'An Act prescribing the mode of maintaining and defending possessory actions on public lands,' approved on the 20th day of April, A. D. 1852.

"In witness of the foregoing, I have hereunto set my hand this 19th day of June, A. D. 1860."

The jury rendered a verdict for the defendants, and judgment was rendered accordingly. The plaintiff moved for a new trial. The motion was denied, and he appealed from the order denying the motion and from the judgment.

The other facts are stated in the opinion of the Court.

Jarboe & Harrison, for Appellants.

The land described in the paper offered in evidence by the defendants was not the land in suit; and in that instrument the plaintiff merely swore as he was required to swear by the Act under which he was proceeding—that he had taken no other claim under that Act. It was, therefore, clearly immaterial and irrelevant for any purpose in this action. The Court erred in admitting it, and it will be pre-

Argument for Respondent.

sumed that the plaintiff was injured by the error. (3 *Graham & Waterman*, New Trials, 708; *Spanagel v. Dellinger*, 38 Cal. 283; *Boyle v. Coleman*, 13 Barb. 43; *Richardson v. McNulty*, 24 Cal. 346; *Attwood v. Fricot*, 17 Cal. 37.) The Court erred in giving the jury the instruction as to better possession. The prior possession need not be a better one, but only an earlier one. The law allows a plaintiff to recover on proof of prior possession, because that possession is prima facie evidence of title, and a proof of possession, however short, will enable a plaintiff to recover. (*Potter v. Knowles*, 5 Cal. 87; *Adams on Ejectment*, 137; 4 *Johnson*, 210.)

The Court erred in refusing the instruction asked by the defendants, that after the entry of the defendants upon the premises no neglect or omission of the plaintiff in taking or exercising possession of the land could be considered by the jury as an indication of an abandonment of the land, for the reason that a party cannot abandon what he has not in his possession. (*Stephens v. Mansfield*, 11 Cal. 365; *Partridge v. McKinney*, 10 Cal. 183.)

G. F. & A. H. Sharp, for Respondent.

The appeal must be dismissed, as the notice of appeal was not served until two days after the filing. The preëmption claim was admissible, not only as tending to prove that fact, but also as corroborative of defendants' evidence. The evidence established that plaintiff declared he had abandoned these premises for others on the San Miguel; and we show by his sworn statement that about the same time he did preëempt the identical premises he said he had. It may have been accumulative, but it was certainly relevant. It was not offered to contradict plaintiff, but it would have been admissible for that purpose.

The portion of the charge complained of was without injury. The prior possession of plaintiff was conceded. The defendants relied on abandonment alone. The instruction

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asked for by the defendant was rightly refused. The testimony established that plaintiff left without the intention of returning, and that intention *ipso facto* proved an abandonment. (*Keane v. Cannivan*, 20 Cal. 305; *Bell v. Red Rock Company*, 36 Cal. 217; *Moon v. Rollins*, 36 Cal. 337.)

By the Court, TEMPLE, J.:

The fact that the notice of appeal was not served until two days after it had been filed, is not a valid objection to the appeal. The statute prescribes no time within which this service must be made, except, of course, that it must be served before the undertaking is filed, which must be within five days after the notice has been filed.

The action was ejectment, and one of the issues made was whether the plaintiff had abandoned the premises before the entry of the defendants. This defense admitted the plaintiff's prior possession for the purposes of the defense. On the trial the defendants offered a certified copy of a statement and an affidavit made by the plaintiff under the provisions of an Act of the Legislature passed April 20th, 1852, entitled "An Act prescribing the mode of maintaining and defending possessory actions on public lands." The sworn statement recited that the land described in it was occupied by the affiant, and that he had taken no other claim under that Act. This was offered to show abandonment, and was received in evidence against the exceptions of the plaintiff.

The admission of this evidence was certainly erroneous, for the instrument in question could have had no bearing whatever upon the issue of abandonment. It was undoubtedly proper to show the acts of the plaintiff in removing his improvements from the premises claimed to have been abandoned, and in locating upon and improving a different tract. This, however, would not be sufficient in itself to show abandonment, and it could not be material in any respect to show

that he claimed under an Act of the Legislature which attempted to prescribe what should constitute possession in a particular class of cases. Nor can we see, from the record, that this error did not prejudice the plaintiff. No evidence which is wrongly admitted because of its irrelevance or immateriality, ought to have weight with a jury; but it is sometimes difficult to say that it has not had weight. The jury may have been led to think that plaintiff could not honestly make such an affidavit while he was laying claim to another tract. Injury will be presumed from error where we cannot see from the record that none has been done. (*Spanagel v. Dellinger*, 38 Cal. 278.)

It was also error to instruct the jury that the defendants, being in possession, plaintiff could not recover, unless he proved an earlier and better possession. The possession need not have been better, as implying a comparison between the acts constituting the prior possession of the plaintiff and the present possession of defendants. The word has no point, unless in reference to such comparison. It cannot be understood as implying that a prior possession would be a better possession; and if such were the intention of the Judge who presided at the trial, the language failed to express his meaning, and was calculated to mislead the jury.

The instruction asked for by the plaintiff, to the effect that after the entry of defendants no neglect or omission of plaintiff, in taking or exercising possession of the land, can be considered as an indication of an abandonment, was properly refused. It is very true that one cannot abandon land when he has not possession, and also that the mere neglect or omission to assert one's title to land from which he has been ousted for a period, within the Statute of Limitations, is not evidence of abandonment. The question of abandonment is to a great extent one of intention, which must be shown from the circumstances of each case; and if the evidence were that the plaintiff left the premises sued for, and

Opinion of Sprague, J., specially concurring.

removed his improvements to another tract in the vicinity, and afterwards knew of the entry of the defendants and their claim of title, it might have a bearing upon the intentions of plaintiff with reference to the premises, if he stood by and saw the defendants improving and occupying the land for a long period of years, and asserted no claim. It would not work an estoppel, or be of itself evidence of abandonment, but it may well be taken into consideration, in connection with other circumstances, to throw light upon the intentions of the plaintiff.

Judgment and order reversed, and cause remanded for a new trial.

SPRAGUE, J., concurring specially:

I concur in the judgment solely on the ground of the error in giving the instruction referred to in the opinion.

[No. 2,781.]

**FREDERICK KAPP v. ARTHUR H. GRIFFITH AND
HARRIET W. GRIFFITH.**

STATUTE OF LIMITATIONS AS TO SEPARATE PROPERTY OF MARRIED WOMAN.

— As a married woman, under section seven of the Practice Act, may maintain ejectment for her separate property, without joining her husband, her coverture does not create a disability so as to save the bar of the Statute of Limitations as to such property — the amendment of April 18th, 1863 (Stats. 1863, p. 325), having changed the rule of the statute of 1850 on this subject.

ADVERSE POSSESSION OF SEPARATE PROPERTY OF MARRIED WOMAN.—

Adverse possession for five years of the separate property of a married woman creates a bar under the Limitation Act of April 18th, 1863 (Stats. 1863, p. 325), and is a good defense to an action of ejectment by her or her grantee.

APPEAL from the District Court of the Third Judicial District, Alameda County.

Argument for Respondents.

The facts are stated in the opinion.

R. B. Noyes and M. G. Cobb, for Appellant.

Title by adverse possession does not run against a married woman. (*Michall v. Wyatt*, 2 Ala. 318; *McDonald v. McGuire*, 8 Texas, 361; 27 Conn. 70.)

Our amendatory statute of 1863 gave her the privileges of disability for five years after the passage of the law; and the plaintiff took his title under the disability, and the statute only commenced to run from the date of his conveyance. The Statute of Limitations does not run against a woman who was married at the time when the cause of action accrued, and it runs against her assignee only from the date of her conveyance to him. (*Drennen v. Walker*, 21 Ark. 529.)

In the exceptional cases mentioned in section seven of the Practice Act, the statute is not obligatory on the wife to sue or defend alone; it confers only a privilege which in many cases it may be important for her to assert for the protection of her interests, and in the exercise of which the fullest liberty should be accorded her.

In the absence of the exercise of this privilege by her, she ought, in harmony with the marital relation, to be viewed as relying on it for protection and electing to consider her husband a "necessary party" in everything that affects her interest. (*Calderwood v. Peyser*, 31 Cal. 335; *Martindale v. Tibbets*, 16 Ind. 200.)

A. H. Griffith, for Respondents.

The plaintiff's right to recover is barred by the Statute of Limitations, which makes adverse possession for five years conclusive evidence of title. (*Arrington v. Liscom*, 34 Cal. 385; *Cannon v. Stockman*, 36 Cal. 542; *Moon v. Rollins*, 36 Cal. 333; *Leroy v. Rogers*, 30 Cal. 234; *Leffingwell v. Warren*, 2 Black. 599.)

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Opinion of the Court — WALLACE, J.

But it is said that Mrs. Toler was a married woman at the time she and her husband executed their deed to Edmonson, the grantor of the defendants, and that the land conveyed was her separate property; therefore, the statute did not run against her. By referring to the statute, the fact that it was her separate property is the reason why the statute ran against her. The disability of coverture exists only when the husband is a necessary party with her in the suit. The Practice Act, section seven, provides that when the action concerns a married woman's separate property she may sue alone. And as the Statute of Limitations now stands, it runs against a married woman in all those actions to which her husband is not a necessary party with her in commencing the action, the same as against other parties. (*Wilson v. Wilson*, 36 Cal. 450.)

By the Court, WALLACE, J.:

This was an action of ejectment, in which the defendant relied upon the Statute of Limitations, and judgment having been rendered in his favor, this appeal is taken from the judgment and from an order denying the plaintiff's motion for a new trial.

The title to the premises in controversy was vested in Mrs. Maria A. Toler, a married woman, by deed of gift to her from her father, made in 1854. In 1856 Edmonson, who claimed to have acquired her title, entered into the adverse possession of the premises, inclosed them with a fence, built a dwelling house, barn, and other buildings, and planted most of the land with fruit trees, and resided thereon, with his family, until the year 1865, when the defendant entered into possession under a deed obtained upon a foreclosure of a mortgage made by Edmonson, and has since occupied the premises adversely. The plaintiff obtained a deed of conveyance of the premises from Mrs. Toler and

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her husband on the 29th day of December, 1864, and commenced this action on the 13th day of December, 1869 — the premises having then been held adversely by the defendant and his grantors some thirteen years.

It is urged that the deed by which Mrs. Toler conveyed, or attempted to convey, the premises to Edmondson in 1856 was insufficient to pass the title, by reason of a defective acknowledgment, but the views we entertain, irrespective of the supposed insufficiency of the deed, upon the defense of the Statute of Limitations as a bar to the action, render it unnecessary to consider the sufficiency of her conveyance to Edmondson.

It is urged that the fact that Mrs. Toler was a married woman from the year 1854 until and at the time she conveyed the premises to the plaintiff, in December, 1864, saved her claim of title from the operation of the statute, and that the plaintiff, having commenced the action within five years after he received his conveyance, his title is not affected by the bar.

The statute of 1850, defining the time for the commencement of civil actions, provided that if the person entitled to commence an action for the recovery of real property were a married woman, the time during which the coverture should continue should not be deemed a portion of the time limited for the commencement of the action; and, had not this provision of the statute been subsequently amended, it is clear that an action might have been brought by the plaintiff at any time within five years after the delivery to him of the deed under which he claims title. But on April 18th, 1863, the Act was amended in this respect, and by the amended Act the fact of coverture was declared not to create a disability, so as to save the bar of the statute in favor of the *femme covert*, except in those cases in which the husband was a necessary party to be joined with her in commencing the action. (Acts 1863, p. 325.) But the premises

Points decided.

being the separate property of the wife here, the husband need not have been joined with her as a plaintiff in an action brought for their recovery. (Pr. Act, Sec. 7, Subd. 1.) And the theretofore existing disability by reason of coverture having been thus removed from Mrs. Toler, her title would become barred, under the sixth section of the amendatory Act of 1863, by the lapse of five years from the 18th day of April, 1863 — which period had fully run in April, 1868 — nearly two years before the commencement of the action.

The judgment and order denying a new trial must, therefore, be affirmed, and it is so ordered.

Mr. Justice SPRAGUE did not participate in the foregoing decision.

[No. 8,122.]

L. L. BATCHELDER v. JOHN K. MOORE.

CONTEMPT OF COURT—POWER TO PUNISH.—The power of a Court to punish for an alleged contempt of its authority, though undoubted, is in its nature arbitrary, and its exercise is not to be upheld, except under the circumstances, and in the manner prescribed by law.

JURISDICTION IN CASES OF CONTEMPT.—It is essential to the validity of proceedings in contempt, subjecting a party to fine and imprisonment, that they show a case in point of jurisdiction within the provisions of the law by which such proceedings are authorized, for mere presumptions and intendments are not to be indulged in their support.

CONTEMPT NOT COMMITTED IN PRESENCE OF THE COURT.—When the alleged contempt is not committed in the presence of the Court an affidavit of the facts constituting the contempt must be presented, in order to set the power of the Court in motion. If the affidavit be defective in stating the facts, it is equivalent to the utter absence of an affidavit.

CONTEMPT UNDER THE ACT OF 1862.—Under the Act of 1862, for the punishment of contempts and trespasses, it is essential that the person accused be one who has been ejected or dispossessed, as provided in the Act.

CERTIORARI to the County Court of the City and County of San Francisco.

Upon an original application to the Supreme Court a writ of certiorari was granted, upon which the record of the proceedings of the County Court of the City and County of San Francisco in this case was brought up for review.

The other facts are stated in the opinion of the Court.

Joseph M. Kinley, for Petitioner.

By the Court, WALLACE, J.:

Upon certiorari to the County Court of the City and County of San Francisco.

Batchelder having recovered judgment against Moore only, in an action of forcible entry and detainer, instituted in the County Court, the latter was removed from the possession of the premises under a writ issuing upon that judgment.

Subsequently Batchelder filed an affidavit in the County Court, in which, after reciting the fact of his recovery against Moore, he alleged that Moore was ejected under the writ, and the affiant placed in possession; that thereafter one Clark intruded into the premises, and took possession thereof; that, on the same day that Clark entered, one Hickey brought an action in the District Court of the Twelfth District against Clark, to recover the premises from the latter, and that, by consent, a judgment in favor of Hickey and against Clark was immediately rendered, and on the next day Clark was removed, and Hickey placed in possession, under a *habere facias* issued upon that judgment; that the possession taken by Clark, and the action brought against him by Hickey, were induced and procured by Moore and one David Calderwood, the petitioner here.

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The affidavit of Batchelder further alleged, that "Calderwood never had any right to, or claim to, or possession of, said lots of land, or any part thereof;" that at the time of the trial of the action of *Batchelder v. Moore*, "Calderwood pretended to be in possession of said lots of land, or to have some right thereto under said Moore, or as the principal of said Moore, and not otherwise;" and that the entry of Moore in the first instance was as an agent of Calderwood as well as in his own right, and that the possession taken by Clark, and the action brought against the latter by Hickey, were really procured by Moore and Calderwood, to evade and defeat the judgment and writ in the case of *Batchelder v. Moore*, and, therefore, amounted to contempt of the process of the County Court.

Upon presentation of this affidavit, the County Court directed Moore and Calderwood to show cause before it why they should not be punished for contempt in the premises. The parties appeared, and upon hearing the proceeding was dismissed as to Moore, but Calderwood was adjudged guilty of the contempt alleged against him, in the willful violation of the writ of restitution issued in the case of *Batchelder v. Moore*, through the instrumentality of the possession taken by Clark, and the recovery against the latter by Hickey; and for his contempt in that behalf it was adjudged that he be imprisoned in the common jail of the City and County of San Francisco for the space of five days, and pay a fine of five hundred dollars, and that he be imprisoned until the fine be paid, etc.

The power of a Court to punish for an alleged contempt of its authority, though undoubted, is in its nature arbitrary, and its exercise is not to be upheld, except under the circumstances and in the manner prescribed by law. It is essential to the validity of proceedings in contempt, subjecting a party to fine and imprisonment, that they show a case in point of jurisdiction within the provisions of the law by

which such proceedings are authorized, for mere presumptions and intendments are not to be indulged in their support.

The statute of this State, regulating contempts and their punishments, provides, that when the alleged contempt is not committed in the presence of the Court an affidavit of the facts constituting the contempt shall be presented. (Prac. Act, Sec. 481.) If there be no affidavit presented there is nothing to set the power of the Court in motion, and if the affidavit, as presented, be one, which, upon its face, fails to state the substantive facts, which in point of law do, or might, constitute a contempt on the part of the accused, the same result must follow—for there is no distinction in such a case between the utter absence of an affidavit and the presentation of one which is defective in substance, in stating the facts constituting the alleged contempt.

In the case here the proceeding is based wholly upon the statute of 1862 (p. 115), "An Act for the punishment of contempts and trespasses." That statute provides that "every person who shall have been, or shall be hereafter, *dispossessed* or *ejected* from" premises under the judgment of a Court, and who shall himself reënter, or procure some one else to reënter, etc., shall be deemed guilty of a contempt, etc. It is essential that the person accused should be one who has been *ejected* or *dispossessed*, as provided in the Act; and unless he be such person the Act has no application whatever, and he cannot be guilty of the contempt therein denounced. In the affidavit of Batchelder there is a total omission to allege that Calderwood was *such a person*, and the omission is obviously jurisdictional in its consequences.

I am, therefore, of opinion that the order of the County Court is void for want of jurisdiction to enter it.

The order is reversed.

Argument for Appellant.

[No. 2,962.]

N. H. THOMASSON v. A. WOOD AND W. B. LONG.

UNITED STATES INTERNAL REVENUE STAMPS — *DUFFY v. HOBSON*, 40 CAL. 240, AFFIRMED.— On the point that the omission of a United States internal revenue stamp cannot be set up as a defense in a State Court to an action on contract.

RELIANCE UPON AUTHORITY AFTERWARDS OVERRULED — OPPORTUNITY TO MAKE OTHER POINTS.— Where a single defense was interposed to an action, and such defense was supported by a decision of the Supreme Court, which, however, was afterwards reversed; held, that judgment should not be rendered on the record, but the cause remanded for further proceedings.

APPEAL from the District Court of the Second Judicial District, Lassen County.

This was an action on a promissory note, dated September 12th, 1864, for six hundred and thirty-one dollars and ninety-one cents. There was a United States revenue stamp to the value of fifteen cents on it, duly canceled. The defendants set up the want of a sufficient stamp as a defense; and there was a judgment in their favor. The plaintiff appealed.

Hyndley & Martin, for Appellant.

The omission of a United States revenue stamp can in no case be set up as a defense in the Courts of this State to an action upon a contract. This was fully determined in the case of *Duffy v. Hobson*, 40 Cal. 240. The Court there says:

“Congress has no constitutional authority to legislate concerning the rules of evidence administered in the Courts of this State, nor to affix conditions or limitations upon which those rules are to be applied and enforced, nor can it rightfully convert those Courts into tax gatherers for the benefit of the Federal Government, nor charge them with the duty of inquiring whether or not the revenue laws of the United States have been observed, or of investigating into the motives of parties in omitting to affix revenue stamps to con-

Opinion of the Court — Crockett, J.

tracts they have made. The case of *Halleck v. Jandin*, 34 Cal. 172, in so far as it intimates that the omission of a revenue stamp may, under certain circumstances, be set up as a defense in a State Court to an action upon a contract, is overruled."

John S. Ward and Burt & Sexton, for Respondents.

This case was decided upon the authority of *Halleck v. Jandin*. While the case of *Duffy v. Hobson* reverses the former adjudication, it is impossible to tell how far the fraud of the payee of a note will vitiate it or prevent it being used in evidence in an action for its collection. Unless the rule announced in *Duffy v. Hobson* is so absolute that even the fraud of a payee can not be shown for the purpose of defeating an action on the note, the judgment here should be sustained; because there is no finding or showing as to who was guilty of fraud against the Government, and the presumptions are all in favor of the correct action of the Court below.

But to whatever extent *Halleck v. Jandin* is overruled, it would be wrong for this Court to render a judgment which would prevent the defendants from having an opportunity for a new trial. The want of a sufficient stamp was, under that decision, an absolute and certain defense, and it was unnecessary to set up any other. But it is impossible to know what separate or different defenses the defendants may set up upon a new trial.

By the Court, CROCKETT, J.:

The judgment in this case is reversed on the authority of *Duffy v. Hobson*, 40 Cal. 240. But when the answer was filed and the cause tried, the defendants may have been induced by the intimation of this Court in *Halleck v. Jandin*, 34 Cal. 172, to rest their defense solely on the ground that

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the note was not sufficiently or properly stamped with internal revenue stamps. Upon the intimations in that case they may well have concluded that this was a sufficient defense, and have therefore omitted to make other defenses which they might have set up.

Judgment reversed and cause remanded.

[No. 3,121.]

GILBERT PALACHE v. PACIFIC INSURANCE COMPANY.

REQUISITION ON INSURANCE COMPANY TO REPAIR CAPITAL STOCK.—The Insurance Commissioner may, under the Act of March 26th, 1868, creating his office (Stats. 1867-8, p. 336), legally require an insurance company, ascertained by him to be insolvent, as therein provided, to repair its capital stock without revoking its certificate.

STATUTORY CONSTRUCTION — GENERAL TENOR AND SCOPE OF LEGISLATIVE SCHEME.—In the construction of statutes for the purpose of ascertaining the legislative intent, regard is to be had not so much to the exact phraseology in which that intent has been expressed as to the general tenor and scope of the entire legislative scheme embodied in the statute.

INSURANCE COMMISSIONER'S POWERS — REQUISITION TO REPAIR STOCK WITHOUT REVOCATION OF CERTIFICATE.—The Act relating to the office, powers, and duties of Insurance Commissioner (Stats. 1867-8, p. 336) plainly distinguishes between the effect of a revocation of a certificate by such Commissioner and a requisition by him to repair capital stock; and it does not oblige him to make a revocation before he can require a repair.

DUTIES OF INSURANCE COMMISSIONER — DISCRETION.—The duties imposed upon the Insurance Commissioner, though generally defined by the Act creating his office (Stats. 1867-8, p. 336), are in their nature largely discretionary, and depend for their efficient performance in a great degree upon the exercise of an enlightened and careful discrimination with reference to the circumstances of the particular case with which he has to deal.

NO LIMIT TO ASSESSMENTS BY INSURANCE COMPANIES WHEN REQUIRED TO REPAIR CAPITAL STOCK.—The limitation of five per cent. in the imposition of assessments upon the capital stock of corporations, as provided by the Act of March 26th, 1866 (Stats. 1865-6, p. 458), has no application to assessments made by an insurance company, in response to a requisition of the Insurance Commissioner, under the Act of March 26th, 1868 (Stats. 1867-8, p. 336), for the repair of its capital stock.

APPEAL from the District Court of the Fifteenth Judicial District, City and County of San Francisco.

The facts are stated in the opinion.

W. H. Rhodes, for Appellant.

The assessment of seventy-five per cent upon the capital stock of the Pacific Insurance Company was illegally levied, because:

1. The power to levy assessments upon the stock of corporations is limited by the statute of March 26th, 1866, to five per cent.

2. The antecedent requirements of the Act creating the office of Insurance Commissioner were not complied with before the requisition was served upon the company.

Section eight of the Act, after stating the particular circumstances under which the power of the Commissioner can be exercised by revoking the certificate of a company, provides that "in such cases he may require a repair of the capital stock." The "such cases" evidently alludes to those mentioned in the preceding clauses; and as the circumstances here do not present such a case, the Commissioner exceeded his powers, and the assessment is void.

S. M. Wilson, for Respondent.

The neglect of the Commissioner to revoke the certificate, or to publish, if obligatory on him, cannot impair the effect of his requisition. It was his duty to make the requisition, and he did it. On the requisition it was the duty of the company to levy the assessment, and they did it. The validity of the assessment can in no way depend on the revocation of the authority to do business. The revocation refers to the future merely; the requisition is to repair past losses. The assessment is to pay losses already accrued; and those losses must be paid whether any further

business be done or not. The two matters are not dependent on each other.

The spirit and object of the whole Act relating to this subject must be considered. In construing it, force and effect should be given, if possible, to each of its provisions. (*French v. Teschemacher*, 24 Cal. 639.) Viewed in this light, the words "such cases" mean cases of insolvency, and not cases of revocation of authority and newspaper notice. Taking the whole section together, it would seem that the validity of the assessment depends on the requisition, and the requisition depends on the ascertainment by the Commissioner of the insolvency under the artificial standard established. In fact, it would not be unreasonable to hold that where the Commissioner has power to compel an assessment a company may voluntarily levy it.

The limit of assessments to five per cent, under the Act of 1866, does not apply to cases like the present. The five per cent assessment is "for the purpose of paying the proper and legal expenses of such corporation." The assessment under the insurance laws, is to repair the capital where it has been impaired twenty per cent.; and, consequently, such assessment is only limited by the amount necessary to make up the deficiency.

By the Court, WALLACE, J.:

The appeal in this case was taken from a judgment rendered in favor of the defendant in the Court below, upon the following case agreed:

"1. On the 14th of July, 1863, the Pacific Insurance Company became a body politic and corporate, under the Act of the Legislature of this State entitled 'An Act concerning corporations,' approved April 22d, 1850, and the several Acts amendatory thereto up to said 14th of July, 1863, and duly organized immediately thereafter, and has ever since

continued in business as a corporation; the objects for which the company was formed are stated in the certificate of incorporation to be to form an insurance company and to make contracts of indemnity, grant policies of insurance, and transact all other business which a corporation so formed may lawfully do.

" 2. On the 11th of July, 1866, the said company, by due proceedings taken under the Act of the Legislature of this State entitled 'An Act relating to fire and marine insurance companies,' approved April 2d, 1866, adopted the provisions of the said Act.

" 3. On the 11th day of February, 1867, by due proceedings had under the statutes in such cases made and provided, the said company increased its capital stock from seven hundred and fifty thousand dollars to one million dollars.

" 4. On the 4th of June, 1868, W. Ashburner became the owner of ten shares in the capital stock of said company, and received therefor a certificate in form prescribed by the Directors and the by-laws of the company; the certificate was in the words and figures following, viz.:

" 'Number 634.]

[10 shares.

" 'Incorporated July, 1863.

" 'Pacific Insurance Company.

" 'Capital, \$1,000,000.

10,000 shares, \$100 each.

[Internal revenue, 25 cents, canceled.]

" 'SAN FRANCISCO, June 4th, 1868.

" 'This certifies that W. Ashburner is entitled to ten shares of the capital stock of the Pacific Insurance Company. Transferable on the books of the company only in compliance with the conditions printed on the back of this certificate.



" 'J. HUNT, President.

" 'A. J. RALSTON, Secretary.'

Opinion of the Court — Wallace, J.

“Printed on the back of the above certificate was the following indorsement, viz.:

“‘No transfer of stock shall be made upon the books of the company until after the payment of all assessments imposed thereon, and of all the indebtedness due to the company by the person in whose name the stock stands on the books of the company, except with the consent of the Finance Committee; nor shall any transfer be made without the indorsement and surrender of this certificate.

“‘For value received I, or we, do hereby sell and assign unto ——— ten shares of the capital stock of the Pacific Insurance Company, as per this certificate; and I, or we, constitute and appoint ——— my, or our, true and lawful attorney, for me or us, and in my, or our, name and stead, to transfer the above number of shares and to sign and execute all necessary papers to that end, hereby ratifying all lawful acts of my, or our, said attorney done by virtue hereof.

“‘San Francisco, ———.

“‘Witness: ———.’

“5. On the 30th of October, 1871, the said Ashburner sold his said ten shares of stock to Gilbert Palache, and made an assignment thereof on the back of the certificate by filling in the name of said Palache in the blank places left therefor in the said printed form of assignment, and by signing his name at the foot of said assignment, and delivering the same to said Palache.

“6. Afterwards, and on the same day, said Palache presented himself at the office of said company with the said certificate of stock so indorsed and signed by said Ashburner, and offered to surrender said certificate for cancellation, and requested the officers of said company to enter the said transfer on the books of said corporation, and that a new certificate be issued to him for the same.

"7. The officers of said company refused to receive and cancel said certificate, and refused to enter such transfer on the books of the corporation, upon the grounds that an assessment of seventy-five per cent had been duly levied upon said capital stock on the 20th of October, 1871, and remained unpaid. The said Ashburner and Palache each refused to pay said assessment, on the ground that the same was not legal and binding.

"8. The by-laws of the company at the time aforesaid, and now in force, provide, among other things, as follows, viz.:

" "TRANSFER OF STOCK.

" "SEC. 13. The stock of the company shall be transferable in such manner as is provided by section twelve of an Act concerning corporations, passed April 22d, 1850, as the same was amended April 8th, 1862; but no transfer of stock shall be made upon the books of the company until after the payment of all assessments imposed thereon, and of all indebtedness due to the company by the person in whose name the stock stands on the books of the company, excepting with the consent of the Finance Committee; nor shall any transfer be made without the surrender of the certificate, and upon such surrender the word "canceled" shall be written across the face of the certificate by the Secretary, and the signatures of the officers shall be erased, and such certificate so canceled shall be preserved by pasting the same to the stub from which it was torn in the Certificate Book; provided, however, that the original corporators may, by their instrument in writing, duly assign to the persons who have signed the Subscription Book the amount of stock by each respectively subscribed. And the restrictions upon the transfer of stock expressed in this section shall be printed upon the back of each certificate of stock.'

"9. The assessment above referred to was made under the

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following circumstances and in the following mode — that is to say:

“ On the 20th of October, 1871, the Hon. George W. Mowe, the Insurance Commissioner of the State of California, made an examination of the business and affairs of said Pacific Insurance Company, induced thereto by reason of the late disastrous fire at the City of Chicago, Illinois, and, upon said examination, ascertained and declared that the condition of said company was as is shown in the requisition herein below set forth.

“ 10. The Insurance Commissioner immediately thereafter, and upon the said 20th of October, 1871, gave notice to said company, and made his requisitions in the words and figures following, viz.:

“ ‘ OFFICE OF INSURANCE COMMISSIONER,
“ ‘ SAN FRANCISCO, October 20th, 1871. } ”

“ ‘ *To the Pacific Insurance Company, its President, Vice President, and Directors:*

“ ‘ You will please take notice that, after inspecting and examining the affairs of your company, with a view to ascertain its condition and ability to fulfill its engagements, which examination was made because of the recent disastrous fire at the City of Chicago, Illinois, and at the request of your officers, I have ascertained and declared that the liability of said company for losses reported, for expenses, taxes, and re-insurance of all outstanding risks, estimated at fifty per cent of the premiums received on fire risks and marine time risks, and at the entire premium on all marine risks, would and do impair the capital stock of said company already paid in to an extent exceeding twenty per cent.

“ ‘ And I do, therefore, pursuant to the statute of this State in such cases made and provided, require the said

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Pacific Insurance Company to repair its capital on or before the 30th of December, A. D. 1871.

“(Signed)

GEORGE W. MOWE,

“ ‘Insurance Commissioner.’

[Seal of Insurance Commissioner.]

“11. The said Insurance Commissioner did not, on ascertaining the condition of said company to be as set forth in his said notice and requisition, nor before making his said requisition, nor has he at any time since revoked the certificate of authority which he had previously granted said company to do business, and under which it had been doing business, at the time of said examination and requisition, and did not give or publish any notice of revocation of such certificate of authority; but said Commissioner gave, on said 20th of October, 1871, the notice and requisition herein above set forth.

“12. After receiving from said Insurance Commissioner the notice and requisition aforesaid, and upon the same day, the Board of Directors of said company, duly assembled, did forthwith call upon its stockholders, by assessment, for the sum of seven hundred and fifty thousand dollars, being the amount necessary to make its capital equal to the amount required by the statute in such cases made and provided—that is to say, said Board of Directors passed the following resolution and made the following order, viz.:

“ ‘WHEREAS, This company has, on this 20th day of October, 1871, been notified by the Hon. George W. Mowe, Insurance Commissioner of the State of California, that, upon an examination of the business and affairs of this company, he has ascertained that the liabilities of this company, for losses reported, for expenses, taxes, and re-insurance of outstanding risks, estimated at the rate fixed by the statute in such cases made and provided, would impair the capital

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stock of this company already paid in, to an extent exceeding twenty per cent, and

“ ‘ WHEREAS, Said Commissioner has, also, made his requisition upon this company, requiring it to repair its capital on or before the 30th of December, 1871, and

“ ‘ WHEREAS, Pursuant to said requisition of said Insurance Commissioner, it is necessary to call upon the stockholders, by assessments, for such amount as will repair its capital, according to the statute in such cases made and provided — that is to say, seven hundred and fifty thousand dollars, or seventy-five per cent of the capital stock ; therefore

“ ‘ *Resolved*, That an assessment of seventy-five dollars per share be, and the same is hereby, levied upon the capital stock of this company, payable on and after the twenty-first day of October, instant, to the President and Vice President of this company, at the office of the company, No. 422 California street, in the City and County of San Francisco, California ; and that any stock upon which said assessments shall remain unpaid on the 1st day of December, 1871, shall be deemed delinquent, and shall be duly advertised for sale at public auction, and, unless payment be made before, shall be sold on the 18th day of December, 1871, to pay the delinquent assessment, together with costs of advertising and expenses of sale.’

“ 13. Upon the making of said order last aforesaid, the Secretary of said company caused to be published immediately, and daily thereafter, in two daily newspapers, published in the City and County of San Francisco, California, which is the principal place of business and office of said company, a notice, of which the following is a copy, viz. :

“ ‘ NOTICE TO STOCKHOLDERS PACIFIC INSURANCE COMPANY,

Having its location and principal place of business at the City and County of San Francisco, California—Notice is

hereby given that at a meeting of the Directors of said company held on the 20th day of October, 1871, an assessment of seventy-five dollars per share was levied upon the capital stock of said company, payable on and after the 21st day of October, 1871, to the President and Vice President of this company, at the office of the company, No. 422 California street, in the City and County of San Francisco, California.

“Any stock upon which said assessment shall remain unpaid on the 1st day of December, 1871, shall be deemed delinquent, and will be duly advertised for sale at public auction, and, unless payment shall be made before, will be sold on the 18th day of December, 1871, to pay the delinquent assessment, together with cost of advertising and expenses of sale.

“ANDREW BAIRD, Secretary pro tem.

“No. 422 California street, San Francisco, California, October 20th, 1871.”

Upon the foregoing facts it is contended by the plaintiff, Palache, that the said assessment is not a legal and valid assessment, but that the same is null and void, and affords no legal impediment to the transfer of said ten shares of stock of said company on its books, and that said officers are bound by law to cause the said transfer and assignment to be entered on the said books. The said company contends that said assessment is valid, legal, and binding, and that, until paid, it is not bound under its by-laws and the form of the said certificate, so delivered to said Ashburner, to enter said transfer and assignment in its books, or otherwise recognize said assignment.

The question, therefore, presented to the Court for its decision, is, whether the said assessment, so levied, is legal, valid, and binding, and to render judgment accordingly. If judgment be against the said Palache, it shall be that he take

nothing by said proceedings as against said Pacific Insurance Company, but shall pay the costs of this proceeding.

If judgment be against the said company, it shall be for the sum of three hundred dollars, the agreed value of said ten shares of stock, with costs of this proceeding.

Upon the oral argument the judgment was affirmed from the bench, but the importance of the points involved renders it proper that a statement be made of the views upon which the judgment proceeded.

The statute upon which the controversy arose is the Act of March 26th, 1868, creating the office of Insurance Commissioner (Acts of 1867-8, p. 336); so far as it is material to the points made in argument, it is as follows:

“Sec. 7. Whenever the liabilities of any person engaged in the insurance business, for losses reported, for expenses, taxes, and re-insurance of all outstanding risks, estimated at fifty per cent of the premiums received on fire risks and marine time risks, and at the entire premiums on all other marine risks, and at such rates for life, accidental, and other kinds of insurance as shall be generally accepted by the actuaries of the States of New York and Massachusetts, would impair his capital stock already paid in to an extent exceeding twenty per cent, such person is hereby declared to be insolvent.

“Sec. 8. Whenever it shall be ascertained by the Commissioner that any person engaged in the insurance business in this State is insolvent, within the true intent and meaning of this Act, he shall, and is hereby empowered to revoke the certificate granted in behalf of such person, and shall send by mail to such person, addressed to him at his principal place of business, or deliver to him personally, notice of such revocation, and shall cause notice of such revocation to be filed in his office, and also to be published in some public newspaper published in the City of San Francisco, for at least four weeks; and such person is required, after receiving notice of said revocation, or after the first publication

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thereof, to discontinue the issuing of any new policies and the renewal of any previously issued; and in such cases the Commissioner shall require the said person, or his manager or agent, to repair its capital within such period as he may designate in such requisition. Any company, corporation, or association receiving the aforesaid requisition from the Commissioner, shall forthwith call upon its stockholders, by assessments, for such amounts as will make its capital equal to the amount of its paid-up capital, exclusive of assets needed to pay all ascertained liabilities for losses reported, for expenses and taxes, and exclusive of the entire premiums received for outstanding risks; and in case any stockholder shall refuse or neglect to pay the amount so called for, it shall be lawful for said company, corporation, or association, to enforce such assessment by such notice and sale as are provided for by the Act entitled an Act concerning assessments upon the stock of corporations, approved March 26th, 1866. In case any person, upon the requisition of the Commissioner as aforesaid, shall fail to make up the deficiency of his capital in accordance with the requirements aforesaid, or to comply in all respects with the insurance laws of this State, the Commissioner shall communicate the facts to the Attorney General, whose duty it shall then become to commence an action in the name of the people of this State, in the District Court of the judicial district where the person in question is located or has his principal office, against such person, and apply for an order requiring him to show cause why his business should not be closed; and the Court shall thereupon proceed to hear the allegations and proofs of the respective parties as in other cases; and in case it shall appear to the satisfaction of the Court that such person is insolvent, as aforesaid, or that the interests of the public so require, the Court shall decree a dissolution of such company, corporation, association, or firm, and a winding up of its affairs and a distribution of the effects of

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such person. But otherwise, the Court shall enter a decree annulling the act of the Commissioner in the premises, and authorizing such person to resume business. But the Commissioner shall not be held liable for damages in the attempted performance of his duty herein, if he has acted in good faith. In the event of any additional losses occurring upon new risks taken after the expiration of the period limited by the Commissioner in the requisition, and before the deficiency shall have been filled up, the Directors of any company, corporation, or association shall be individually liable to the extent thereof."

1. It was objected in argument upon the part of the appellant, that the requisition of the Commissioner, by which he required the company to repair their capital stock, and in assumed obedience to which the company levied the assessment complained of, was itself invalid and unauthorized by the provisions of the statute already referred to, because the Commissioner did not then, or at any time, revoke the certificate of authority which he had previously, under section four of the statute, granted to the company, authorizing it to transact insurance business. It was argued, in this connection, that the phrase "*in such cases*," occurring in section eight, and defining the cases in which such a requisition is authorized, embraces only those cases in which the Commissioner had not only ascertained the fact of insolvency, but had also revoked the certificate itself. It was said that the language employed in the statute (section eight) is mandatory upon the Commissioner, that whenever he shall ascertain the fact of insolvency, *he shall*, and is hereby empowered to revoke "the certificate granted," etc. It is well settled that in the construction of statutes, for the purpose of ascertaining the legislative intent, regard is to be had not so much to the exact phraseology in which that intent has been expressed, as to the general tenor and scope of the entire legislative scheme embodied in the Act.

Mere philology often sticks in the bark, and so becomes an obstruction rather than an aid to a correct exposition of the meaning of the statute. The Act under consideration plainly distinguishes between the effect of a revocation notified and a requisition received. In the former case it declares that the company shall absolutely discontinue the taking of new risks, the issuing of new policies, and the renewal of old ones. (Sec. 8.) Such revocation deprives the company of the certificate of authority which (under section nine) it must possess before it can be lawful to transact insurance business at all, "and all policies issued or renewed, and all insurances taken before the issuance of such certificate shall be null and void for all purposes whatsoever." (Sec. 9.) But the consequences of a requisition for the repair of capital stock upon insurance business transacted intermediate the receipt of the requisition and the expiration of the time therein limited are widely different from those which ensue upon a revocation notified. The company may, of course, at once and without delay, supply the deficiency in its capital stock, and in that event the transaction of its business is wholly unaffected by the requisition made. Otherwise it may, at its option, suspend the taking of insurances and the issuance of new policies during the time limited in the requisition; or, if it prefer, it may take such new risks, even before the deficiency in its capital stock be supplied, the Directors being in that case, however, personally liable for any loss which may occur upon such new risks thus taken. But if we are to hold that in every case where a requisition to repair capital stock is received a revocation must first be notified, it is obvious that the revocation must operate to utterly destroy the privilege plainly acceded to the company intermediate the receipt of the mere requisition and the expiration of the time therein limited for making the required repair of the capital stock. A construction involving such results would be in plain conflict with the apparent intent

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had in view by the statute. There are other considerations, too, which present themselves, if attention be had to the general scope of the Act and the purpose in which it originated, and which confirm us in the view we have expressed upon this point.

The duties imposed upon the Commissioner of Insurance, though defined in a general way, are in their nature largely discretionary, and depend for their efficient performance in a great degree upon the exercise by him of an enlightened and careful discrimination with reference to the circumstances surrounding each particular case with which he is expected to deal. He is generally to do and perform with justice and impartiality the duties of his office in connection with the laws regulating the business of insurance in this State, and to enforce the execution of such laws according to the true intent and meaning thereof. (Sec. 4.) With this view he is clothed with important powers, to be exercised to a greater or less extent according as the particular circumstances appearing may in his judgment require. It may be, for instance, that an insurance company is ascertained by him to be insolvent in fact and in a commercial sense, and the risks to be taken by such a company therefore absolutely worthless to the assured. In such a case it may, and doubtless would be, his duty to exert the high authority devolved upon him by law, to revoke its certificate at once, as the only means by which the interests of the public could be preserved. Such a case would, however, be clearly and easily distinguishable from another, in which there was found to be *only the technical insolvency* defined by the provisions of the statute itself.

For it will be observed that section seven of the Act establishes a test of solvency and insolvency of a merely arbitrary character, and under the operation of which an insurance company may, within the intent and for the purposes of the statute, be held insolvent, and at the same time

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be not only really and actually solvent in a business sense, but justly so regarded in the commercial world. Thus, in order to ascertain the present condition of the company as being one of solvency or insolvency, for the mere purposes of the statute, the Commissioner must assume, against the condition of solvency, that certain losses, though yet in fact only reported, are already established and ascertained; that in relation to outstanding risks, not yet heard from even by report, all of those of one and half of those of another designated class will eventually prove to be losses; and the probable losses thereafter to be sustained upon outstanding risks of yet another general character are to be arrived at by applying the rules of calculation in such cases adopted by the actuaries in the States of New York and Massachusetts.

If under the provisions of the Statute the Commissioner should determine, upon a proper investigation had, that the company, though insolvent within the intent of the Act, was, nevertheless, solvent in a business point of view, we should be surprised to find, and we do not find, upon examination of the Act, that he had no discretion to stop with the delivery of the requisition, but must, of mere legal necessity, resort to the harsher measure of an absolute revocation of the company's certificate. We would, we think, greatly misapprehend the scope and purpose of the Act should we hold that, under its provisions, the Commissioner is to exercise no discretion in this most important respect, but that, being once put in motion, he must in all cases, *nolens volens*, proceed to the same and a uniform extremity against all companies with whose financial condition he is called upon to deal, and that he cannot legally require a company to merely repair its capital, even in a case where such repair is all that is needed, but must first

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revoke its certificate, suspend, and, perhaps, thereby nearly destroy its business, and certainly injure its general credit in advance by an official promulgation of his judgment, that the company is wholly unfit to transact business at all, and that only after that step has been taken, and notice thereof "published in some public newspaper published in the City of San Francisco for at least four weeks," is he to call upon the company to repair its capital—if it can.

We think that such an interpretation of the statute would, in its inevitable consequences, involve the absolute destruction of the business of insurance, instead of regulating its transactions.

2. It is claimed in the second place that even if the requisition to repair the capital stock is to be considered as valid, it will not authorize the assessment, as here made, that by the Act of March 26th, 1866 (Stats. 1865-6, p. 458), it is provided that no one assessment shall exceed five per cent. of the stated amount of the capital stock of the corporation. But the Act of 1868, which we have been considering, expressly provides that, upon receiving the requisition from the Commissioner, the company "shall forthwith call upon its stockholders, by assessments, for such amounts as will make its capital equal to the amount of its paid-up capital," etc., and enacts that such assessments shall be enforced by such notice and sale as are provided for by the Act of March 26th, 1866.

It results that the limitation of five per cent in the imposition of assessments has no application to assessments made in response to the requisition of the Commissioner, under the Act of 1868, for the repair of the company's capital.

Statement of Facts.

[No. 2,793.]

MARY SHAW v. CHARLES CROCKER.

RIGHT OF CITY TO RAISE GRADE OF STREET — DAMAGES.— A city has the right to raise the grade of a street; and if the contractor performs the work with proper care and skill, he is not responsible for any damage which may result to the contiguous property.

LIABILITY OF STREET CONTRACTOR FOR DAMAGES — BURDEN OF PROOF.— In a suit against a contractor for damages occasioned to contiguous property by raising the grade of a street under a city contract, it is incumbent upon the plaintiff to show that the work was performed in an improper or negligent manner, or that the damage resulted from a want of care or skill on the part of the contractor or his servants.

NEGLECT OR UNSKILLFULNESS NOT PRESUMED.— Negligence or want of skill in the grading of a street by a contractor, under a city contract, will not be presumed, nor inferred from the mere fact of damage, but must be proved.

APPEAL from the District Court of the Sixth Judicial District, Sacramento County.

The plaintiff recovered judgment in the Court below for one thousand dollars. Defendant moved for a new trial, which being refused, he took this appeal from the judgment and order.

S. W. Sanderson, for Appellant.

The testimony showed conclusively that defendant was performing a lawful contract with the City of Sacramento; that he did the work according to the survey and directions of the proper officers of the city; that he did it in the usual and proper mode and with ordinary care and skill; and that the demolition of the plaintiff's shanties was the natural consequence of the grading, and was in no respect due to any negligence or want of ordinary care on the part of the defendant. Such being the case, the demolition of the plaintiff's shanties was *damnum absque injuria*. (Stats. 1863, p. 416, Sec. 2, Sub. 5, and Secs. 3 and 4; *Governor, etc., of Cast Plate Manufacturers v. Meredith*, 4 Durnford & East,

Argument for Respondent.

794; *Wilson v. Mayor, etc., of New York*, 1 Denio, 595; *Green v. The Borough of Reading*, 9 Watts, 382; *The Mayor v. Randolph*, 4 Watts & Serg. 516; *Callender v. Marsh*, 1. Pick. 418; *Thurston v. Hancock*, 12 Mass. 220; *Sutton v. Clark*, 6 Taunton, 29; *Harman v. Tappenden*, 1 East, 555; *Gossley v. Georgetown*, 6 Wheaton, 598; *City of St. Louis v. Gurno*, 12 Missouri, 414; *Taylor v. City of St. Louis*, 14 Missouri, 20; *Hoffman v. City of St. Louis*, 15 Missouri, 651; *Radcliff's Executors v. Mayor, etc., of Brooklyn*, 4 Comstock, 195.)

J. H. McKune, for Respondent.

It did not require authorities to support the proposition relied on by appellant, that the plaintiff could not recover without showing "negligence or want of ordinary care." Plaintiff relied upon carelessness and negligence on the part of defendant. The contract was to grade the roadway thirty-four feet in width; but the defendant filled the roadway to the extreme eastern boundary of the street. The slope was made one and a half to one. The contract provided for that slope wherever necessary; and there was no evidence tending to show such necessity at that place. Here clearly was not only negligence, but an utter disregard of the rights of plaintiff in so adjusting the slope of the embankment as to push the buildings of plaintiff over, and into a pond of water.

That the defendant deposited earth on the land of plaintiff, and thereby damaged plaintiff, is undisputed, and a right of action thereupon accrued to plaintiff against defendant for such damage (*Himmelmann v. Spanghel*), and plaintiff would be entitled to recover without further negligence. (21 Barb. 68.)

By the Court, CROCKETT, J.:

The plaintiff was the owner of several lots situate in the City of Sacramento, fronting on First street, and of several frame buildings erected thereon. The substance of the complaint is that the defendant and his servants wrongfully entered upon said lots, and "unlawfully, willfully, carelessly, and negligently threw, deposited, and forced stones, gravel, earth, and other solid and weighty substances upon and against such buildings, and upon and against the timbers supporting the same," whereby the timbers were forced from their places, and the buildings were thrown down and destroyed.

Among other defenses, the answer sets up that the defendant was employed by the City of Sacramento to raise the grade of First street in front of the plaintiff's premises, and that he performed the work in accordance with the contract, under the orders and directions of the Trustees of the city and its officers authorized by law to superintend the same, that the work was performed in a proper, discreet, and careful manner, doing no more damage than was necessary; that the plaintiff's buildings were located on or near the street, and that the plaintiff had due notice of the grading of the street, and might, by the exercise of reasonable care, have protected the buildings from damage, but negligently omitted to do so, whereby the buildings fell down and were destroyed without any fault of the defendant.

At the trial the plaintiff proved the value of the buildings, and that they were thrown down and destroyed by the pressure of the earth and other materials deposited in the street by the defendant in raising the grade under his contract. The plaintiff then rested, and the defendant moved for a nonsuit, on the ground that there was no evidence tending to show that the work was performed in a careless or improper manner, or that the damage was owing to any

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carelessness or negligence on the part of the defendant, his agents, or servants. The motion was denied, and the defendant excepted and assigns this ruling as error.

After a careful examination of the evidence in chief for the plaintiff, I discover none which tended, in the slightest degree, to prove that the work of grading the street was performed in an improper, careless, or negligent manner, or that the damage to the plaintiff's property resulted, in any degree, from a want of proper care or skill on the part of the defendant or his servants. It was proved that the plaintiff had notice of the grading of the street; and some days before the buildings were damaged, sent a carpenter to examine them, who reported to her that they could be protected from injury by the erection of a bulkhead; but she made no effort to erect it, so far as the proof shows. The city had the right to raise the grade of the street; and if the contractor performed the work with proper care and skill, he is not responsible for any damage which may have resulted to the contiguous property. This is settled by an overwhelming weight of authority, and is apparently conceded to be the law by the plaintiff's counsel. (4 Dumpf. & East, 794; 1 Denio, 595; 9 Watts, 382; 1 Pick. 418; 12 Mass. 220; 6 Wheat. 593; 12 Mo. 414; 1 Const. 195, 203.)

Negligence or want of skill in the work will not be presumed, but must be proved. As already stated, there was no such proof on the part of the plaintiff, before she rested her case, and the nonsuit ought, therefore, to have been granted. Nor, so far as I can discover, was the omission supplied at any subsequent stage of the case.

Judgment reversed and cause remanded for a new trial.

Mr. Justice TEMPLE did not participate in the foregoing decision.

Statement of Facts.

[No. 2,807.]

L. H. FOOTE v. J. W. RICHMOND.

ADMISSION OF TESTIMONY AFTER CLOSE IN CHIEF — DISCRETION.—Where a defective power of attorney, offered by plaintiff, was admitted under objection, and after plaintiff's evidence in chief was closed, the Court allowed him to produce a sufficient power; *held*, that its admission at that time was matter of discretion, not to be disturbed in the absence of a showing of abuse.

APPEARANCE OF ATTORNEY OUT OF STATE.—Where a defendant was served out of the State, and an attorney then with him signed and transmitted a document to the effect that as defendant's attorney he acknowledged service, and authorized a judgment to be taken as prayed for; *held*, sufficient to show a voluntary appearance, and to justify the entry of an immediate judgment.

AMENDED COMPLAINT — ADMISSION OF SERVICE BY NEW PARTIES.—Where plaintiff amended his complaint by adding two new parties defendant, and these new parties afterwards filed a document in which they acknowledged "service of a copy of the complaint and summons herein," without mentioning the amended complaint, and consented to the entry of judgment as prayed for; *held*, that such appearance was sufficient, and authorized such a judgment.

RECITALS IN JUDGMENT — PRESUMPTIONS OF THEIR CORRECTNESS.—Where a decree recited that defendants consented to the entry thereof; *held*, that it would be presumed, against collateral attack, that such consent was so presented as to give the Court jurisdiction of their persons at the date of the decree.

POINTS AS TO SUFFICIENCY OF EVIDENCE WAIVED IF NOT PRESENTED BELOW.—The points that the evidence failed to establish a compliance with the conditions precedent of a deed under which the prevailing party claimed, and that the evidence failed to show that the property in controversy was within the calls of such deed, cannot be urged in the Supreme Court, if not specified as grounds of a motion for new trial.

PARTICULARS OF INSUFFICIENCY OF EVIDENCE MUST BE SPECIFIED.—On a motion for new trial the general ground of insufficiency of the evidence to justify the findings is of no avail, unless there are proper specifications of particulars wherein it is insufficient.

APPEAL from the District Court of the Sixth Judicial District, Sacramento County.

This was an action of ejectment for twenty town lots in the City of Sacramento. As a portion of his deraignment of title to some of them, the plaintiff introduced a deed

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from Roland Gelston, by his attorney in fact, Joseph Clough, to James C. Zabriskie. It was the power of attorney under which Clough acted that first engages the attention of the Court in the following opinion. From Zabriskie, the title passed to P. B. Cornwall, and from him to David B. Milne. Milne mortgaged to William S. Mesick, and Mesick, in 1862, commenced a foreclosure suit against Milne, and soon after its commencement, on leave of the Court first obtained, amended the complaint by making James C. Zabriskie and wife also parties defendant, and alleging that Milne had conveyed to them after the execution of the mortgage to Mesick.

As the plaintiff claimed under the decree and sale in *Mesick v. Milne*, defendant attacked the proceedings in that case. It seems that Milne was in the then Territory of Nevada, at the commencement of that suit. An affidavit for publication of the summons was accordingly presented, and an order obtained; and soon afterwards a personal service upon him was made in Carson City, Nevada. At the time of such service, March 15th, 1862, an attorney named G. D. Hall, wrote and transmitted to Mr. Cadwalader, Mesick's attorney, a document, as follows:

"State of California, Sacramento County, District Court, Sixth Judicial District.

"WILLIAM S. MESICK, Plaintiff,

"v.

"DAVID B. MILNE, Defendant.

"GEORGE CADWALADER, Esq.: I hereby acknowledge service of the summons and complaint in the above entitled action, and authorize a decree therein pursuant to the prayer of the plaintiff against D. B. Milne.

"Respectfully, etc.,

"G. D. HALL, Respondent's Attorney.

"CARSON CITY, ORMSBY COUNTY,

"NEVADA TERRITORY, March 15th, 1862."

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Shortly afterwards, and after the complaint had been amended as mentioned above, the following other document was signed and acknowledged in San Francisco, and placed in the hands of the plaintiff's attorney in that suit:

"In the District Court of the Sixth Judicial District for the County of Sacramento.

"W. S. MESICK, Plaintiff,

"v.

"D. B. MILNE, *et als.*, Defendants. }

"We hereby acknowledge service of a copy of the complaint and summons herein, and waive the time allowed by law for answering, and consent that the decree herein prayed for by plaintiff be entered.

"JAMES C. ZABRISKIE.

"MARY M. ZABRISKIE.

"June 14th, 1862."

On July 2d, 1862, both the forgoing documents were filed, and Mesick took a decree for the foreclosure of the mortgage against Milne. The decree recited that the cause had been submitted, and that it appeared to the satisfaction of the Court that the defendants therein had duly consented to the plaintiff having the relief prayed for by him.

The defendant, in the case at bar, objected to the introduction of the decree referred to, on the ground that at the time of its entry the service upon Milne was not complete, and that there being therefore no jurisdiction in the Court, the decree was void; also, because there was nothing in the record to show that the amended complaint was ever served upon Zabriskie or his wife. The objections were overruled, and defendant excepted.

After both parties had rested, and defendant had moved to strike out the power of attorney from Gelston to Clough, on account of its defective acknowledgment, plaintiff asked

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and obtained leave of the Court, against defendants' objection, to introduce the power of attorney in evidence over again, it appearing that it had been reacknowledged and re-recorded, and its previous defects, if any, entirely remedied.

There having been a judgment for plaintiff, defendant moved for a new trial upon the two grounds of: 1st. Insufficiency of the evidence to justify the decision of the Court, and that it was against law; 2d. Errors in law occurring at the trial, and excepted to by defendant at the time. The motion being denied, defendant appealed.

Henry Starr, for Appellant.

Beatty & Denson, for Respondent.

By the Court, SPRAGUE, J.:

The objection to the power of attorney from Gelston to Clough as evidence, on the ground of defective acknowledgment, was cured by subsequent evidence of a power properly acknowledged, admitted by the Court without other objection than that the evidence came too late — the plaintiff having closed his evidence in chief. The Court, notwithstanding this objection, admitted the evidence, which, in the exercise of a sound discretion, he could properly do; and I think in this there was no abuse of this discretion. (*Mowry v. Starbuck*, 4 Cal. 274; *Priest v. Union Canal Co.*, 6 id. 170; *Lisman v. Early*, 5 id. 199.)

The objections to the judgment roll in the case of *Mesick v. Milne et al.* as evidence are not well taken. It appears from said judgment roll that the action was originally commenced for the foreclosure of a mortgage upon certain real estate, given by Milne March 9th, 1859. The original complaint was filed March 1st, 1862; summons issued thereon against Milne alone. Subsequently, on the 19th of May,

1862, upon discovery that Milne, after the execution of the mortgage, had conveyed the mortgaged premises to Zabriskie and wife, plaintiff, by leave of the Court, filed a supplemental complaint, alleging the fact, and making Zabriskie and wife defendants.

Defendant Milne was personally served with the summons on the 15th March, 1862, in Nevada Territory. On the 2d day of July, 1862, the consent of Milne, by his attorney, G. D. Hall, that a decree be taken against him in the case, pursuant to the prayer of the complaint, was filed. This consent is in writing, signed by Hall as Milne's attorney, and is dated 15th March, 1862, the day on which service of summons was made on Milne. On the 14th day of June, 1862, the defendants Zabriskie and wife duly acknowledged service of summons and copy of the complaint, and consented that decree be entered against them as prayed for, which consent was in writing, duly signed and acknowledged by Zabriskie and wife. The decree was entered on the 2d day of July, 1862, and recites that it appeared to the satisfaction of the Court that the defendants duly consented thereto.

I think that the written consent of defendants, as filed, sufficiently shows a voluntary appearance of defendants, and that the Court had jurisdiction of their persons. But even if this evidence of voluntary appearance were not deemed sufficient—from the recital of the decree that it appeared to the satisfaction of the Court that the defendants have duly consented that decree be entered against them—it must be presumed, against collateral attack of the decree, that the consent of the defendants was presented to the Court in such a manner and form as to give the Court jurisdiction of their persons at the date of the rendition of the decree.

The fourth and fifth points urged by appellant are not well taken. The deed or writing from John A. Sutter, Jr.,

Argument for Petitioner.

purpose. The defendant has never interfered with the plaintiff in the disposition of the moneys earned by her, and, as these were sufficient for her support, the action must fail. (*Washburn v. Washburn*, 9 Cal. 477.) If this were otherwise, we could not consider the sufficiency of the evidence on the appeal from the judgment.

Judgment affirmed.

[No. 2,502.]

PATRICK CREIGHTON v. THE BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO.

LEGISLATIVE POWER TO APPROPRIATE MUNICIPAL FUNDS.—The power of the Legislature to appropriate the moneys of municipal corporations in payment of claims, ascertained by it to be equitably due to individuals, though such claims be not enforceable in the Courts, depends largely upon the legislative conscience, and will not be interfered with by the judicial department, unless in exceptional cases.

LIABILITY OF SAN FRANCISCO FOR STREET WORK UNDER THE PATRICK CREIGHTON RELIEF ACT.—The circumstance that the contract, under which Patrick Creighton did certain street work in San Francisco, expressly provided that the city should in no event be liable for any portion of the expenses thereof; *held*, not to affect or in any manner invalidate the special Act subsequently passed by the Legislature (Stats. 1869-70, p. 309), requiring the city to pay him.

APPLICATION to the Supreme Court for mandamus.

The facts are stated in the opinion.

William Irvine, for Petitioner.

The direction to the Supervisors to order the petitioner's claim paid is mandatory, and their duty ministerial. (*Nougues v. Douglass*, 7 Cal. 65; *McCauley v. Brooks*, 16 Cal. 11.) The statute, being founded on a manifest equity existing against a municipal corporation, was especially within the

Argument for Respondent.

province of the Legislature. (*People v. Supervisors of San Francisco*, 11 Cal. 206; *People v. Hawes*, 37 Barb. 440; *Stillwell v. Mayor of New York*, 19 Abbott, 376; *Town of Guilford v. Supervisors of Chenango County*, 18 Barb. 615; 3 Kernan, 143; *Blanding v. Burr*, 13 Cal. 343; *Hobart v. Supervisors of Butte County*, 17 Cal. 31; *People v. Pacheco*, 27 Cal. 209; *People v. Stewart*, 28 Cal. 395; *Beals v. Amador County*, 35 Cal. 632; *Davidson v. Mayor of New York*, 27 How. Pr. 342.)

In declaring the amount to be paid, the Legislature did not assume the exercise of judicial powers. (*Brewster v. City of Syracuse*, 19 N. Y. 116; *Thomas v. Leland*, 24 Wend. 65; *Morris v. People*, 3 Denio, 381; *Gifford v. Supervisors of Chenango County*, 13 N. Y. 143; *Rumney v. People*, 19 N. Y. 49; 4 Ind. Ch. Dec. 352; 5 Sandford, 10.) Nor did the provision in the contract, that in no case should the city be liable for the contract price of the work, affect the right of the Legislature to make the city liable. (*Stocking v. Hunt*, 3 Denio, 274.)

J. M. Nougues, for Respondent.

The Legislature, in directing the Board of Supervisors to order paid a specific sum of money, and interest thereon, to Patrick Creighton, assumed and exercised judicial powers. (Const. Arts. III and IV, Sec. 1; *People v. Hawes*, 37 Barb. 454; *Denny v. Mattoon*, 2 Allen, 361.)

The special relief act, upon which the petitioner bases his right of action, is repugnant to the United States Constitution and to the State Constitution. (U. S. Const. Art. I, Sec. 10; State Const. Art. I, Secs. 3, 8, 16, and Art. IV, Sec. 37; *Baldwin v. Mayor, etc.*, 42 Barb. 553; *Bank of Columbia v. Oakley*, 4 Wheat. 235; *Taylor v. Porter*, 4 Hill, 140; *Rockwell v. Neaning*, 35 N. Y. 302; *Westervelt v. Gregg*, 13 N. Y. 209.)

By the Court, WALLACE, J.:

It appears by the petition here, praying a writ of mandamus against the Board of Supervisors, that Creighton, in April, 1861, entered into certain contracts, in writing, with the Superintendent of Public Streets and Highways of the City and County of San Francisco, for the time being, to grade Union street, from Taylor to Larkin, and to grade the crossing of Union and Jones streets, according to specifications, in the usual form in which such contracts were accustomed to be made, under the provisions of the statute in that behalf; and thereafter, in due time and manner, he fully performed the contract upon his part, and the assessment roll and warrants were thereupon delivered by said Superintendent to the petitioner, who collected something less than twenty thousand dollars assessments thereon, leaving a balance of upwards of thirteen thousand dollars of said assessments still unpaid. He attempted to enforce the payment of this aggregate balance by actions brought against the persons severally assessed, for their respective portions thereof. These actions failed, however, because the resolution of intention to do the work had not been "presented to the President of the Board for approval, according to the requirements of section sixty-eight of the Consolidation Act." (*Creighton v. Manson*, 27 Cal. 629.)

The petition further sets forth that he thereupon made application to the Legislature of the State for relief in the premises, and that that body having made a careful and complete examination of all and singular the terms and conditions of said contracts, and of all the facts in connection therewith, thereupon passed an Act for his relief. This statute is set out in the petition (Chap. 210, p. 309, Acts 1869-70), and it enacts that the Board of Supervisors are thereby "authorized and directed to order paid to Patrick Creighton the sum of thirteen thousand five hundred and six dollars,

with legal interest on the said amount from July, A. D. 1862, until paid, in United States gold coin, which said amount of principal remains due and unpaid to the said Patrick Creighton on the contract for grading Union street, from Taylor to Larkin, including the crossing thereof, in the City and County of San Francisco, as per assessment on record in Volume VIII of Street Assessments, in the office of the Superintendent of Public Streets and Highways in the said City and County of San Francisco." In a subsequent section of the Act, the Auditor of the city and county is directed to audit this sum, with interest thereon, and to issue his warrant therefor to Creighton, and the Treasurer of the city and county is directed, upon presentation of such warrant, to pay the same, "as other indebtedness of the said City and County of San Francisco, in United States gold coin, to the above said Patrick Creighton," etc.

The Board of Supervisors, upon application made to them by Creighton for an order directing payment to be made to him, as provided in the Act, refused and still refuse to order the payment.

To this petition of Creighton, stating substantially the foregoing facts, the Board of Supervisors have filed a demurrer and an answer.

The ground of demurrer is, that the petition does not state facts sufficient to constitute a cause of action.

The answer alleges that the Act of the Legislature was passed against the will and consent of the City and County of San Francisco; that the sum of money by the Act directed to be paid to Creighton never was at any time a claim against the city and county, nor obligatory upon it, either legally or morally. The answer further sets up in defense of the action that, in and by the terms of the contracts for street grading, alleged in the petition as having

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been entered into by Creighton with the Superintendent of Public Streets and Highways, it was, in fact, expressly stipulated that the said city and county should not be liable for any portion of the expense of the work nor for any delinquency of the persons or property assessed.

The power of the Legislature to appropriate the moneys of municipal corporations in payment of claims ascertained by it to be equitably due to individuals, though such claims be not enforceable in the Courts, has been uniformly upheld ever since the case of *Blanding v. Burr*, 13 Cal. 351, in which this Court said: "The power of appropriation which the Legislature can exercise over the revenues of the State, for any purpose which it may regard as calculated to promote the public good, it can exercise over the revenues of a county, city, or town, for any purpose connected with their past or present condition, except as such revenues may, by the law creating them, be devoted to special purposes."

The sovereign power of appropriation of the public funds already in the Treasury or to be raised by taxation, in favor of individuals, is one, the exercise of which must depend largely upon the legislative conscience, and like most of the great powers of government, can not be interfered with by us, unless in exceptional cases. The most usual cases in which this power has been exercised are those, like the one under consideration now, where an individual, having no legal claim in the sense of being capable of enforcement by judicial proceedings against a municipal government, has, nevertheless, in equity and justice, in the larger sense of those terms, a right to indemnity and compensation out of the public Treasury. As was said by DENIO, J., 8 Kern. 149: "The Legislature is not confined in its appropriation of the public moneys, or of the sums to be raised by taxation, in favor of individuals, to cases in which a legal demand exists against the State. It can thus recognize claims founded in equity and justice, in the largest sense of these

terms, or in gratitude, or charity. Independently of express constitutional restrictions, it can make appropriations of money whenever the public well being requires or will be promoted by it, and it is the judge of what is for the public good."

The admitted fact here that Creighton had performed labor in the improvement of the public street, and of which the municipal government and people of San Francisco had the benefit, and that he had been unable to obtain compensation therefor, only because the principal officer of the municipal government had neglected to observe the statute requiring him to sign his name to the resolution under which the work was done, presented a case fully as persuasive in its circumstances as most of those which have been the subject of legislative relief in this State or elsewhere.

There is nothing in the circumstance that the contract under which the work was done contained a stipulation by which it was provided that the City of San Francisco should, in no event, be liable for any portion of the expense thereof. The Legislature, in passing the statute, have proceeded upon the equity of Creighton to be relieved by reason of matters occurring subsequently to the making of the contract, and not contemplated by it or anticipated when it was entered into. Besides, it would be difficult to show that these parties, by the stipulations of that contract, had, in terms or by fair construction, limited or taken away the constitutional power of the Legislature to extend relief to the public creditors, or those it considers to be such, as it may see fit; and the existence of such a power is all that we have to inquire into here.

The writ must issue, as prayed for, and it is so ordered.

Opinion of Crockett, J., concurring.

CROCKETT, J., concurring:

The questions involved in this case are not distinguishable in principle from those decided since the last term in the case of *Sinton v. Ashbury*. On the authority of that case I concur in the opinion that the plaintiff is entitled to the writ as prayed for.

[No. 2,354.]

MARIA DE JESUS GUEDICCI v. WILLIAM BOOTS.

MISTAKE OF CARRYING OUT PARTITION ACCORDING TO AGREEMENT—EQUITABLE DEFENSE TO EJECTMENT.—Where Guedici, Boots, and others, owners of a tract of land in common, entered in a partition agreement, according to which Commissioners were to divide the land so as to allow Boots to retain a certain portion then in his possession, but the Commissioners in carrying out the agreement, by a mistake in running the line agreed upon, cut off a portion of Boots' share, and gave it to Guedici, and the partition deeds executed between the parties followed the lines of the Commissioners, and the mistake was not discovered until afterwards; *held*, in ejectment by Guedici against Boots for the strip so by mistake cut off of his portion, that the facts constituted a good equitable defense, and that upon being properly set up and proved Guedici could not recover.

EXECUTION OF PARTITION DEEDS UNDER MISTAKE, WHEN NOT A "FINALITY."—Where a partition agreement fixed upon a certain line as dividing off the interest of one of the parties, but in carrying out the agreement a mistake was made in running this line so as to cut a portion of the land it was agreed he should have, and the mistake was carried into the partition deeds, and not discovered until afterwards; *held*, that the proceedings did not, under the circumstances, become a "finality," but that the party was entitled to relief in equity.

APPEAL from the District Court of the Third Judicial District, County of Santa Clara.

The southerly line of the land purchased by the defendant, Boots, of Rafael Alviso, and which it was stipulated in the partition agreement he was to retain in severalty, ap-

Argument for Appellant.

pears to have been run and surveyed, and should have been described in courses and distances, as follows: Beginning at a post marked "B. No. 1," in the center of the Coyote Creek, from which a sycamore tree, three feet in diameter, bears north $63^{\circ} 15'$ west, one chain distant, and running thence south $89^{\circ} 45'$ west 59.40 chains to a post marked "B. No. 2." The mistake consisted in leaving out the words and figures, "north $63^{\circ} 15'$ " and "south $89^{\circ} 45'$." The result was the cutting off of about three acres of Boots' land, which constituted the property in controversy. A judgment of ejectment having been rendered for plaintiff, the defendant appealed.

F. E. Spencer, for Appellant.

The partition agreement refers to the conveyance from Rafael Alviso to William Boots, and in effect adopts the description therein contained. (*Vaver v. Fore*, 24 Cal. 435; *Allen v. Bates*, 6 Pick. 460.) That description is an artificial landmark, clearly identified, that is to say, a fence. The other description is by courses and distances; and the two differing, the former will govern. (*Colton v. Leary*, 22 Cal. 496.) But even if this were doubtful, the fact that defendant has occupied up to the fence is presumptive evidence of the true place of the line. (*French v. Pearce*, 8 Conn. 439.)

It was clearly the intention of all the parties in interest that Boots and Fogarty should have in severalty the land described in the deeds to them; and such being their intention, as expressed in their written contract, if a mistake has occurred, it is the duty of the Court to correct it, and carry out the intention of the parties. As between Boots and Fogarty on the one side and the other tenants in common on the other, the transaction was not a partition, but simply an act recognizing and validating the conveyance of one of their co-tenants. It partook of the character of a partition only as between the others. (1 Story Eq. Jur. Secs. 140;

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160, 162; *Pierson v. Cahill*, 23 Cal. 249; *Hathaway v. Brady*, 28 Cal. 121.)

D. M. Delmas, for Respondent.

There is nothing in the transcript to show that the Court below erred in dismissing the cross complaint. All the tenants in common, including the defendant, joined in the conveyance to Wright, in which they agreed that "said land shall be partitioned and divided among them, and they shall henceforth have and hold in severalty the parcels hereinafter described as the parcels to be set apart to each of them;" and, also, that Wright was to convey to said parties in severalty these several parcels of the said premises "which are hereinbefore described as the respective parcels which shall be held by the said parties respectively in severalty." Wright followed those descriptions. The legal ownership of the whole tract was vested in him, and he afterward conveyed to defendant a part of that tract. The question in the action at law is: Does the defendant, by virtue of that conveyance, own any more of that tract than was conveyed to him? I submit that to this question there can be but one answer.

By the Court, WALLACE, J.:

The plaintiff recovered in the Court below, on the trial of the action, a small tract of land which is included in the southerly half of the Rancho "Rincon de los Esteros," in Santa Clara County, of which southerly half she and others (among whom was Rafael Alviso), were formerly owners and tenants in common.

The defendant, Boots, had purchased of said Alviso, a defined portion of the lands of the estate in common, and entered into possession of the tract so purchased, occupying it according to its boundaries, as set forth in the conveyance

made to him by Alviso, which was a conveyance in fee, and which described the tract as bounded on its southerly side by a fence dividing it from another tract called the "Bloomfield Claim." Under this condition of things, Boots, and all the tenants in common, agreed with each other that three named persons, chosen as Commissioners, should make partition of the premises, between the tenants common, according to their respective interests, and that Boots should hold, in severalty, the specified parcel purchased by him from said Rafael Alviso. The Commissioners proceeded to make the partition, and, also, as they supposed, to set off to Boots the tract of land which the agreement had already determined to be his. In so doing, however, they undertook to define each of the several tracts by calls and distances, and by a mistaken call they ran the southern boundary line of the land of Boots to the north of the fence, which was its true southern line, as laid down in the Alviso deed and confirmed by the agreement under which the Commissioners acted. These descriptions, by calls and distances, having been reported by the Commissioners, and no mistake being discovered or suspected, the parties in interest, among them the plaintiff and the defendant, Boots, in order to effect the partition intended, conveyed the premises (being the entire southern half of the rancho) to one Wright, reciting in the deed to him that they had "agreed that the said Boots and Fogarty (who had also purchased a several tract from said Rafael Alviso) shall hold in severalty the said parcels so purchased by them as aforesaid, from said Alviso." The deed to Wright was upon the trust therein expressed, that he should convey to each of the grantors the tract of land to which such grantors would be entitled according to the report of the Commissioners. These conveyances the trustee, Wright, subsequently made, and in so doing he followed the calls, and distances reported by the Commissioners, and which were set forth in the deed to him defining the particu-

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lar tract thereafter to be conveyed by him to each. The result was, that the conveyance, as made by the trustee to Boots, did not include in its description all of the land which he had purchased from Alviso, but only a part, though by far the larger part of, and that a portion of it was included in the deed made by the trustee to the plaintiff, to whom the tract next adjoining the Boots tract on the south had been assigned by the Commissioners. It is this small tract, lying between the fence and the mistaken line of the Commissioners to the northward of the fence, which the plaintiff, relying upon her legal title, recovered in the court below. The defendant set up the foregoing facts as an equitable defense and as a cross complaint, upon which he prayed that the plaintiff should be directed to convey the premises in controversy to him. The learned Judge of the Court below denied this; or any relief to the defendant, and to review the determination in that respect this appeal is brought.

If respect be had to the agreement made between all the parties in interest — including the plaintiff and the defendant, Boots — it is obvious that the pretensions of the plaintiff in the premises cannot be maintained. For it is distinctly provided by the terms of that agreement, that the defendant, Boots, is to hold in severalty the land which he had purchased of Alviso, and of which he was already in the possession. I am unable to see how this agreement subsequently became inoperative between the parties to it. The selection of the Commissioners — their steps taken to effect a partition — their report to the parties in interest, describing, as they supposed, and as all parties supposed correctly describing, the tract already set off to Boots by the agreement itself; the adoption of that report by all parties, in the belief that it did accord with the agreement in the particular in question here; the conveyance thereupon made to Wright in trust, and his subsequent conveyance in turn, made to Boots, of the tract, as was supposed, already designated by the agree-

Points decided.

ment, were but steps taken to carry the agreement itself into effect, and were not intended to modify its terms, or substitute a new one in its stead. Had the mistake in the call of the southern line of the Boots tract been discovered before Wright executed the deed, by which the erroneous line was fixed between the plaintiff and Boots, it might, according to the view of the Court below, have been corrected, but not after then; because, as is said, at that point "the proceedings became a finality." If Boots had known of the mistake and had failed to make timely objection to the erroneous line, but had knowingly permitted it to be carried into the Wright deed, it might have been too late for him to object after that; but here the mistake was not discovered by any one then; the possession of Boots was always in accordance with his true boundary, and the plaintiff cannot be permitted to disturb him, in the face of her agreement that he should have the land according to the lines of the Alviso deed as made to him.

The judgment is reversed, and the cause remanded with directions to set aside the order dismissing the cross complaint, and for further proceedings not inconsistent with this opinion.

[No. 2,712.]

A. B. MCCREEERY AND JOHN SULLIVAN v. GEORGE BROWN, WM. PERRY, AND EDWARD EWALD.

DISCRETION AS TO DISSOLVING INJUNCTION, THOUGH EQUITIES OF BILL DENIED BY ANSWER.—Though an injunction should in general be dissolved when all the equities of the bill are denied by the answer, yet there may be circumstances disclosed by the pleadings under which the Court will, in the exercise of a sound discretion, be justified in continuing it till the hearing on the merits.

APPEAL from the District Court of the Twelfth Judicial District, City and County of San Francisco.

Statement of Facts.

This was an action to restrain the defendant Brown from prosecuting a forcible entry case against the defendants Perry and Ewald, in the County Court of the City and County of San Francisco. That suit, as appears, was originally commenced in 1860, before a Justice of the Peace. Being there decided in favor of the defendants therein, it was appealed to the County Court, where it was again decided in favor of the same parties. Brown subsequently took an appeal to the Supreme Court, where the cause remained unmoved from 1861 till 1869, when certain defects in the appeal papers were remedied upon an affidavit made by one A. Williams, to the effect that he had made certain clerical errors in the indorsements of the admission of service of the notice of appeal; and, the cause being then brought on for hearing before the Supreme Court, the judgment of the County Court was reversed and the cause remanded for a new trial.

In the meanwhile, the plaintiffs McCreery and Sullivan purchased the ground in controversy, consisting of about twenty-five acres of land in the City and County of San Francisco, from Perry to Ewald. In their complaint they allege that their grantors were in the actual possession of the land and transferred it to them; that Brown never had any right, title, interest, or possession; that he had no record title whatever; that his claim was fraudulent, and made to extort money; that as a matter of fact, he had abandoned his forcible entry case, and claim to the premises, immediately after taking the appeal to the Supreme Court; that plaintiffs, though previous to their purchase they had had the title of the land searched, were ignorant of any claim by Brown; that the papers on appeal in said suit were insufficient to sustain the appeal taken; that afterwards, as the land became valuable, the defendants Brown and Perry confederated and combined together to defraud plaintiffs, and, in pursuance of their plans, induced Williams

Argument for Appellant.

to make the affidavit before referred to, and caused the record to be altered so that the appeal might be heard; that the record was thereby falsified and made to state what was not the truth; that the Court was imposed upon by said affidavit and alterations, all of which were done without any notice to or any knowledge of the plaintiffs; that the appeal in the Supreme Court, not being opposed, but fraudulently connived at by Perry, resulted in a reversal of the judgment and a sending of it back for the new trial, which they prayed to restrain. They further alleged that Brown was irresponsible; that Perry and Ewald would not defend said action; and that if it should be allowed to go to judgment, and Brown thereby and by means of his frauds obtain possession of the premises, it would require tedious and expensive proceedings to evict him.

Upon the complaint being filed, and on motion of plaintiffs, an injunction was issued and served with the summons, requiring the defendant Brown, until further order, to desist from further prosecuting the forcible entry suit in the County Court. Afterwards Brown filed his answer, specifically denying each and every material allegation of the complaint, and then moved to dissolve the injunction, supporting his motion by affidavits of A. Williams, his former attorney, and M. A. Wheaton, his then attorney, in the forcible entry case, in addition to his own sworn answer.

On a hearing, the motion to dissolve the injunction was denied; and the defendant Brown appealed from the order.

M. A. Wheaton, for Appellant.

As the answer denied all the equities of the complaint, the injunction should have been dissolved. (*Gardner v. Perkins*, 9 Cal. 558; *Burnett v. Whitesides*, 13 Cal. 156; *Curtis v. Sutter*, 15 Cal. 259; *Johnson v. Wide West M. Co.*, 22 Cal. 479; *Real del Monte M. Co. v. Pond Co.*, 23 Cal. 82.)

There are no equities stated in the complaint sufficient to

Argument for Respondents.

sustain the injunction, for the reason that it does not show that Brown has not a good cause of action in his forcible entry suit, but it rather affirmatively shows that he has a good cause of action therein. It further shows that the Supreme Court has decided that the judgment in the County Court against Brown was erroneous, and reversed it as such. All the facts as to the time when the appeal was taken and the time that it had lain dormant, and the correction of the record, were before the Supreme Court; and it is not for a District Court to undertake to say that the Supreme Court acted wrongfully, or that its judgment was a nullity.

The case shows simply this state of facts: Brown was in possession of the twenty-five acres. Perry and Ewald forcibly ousted him in such a manner that he had a remedy to recover possession under the Forcible Entry Act. While he is pursuing that remedy the plaintiffs herein bought out Perry and Ewald's interest in the premises, and now attempt to deprive Brown of his remedy under the Forcible Entry Act by transferring the case to the District Court, on the sole and only ground of a plea of title in themselves—putting this action in such a shape, too, that even when Brown defeats them on their plea of title he will still be left out of possession and the plaintiffs in possession. All this is contrary to the forcible entry law and the decisions. (*McCaughey v. Weller*, 12 Cal. 500; *Hodgkins v. Jordan*, 29 Cal. 578; *Owen v. Doty*, 28 Cal. 505; *Davis v. Perly*, 80 Cal. 632.)

Barnes & Bowie, for Respondents.

It is not denied that Brown is pecuniarily irresponsible, and without property or means, and that he could be made to respond to plaintiffs for detention of their property, or costs, and that all of plaintiffs' expenditures in the matter would be a total and irrevocable loss. These allegations of the complaint are, therefore, to be taken as true, so far as this proceeding is concerned. (*Croniss v. Clark*, 4 Md. Ch.

Dec., 403.) This being a material allegation, and undenied, the Court properly refused to dissolve the injunction. (*Rich. v. Thomas*, 4 Jones Eq. 71; *Nelson v. Robinson*, 1 Hempstead, 464; *Furlong v. Edwards*, 3 Md. 113; *Real del Monte M. Co. v. Pond Co.* 23 Cal. 82; *Powell v. Brown*, 22 Geo. 275; *Parkinson v. Trousdale*, 3 Scam. 367; *Buckner v. Biernes*, 9 S. & M. 804; Hilliard on Inj. 94, 96, 100.)

The defendant would not have been necessarily entitled to a dissolution of the injunction even had his answer denied the equity of the bill. It still rested in the discretion of the Court to deny the motion. (Hilliard on Inj. 90, 100; Adams' Eq. 196; *Roberts v. Anderson*, 2 Johns. Ch. 204; *Crutchfield v. Danilly*, 16 Geo. 432; *Nelson v. Robinson*, 1 Hempst. 464; *Poor v. Carleton*, 3 Sumn. 25; *Linton v. Denham*, 6 Florida, 533; *Monroe v. McIntyre*, 6 Ired. Eq. 65.)

The proceedings of Brown, as detailed in the complaint and confirmed by the answer, were fruitful of suspicions; and the Court held, and we submit rightfully and within the limits of a reasonable judicial judgment, that a forcible entry and detainer suit which had been wrapped in a sleep of death for eight years might slumber yet a little longer, until the facts could be fairly, fully, and judicially investigated.

By the Court, SPRAGUE, J.:

The material allegations of the complaint constituting the gravamen of plaintiff's claim to equitable relief are specifically denied by the answer, and the special denials of collusion and fraud are supported by the affidavits of Williams and Wheaton, filed with the answer. Under the general rule that "when all the equities of the bill are denied by the answer the injunction should be dissolved," the injunction should have been dissolved, unless the circumstances of the case, as disclosed by the pleadings, be such as to justify

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the Court in the exercise of a sound discretion in continuing the injunction until the hearing upon the merits.

There are circumstances disclosed by the pleadings in this case, independent of the direct issues made thereby, which might well have influenced the Judge, in the exercise of a sound discretion, to continue the restraining order until the hearing upon the merits of the case. (*Godey v. Godey*, 39 Cal. 166, 167.)

Order affirmed.

[No. 2,747.]

**A. B. CHAPMAN v. D. A. HOLLISTER AND ALBERT
O. WALLACE.**

VACANCY IN ADMINISTRATION—GRANTEE OF DEVISEE NOT ENTITLED TO POSSESSION.—Where a widow, who was both devisee and executrix, married, and she and her husband then deeded the land devised; *held*, that though the marriage may have operated as a revocation of the letters testamentary, yet there was an unclosed administration, and the grantee was not entitled to possession.

HEIR OR DEVISEE CANNOT MAINTAIN EJECTMENT WHILE ADMINISTRATION UNCLOSED.—If letters be regularly granted, and the Probate Court acquire jurisdiction over an estate, though a vacancy occurs in the office of executor or administrator, the heir or devisee can not maintain ejectment during such vacancy as long as the administration remains unclosed.

APPEAL from the District Court of the Seventeenth Judicial District, County of San Diego.

This was an action of ejectment for a lot known as the Pear Garden of Lorenzo Soto, in the old City of San Diego. Defendant Hollister disclaimed any interest. Defendant Wallace filed a general denial, and set up the Statute of Limitations. There was a judgment for defendant Wallace; and a motion for new trial having been overruled, plaintiff appealed.

Glassell, Chapman & Smith, for Appellant.

I. Hartman, for Respondents.

By the Court, CROCKETT, J.:

The first point for consideration is, whether the plaintiff is entitled to the possession of the demanded premises on his own theory of the facts. Both parties claim through the will of Lorenzo Soto, deceased, which was duly probated, and of which the widow of Soto was appointed and duly qualified as executrix. Whilst acting as executrix, the widow contracted a second marriage, and subsequently, by the joint deed of herself and husband, conveyed said premises to the plaintiff, who insists that the property was devised to the widow by Soto's will, and that her authority as executrix having ceased when she contracted a second marriage, the administration of the estate became vacant, and, so far the evidence shows, yet remains so. Assuming these to be the facts, he insists that he is entitled to possession, there being no executor or administrator of the estate. If it be conceded that, if there be no existing administration upon an estate, the heir or devisee can maintain ejectment for the real estate; and if it be further admitted that the marriage of the executrix operated, *ipso facto*, as a revocation of her letters, without any action of the Probate Court declaring the revocation, it by no means follows that the heir or devisee is entitled to the possession, whilst there is a pending and unclosed administration temporarily vacant. On the death of the ancestor his title to real estate passes to the heir or devisee, subject, however, to the right of possession of the executor or administrator for the payment of debts. (Probate Act, Secs. 114, 194; *Becket v. Selover*, 7 Cal. 215; *Meeks v. Hahn*, 20 Cal. 627; *Matter of Estate of Woodworth*, 31 Cal. 604.) And, when there is no administration upon the estate, the heir or devisee may maintain ejectment for the real estate of the tes-

Opinion of the Court — Crockett, J.

tator or intestate. (*Updegraff v. Trask*, 18 Cal. 458.) But if the Probate Court has regularly granted letters testamentary or of administration, and has acquired jurisdiction over the administration of the estate, and if a temporary vacancy occurs in the office of executor or administrator pending the administration, and whilst it is yet unclosed, the heir or devisee cannot maintain ejectment during the vacancy. It would lead to great perplexity in the settlement of estates, if, during a temporary vacancy in the administration, the heir or devisee should be held to be entitled to the possession of the estate, and to receive the rents and issues. On the appointment of a new executor or administrator he would be entitled to the possession and to all the rents and profits which had accrued during the vacancy, his right in this respect taking effect by relation as of the date when the vacancy occurred. A different ruling on this point would only tend to promote litigation and embarrass the administration of estates, without increasing the security of creditors and heirs. The Probate Court has ample power to protect the estate during the vacancy in the administration, by the appointment of a special administrator, whose proceedings would be subject to its control and supervision. But to permit the heirs and devisees, or their grantees, to intervene and take possession of the estate during the temporary vacancy in a pending administration of an unsettled estate, would tend only to unnecessary confusion, delay, and embarrassment in the administration.

This view of the case renders it unnecessary to notice the other points discussed in the briefs.

Judgment affirmed.

Mr. Chief Justice RHODES dissented.

Mr. Justice SPRAGUE did not participate in the foregoing decision.

Opinion of the Court — Wallace, J.

[No. 2,825.]

GEORGE BARSTOW v. THE CITY RAILROAD COMPANY.

IMPLIED PROMISE OF CORPORATION — CIRCUMSTANCES AND RELATION OF PARTIES AS EVIDENCE.— In an action against a corporation to recover on a *quantum meruit* for services performed, the situation of the parties at the time, and the relation, if any, in which they stood, of a business character or otherwise, are relevant and material circumstances; and the exclusion of competent testimony, tending to show such circumstances, is error.

SERVICES TO CORPORATION BY DIRECTOR — BY-LAWS AS EVIDENCE.— In an action by Barstow against the City Railroad Company, to recover on an implied promise for alleged services performed by him, while a Director, in going to New York and negotiating a construction contract for the company, where it appeared that the President told him, previous to going, that he should be compensated; *held*, that a by-law of the company, to the effect that Directors should receive no compensation for services as Directors, though traveling expenses might be audited and paid, was relevant testimony for defendant, and its exclusion was error.

APPEAL from the District Court of the Fifteenth Judicial District, City and County of San Francisco.

This action was tried by the Court below without a jury, and resulted in a judgment for plaintiff for two thousand five hundred dollars, as prayed in his complaint. A motion for a new trial having been overruled, defendant appealed from the judgment and order.

The facts are stated in the opinion.

E. J. & J. H. Moore, for Appellant.

Barstow, Stetson & Houghton, for Respondent.

By the Court, WALLACE, J.:

The plaintiff was a Director of the corporation defendant, and alleges that he was employed by defendant, while holding that position, to go to New York and there engage in

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certain negotiations then pending there between the defendant and one Randall, concerning the execution or modification of a proposed contract between defendant and Randall for the construction of the defendant's projected railroad. It is alleged in the complaint that the defendant promised to pay the plaintiff "for his services and expenditures, including traveling expenses, whatever the same should be reasonably worth, and promised to pay him in gold coin of the United States," etc. The defendant denied the allegations of the complaint.

It was not pretended at the trial that the defendant had, by proceedings at any corporate meetings, directly employed the plaintiff as its agent to proceed to New York upon this business; but it appeared that the plaintiff and one Gladding had already agreed with each other to go to New York from California, in the prosecution of a joint enterprise of their own, into which they had entered for the sale of certain mines and mining interests in the New York market, and that it was in contemplation to sell one of these mines to Randall, the same person who was about to contract to build the defendant's road. Under these circumstances, Barstow had a conversation with the President of the defendant, Dr. Rowell, in which he remarked that he thought of going to New York; that he had some "contingent business" there. Rowell replied: "Then you must go for the City Railroad Company and complete the contract with Randall, or get somebody else to build this road," adding that Barstow should be compensated for his services and expenses. This was in October, 1865, and on the eighteenth day of that month Barstow left San Francisco by the steamer, and arrived in the City of New York on the eighth day of November following. On the twenty-eighth of November — twenty days after Barstow had arrived in New York — a corporate resolution was passed by the defendant, authorizing Barstow and Gladding (then also in the Eastern States)

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to close the construction contract with Randall, etc., which resolution, or a copy of it, was forwarded to them from California. Negotiations had there with Randall, up to the time of Barstow's return to California, in March, 1866, resulted in nothing. In the mean time, other persons, not then interested in the stock of the corporation, have become stockholders, and Barstow now claims that the corporation is indebted to him in the sum of two thousand five hundred dollars, for these alleged services at the East in 1865-6.

It is claimed that the circumstances are such as that the law would imply a promise upon the part of the corporation to pay him his claim. It was held in *Pixley v. W. P. R. R. Co.*, 33 Cal. 83, that a *quantum meruit* would lie against a corporation for services rendered, and would be supported by proof of circumstances from which a promise to pay might ordinarily be inferred against a natural person.

Even if the cause of action set forth in the complaint here is to be considered to be in this respect altogether of the same character as was that in the case just referred to (a point upon which I am not to be understood to be expressing an opinion now), it is clear enough that the defendant was entitled at the trial to put in evidence all the facts, which could be reasonably supposed to throw light upon the question as to whether the plaintiff had really been employed as alleged by him. It was supposed that the conversation already referred to, had between the plaintiff and the president of the defendant, previous to the departure of the former from California in October, 1865, coupled with the corporate resolution of November twenty-eighth following, were circumstances tending to prove the employment alleged—and they were admitted in evidence upon that view. It is evident, however, that the weight and value of such circumstances, when proven, must be affected by a consideration of other and co-existent facts surrounding the transaction. For instance, it appears in this case that the

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plaintiff was himself, at the time, a Director of the defendant. That fact in itself tended, and I must consider that the Court below regarded it as tending, in some degree to weaken the presumption of a promise to pay by the corporation defendant. The situation of the parties at the time — the relation, if any, in which they stood of a business character, or otherwise, are important to be known and considered, in order to arrive at a correct solution of the ultimate question involved. In *Murdock v. Murdock*, 7 Cal. 511, we said that where the right of the plaintiff to recover rests upon an alleged implied contract, all the circumstances of the case must be considered to ascertain what were the expectations of both the parties as to compensation, etc. In that case the plaintiff sought to recover the value of services rendered the defendants, in the family of the latter, upon an implied contract to pay her therefor. The fact, however, that the plaintiff bore the relation of a step-mother to the defendants at the time the services were rendered was held to be of great import, as tending to overthrow any implication of a promise to pay her for her services. In this view, the fact that the plaintiff was at the time a Director of the corporation was important to be considered, as I have said already. And upon the same principle the Court should have considered if there were any existing general rule or regulation of business in force between the parties, in reference to which they might be supposed to have dealt in the particular instance under consideration. Such a regulation may go far to determine the intention and mutual expectation of the parties at the time of the supposed employment. Upon the trial of this cause the defendant offered in evidence a by-law of the corporation, which provided that no Director should receive any compensation for his services as Director, but that the traveling expenses of the officers and Directors, while actually engaged in the business of the company, might be audited

Points decided.

and paid. This was excluded as being irrelevant. In this there was error. It was not irrelevant. It tended, in a degree at least, to aid in the determination of the main point in controversy — the alleged employment and promise to pay. We cannot, of course, know what other circumstances the defendant might have shown in connection with this by-law, had it been received in evidence, nor how far it might of itself have influenced the decision of the cause; but it was a fact upon which the defendant had a right to rely, as tending in a measure to defeat the claim asserted by the plaintiff. The conversation, which, it is claimed, resulted in an employment of the plaintiff, was had between Dr. Rowell and the plaintiff — they being respectively President and Director of the corporation. The by-law which was excluded cannot be said to have been irrelevant in an investigation as to how the parties may have understood each other.

I think that the judgment should be reversed, and a new trial had; and it is so ordered.

[No. 2,489.]

ANDREW CRAWFORD (DOING BUSINESS UNDER THE FIRM NAME OF A. CRAWFORD & Co.) v. THE BARK "CAROLINE REED," HER TACKLE, APPAREL, AND FURNITURE.

JURISDICTION AS TO MARITIME CONTRACT.—Where materials and supplies are furnished a domestic vessel at her home port, under a contract with the master of the vessel, the United States Courts have exclusive original jurisdiction of proceedings *in rem* to enforce a lien against the vessel for the same.

STATE LEGISLATION ON ADMIRALTY PROCEEDINGS.—The statute of this State, so far as it attempts to authorize proceedings *in rem* for causes of action cognisable in the admiralty, is unconstitutional.

APPEAL from the District Court of the Twelfth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

McAllister & Bergin, for Appellant.

The question involved is the constitutionality of the provisions of the Practice Act, under which the proceedings were instituted.

The presumption of law is, that every statute is constitutional and valid, and its invalidity can only be declared in cases free from all doubt. (*Bourland v. Hildreth*, 26 Cal. 227.)

This Court has decided that the statute in question was constitutional and valid, and the State Courts exercised lawful jurisdiction thereunder. (*Warner v. Uncle Sam*, 9 Cal. 647; *Ord v. Uncle Sam*, 13 Cal. 369; *Sheldon v. Uncle Sam*, 18 Cal. 562.)

The power of the Legislature over the forms of procedure and measure of the remedy is plenary. (*The People v. Steamer America*, 34 Cal. 680; *Keating v. Spink*, 3 Ohio St. 105; *Trevor v. Ad. Hine*, 17 Iowa, 350.)

The Federal Courts have repeatedly affirmed the constitutionality of similar statutes by administering and enforcing them. (*The General Smith*, 4 Wheat. 438; *The Robert Fulton*, 1 Paine, 620; *Peyroux v. Howard*, 7 Pet. 340; *People's Ferry Company v. Beers*, 20 How. 395; *The Ship Harriet*, Olcott Rep. 231; *Roach v. Chapman*, 22 How. 129; 1 Pars. on Mar. Law, 498.)

The New York cases are opposed to the decisions of this Court already referred to, the following cases in Illinois, Missouri, and Indiana, as well as to the various decisions of the United States District, Circuit, and Supreme Courts, enforcing these State laws. (*Wyatt v. Stuckley*, 29 Ired. 279; *Cavender v. Fanny Barker*, 40 Mo. 235; *Boylan v. St. Bt. Victory*, id. 245.)

Argument for Respondent.

Horne & Rosenbaum, for Respondent, cited *The Moses Taylor*, 4 Wallace, U. S., 411; *The Hine v. Trevor*, 4 Wallace, U. S., 555; *The Belfast*, 7 Wallace, U. S., 624; *The Josephine*, 39 N. Y. 19; *Jackson v. The Propeller Kinnie*, 8 Am. Law Reg., N. S., 470; *Ferran & Lowndes v. Hosford & Goodrich*, 54 Barb. 200.)

Is the jurisdiction of the United States Court in actions against vessels by name, exclusive or concurrent? If we examine the Constitution and the several Acts of Congress under it, but one conclusion can be arrived at, namely: that the jurisdiction is exclusive.

Article five of the Constitution of the United States extends the jurisdiction of the Federal Court "to all cases of admiralty and maritime jurisdiction." It will be observed that in said article the word "all" is used in some cases, and in others omitted. It must be presumed that the framers of that instrument had an object in making that distinction. Justice STORY says, that where the word "all" is used in that instrument, it means exclusive; and where omitted, concurrent. (1 Wheaton, 334.)

Act of Congress, 24th September, 1789, gives to the District Court exclusive original cognizance in all cases of admiralty and maritime jurisdiction. Now if this Act of Congress giving to this District Court exclusive jurisdiction is constitutional, the Act of the State Legislature giving to State Courts concurrent jurisdiction must be unconstitutional. Whatever may have been the opinion of jurists heretofore, the case of *The Moses Taylor*, followed by that of *The Hine v. Trevor*; *The Belfast*, decided by the Supreme Court of the United States; the case of steamer *Josephine*, decided by the Court of Appeals of the State of New York, as well as that of the propeller *Kinnie* (in which case the Court, in speaking of *The Josephine* case, expressed its satisfaction that State Courts agree with Federal Courts in denying

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jurisdiction in such action to State Courts), fully settles it in favor of the exclusive jurisdiction.

By the Court, TEMPLE, J.:

This is an action brought under section three hundred and seventeen of the Practice Act, to enforce a lien for materials for the equipment and repair, and supplies for the use of the bark Caroline Reed. The vessel is a domestic vessel, and San Francisco, where the cause of action arose, is her home port. Whether the vessel was engaged entirely in commerce between different ports of this State, or between ports of this State and places not within the State, does not appear from the averments of the complaint. A demurrer to the complaint was sustained on the ground that the statute under which the suit was brought is unconstitutional; and this appeal is from the judgment entered sustaining the demurrer.

The materials and supplies furnished are alleged to have been furnished under a contract with the master of the vessel, and I do not understand that it is denied that the contract was of a maritime nature, upon which suit might have been brought against the owners or against the master *in personam* in the Courts of admiralty.

The case of *The Moses Taylor*, 4 Wall. 411, was a case under this very statute, to enforce a lien arising upon the breach of a contract to convey the complainant from New York to San Francisco. The decision in this case, as I understand it, does not go to the extent of holding that the language of the Constitution itself, *ex vi termini*, vests in the Courts of the United States exclusive jurisdiction of all civil causes of maritime and admiralty jurisdiction, but holds that in all cases to which the judicial power of the United States extends, Congress may rightfully vest exclusive jurisdiction in the Federal Courts, "and that the Judiciary Act of 1789

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vests in the District Courts exclusive jurisdiction of causes of action of this character." It is also held that the saving clause in the ninth section of the Judiciary Act is not a saving of a concurrent remedy in a common law Court, but the saving of a common law remedy. A proceeding *in rem* is not a common law remedy, and the statute of this State, as far as it attempts to authorize proceedings *in rem* for causes of action cognizable in the admiralty, is unconstitutional and void.

The case of *Hine v. Trevor*, 4 Wall. 555, decided at the same term, is to the same effect. It is there held that the grant to the District Courts of the United States of original admiralty jurisdiction is exclusive, not only of all other Federal Courts, but of the State Courts; and therefore State statutes which attempt to confer upon State Courts power to enforce a remedy by proceedings *in rem* for marine torts or contracts, are void. Both of these, however, were cases in which a maritime lien existed which could only be enforced in Courts of admiralty. The Legislatures of the States in which the actions were brought had attempted to create a statutory lien which should, in effect, take the place of the maritime lien previously existing. If this could be done, it would necessarily deprive the District Courts of much of the jurisdiction conferred upon them by the Judiciary Act, or, at least, would give the State Courts concurrent jurisdiction with them.

It is contended, however, that in the case at bar—there being no lien, by maritime law, for materials and supplies furnished at the home port—the statute does not trench at all upon the jurisdiction of the District Courts of the United States. The lien created is not a substitute for the lien existing by maritime law, but is made to meet a case where no such lien existed before. The Federal Courts can not enforce this lien, for it is not a maritime lien.

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This argument, it seems to me, overlooks the fact that the *cause of action* is not to enforce a lien, but to recover for materials and supplies upon a maritime contract. The Admiralty Courts undoubtedly have jurisdiction to enforce this contract. The language of the Judiciary Act is not that the District Courts shall have exclusive, original cognizance of actions to enforce maritime *liens*, but of all civil causes of admiralty and maritime jurisdiction. The cause of action is the breach of the contract. For this an action lies in admiralty. It is the fact that it is a maritime contract which gives that Court jurisdiction, and not the fact that a maritime lien is to be enforced.

It being admitted that the cause of action in the case at bar is one of which the Courts of admiralty have jurisdiction, it must follow that their jurisdiction is exclusive, except so far as the State Courts are permitted to take jurisdiction by the saving clause in the ninth section of the Judiciary Act. It is remarked in each of the cases cited from 4 Wallace that this saving is not of a remedy in the common law Courts, but of a common law remedy. It must follow from this that whenever Courts of admiralty have jurisdiction of a cause of action, whether it affords a remedy *in rem*, or *in personam* merely, that jurisdiction is exclusive, except as to the common law remedy reserved by that Act.

This action is brought to obtain *relief* for the *breach* of a maritime contract, and the remedy given by the statute is not a common law remedy. This seems to me conclusive against the statute.

I see no reason to doubt the constitutionality of the statute, so far as it may be made applicable to causes of action which are not cognizable in Courts of admiralty. There is no objection to the law merely because it authorizes a suit against the vessel itself, except so far as the suit is upon a marine contract.

Judgment affirmed.

[No. 2,852.]

P. H. RUSSELL v. GEORGE H. MIXER, MELISSA MIXER, AND JANE P. MORRILL.**MISTAKE IN SATISFYING INSTEAD OF ASSIGNING A MORTGAGE.—RELIEF.—**

Where the owner of a mortgage agreed to assign it to a third person, and at his request entered a satisfaction of record, both supposing that would carry out their intentions; *held*, upon a proper complaint by the intended assignee against the mortgagor, setting up the facts, that equity would relieve against the mistake and decree a foreclosure of the mortgage.

CURING MISTAKES OF PARTIES OWN IGNORANCE OR INATTENTION.—Equity will grant relief against a mistake by which parties, through their own ignorance or inattention, fail to select or prepare a proper kind of instrument to effectuate their agreement and intention, the same as if such mistake were made by a scrivener.

DEFECTIVE COMPLAINT.—When a complaint is defective in manner rather than in matter, if no objection is taken by demurrer, it will be held sufficient to support a judgment.

APPEAL from the District Court of the Sixth Judicial District, Sacramento County.

The facts are stated in the opinions.

J. H. McKune, for Appellants.

The original complaint made no attempt whatever to present a case for relief on the ground of mistake; and the amended complaint is equally barren of facts stated tending to make a case for relief on that ground. The plaintiff mistook no question of fact. He deliberately, of his own motion, with full knowledge of all the facts and of the law, without fraud on the part of anybody, released his mortgage. He avers that it was by mistake, but what that mistake was is only hinted at by an averment that he was surprised at its effect. That surprise which will avoid a deed must be produced by or accompanied with fraud or circumlocution. (*Tiffany & Bullard on Trustees*, 185; *Story's Eq. Secs.* 251, 111, 112; *Gould v. Gould*, 5 Met. 274;

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Kenyon v. Welty, 20 Cal. 637; *Mastick v. Thorpe*, 29 Cal. 444; 1 Johns. Ch. 512; 6 Johns. Ch. 166; 9 Barb. 532.)

The satisfaction of the mortgage operated as a deed of release, and such release is binding, operative, effectual, and irrevocable without consideration. (*Frink v. Green*, 5 Barb. 459; Stat. of Conveyances, Sec. 37; *Romley v. Stoddard*, 7 Johns. 207; *People v. Chisholm*, 8 Cal. 30; *Pratt v. Crocker*, 16 John. 270.)

Beatty & Denson and John Heard, for Respondent.

The mistake complained of and sought to be corrected, not occurring in the agreement of the parties, which is to assign and transfer the mortgage from Miller to Russell, but in the instrument which was executed by them with the intention and for the sole purpose of carrying into execution their agreement, ought to be so corrected in a Court of equity as to make the instrument conform to the agreement. (*Hunt v. Rousmanier, Admin.*, 1 Peters, 13; 1 Story on Eq. Juris. Secs. 115, 119, 120; *Key v. Simpson*, 6 Iredell Eq. 462.)

The cases of mistake in law as to the effect of the contract itself rests upon totally different principles. The mistake here is the same as if the parties should go to a scrivener, state their contract, and request him to reduce it to writing. He draws up a writing, but expressing a contract entirely different from that which he was directed to frame. The parties, relying on his judgment as to the proper reading of the contract, sign it. There is no question but that on a proper bill and proof, equity would reform the contract.

By the Court, WALLACE, J.:

This case was recently here upon a former appeal (39 Cal. 504), and, upon its return below, an amended complaint was filed, averring in substance that, after the assignment of

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the five hundred dollar note by Miller to Russell, an agreement was made between them (to which the mortgagors, Mixer and wife, were not parties, and of which they had no knowledge), to the effect that Miller should assign the one thousand five hundred dollar mortgage to Russell, in order to enable the latter to more effectually control it; that, with this view, Russell and Miller proceeded together to the Recorder's office; that, when they arrived there, Miller, at the suggestion of Russell, entered a satisfaction of the mortgage upon the record — both he and Russell supposing that the previous agreement to assign it would be effectuated thereby, and both being surprised when they afterwards learned that they had, thereby, wholly discharged the lien of the mortgage, instead of keeping it on foot in the hands of Russell, the plaintiff, as they intended to do.

There is no controversy between Miller and the plaintiff, but the mortgagors, Mixer and wife, insist that the mortgage lien, which was removed by the entry of satisfaction, should not be restored nor the satisfaction canceled.

The Court below having entered a decree against them, they bring this appeal, and the only question presented, is whether or not, upon the facts stated in the amended complaint, the plaintiff is entitled to the relief he obtained.

We think that there can be no doubt that he is. The agreement between Miller and himself was for an assignment and transfer of the mortgage — the mistake occurred wholly in the selection of the means by which this agreement was to be effectuated.

There is no appreciable distinction between this case and that where a scrivener, through ignorance or inattention, fails to select or prepare such an instrument as effectuates the previous agreement of parties, and relief is always decreed in that case. (1 Story Eq. Jur. Sec. 115.) Had the Recorder here, upon being informed by the parties that the agreement between them was that the mortgage in question

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should be more effectually transferred to Russell, prepared a release, instead of an assignment, whether he did so through mere inattention to what he was doing, or through a misapprehension of its legal effect in the premises, there would be no doubt that equity would relieve against the mistake. The rule must be the same in a case where the parties have made the mistake for themselves, and without the aid of either scrivener or Recorder.

Judgment affirmed.

Mr. Chief Justice RHODES dissented.

Mr. Justice TEMPLE did not participate in the foregoing decision.

Afterwards a petition for rehearing having been filed by defendants, the following decision was rendered:

By the Court, WALLACE, J.:

In the original complaint before us on the first appeal (39 Cal. 504), there was not a sufficient, nor any, averment of a mistake having occurred in the entry of satisfaction of the mortgage in question. There was no allegation that there had been an agreement between Russell and Miller for a transfer of the mortgage by the latter to the former, and that the mistake occurred in the attempted carrying this agreement into effect. In the amended complaint, however, it is averred, that Russell applied to Miller to obtain an *assignment* of the mortgage; that Miller consented to give him the assignment, and that the two proceeded together to the Recorder's office "for the express purpose of making such transfer to this plaintiff." The case, as thus presented in the amended complaint, is essentially different from that appearing in the original complaint in the respect indicated. It is true that even in the amended complaint it is not alleged

Statement of Facts.

with commendable certainty and precision, that Miller did agree to transfer the mortgage to Russell, and had an objection been taken below to the sufficiency of the amended complaint on that ground, the plaintiff must have been driven to a further amendment; but no such objection was interposed there, and it can not be maintained, that for these defects in manner, rather than in matter, of averment, the complaint is radically insufficient to sustain the judgment.

The rehearing must, therefore, be denied, and it is so ordered.

Neither Mr. Chief Justice RHODES nor Mr. Justice TEMPLE took any part in the decision on rehearing.

[No. 1,762.]

**STEPHEN SPENCER AND HARTWELL PRATT v.
JOHN WINSELMAN AND JOHN R. CLOW.**

TITLE TO POSSESSION OF MINING GROUND NOT A SUBJECT FOR ARBITRATION.—The subject matter of an action for the recovery of mining ground on public land, is regarded in this State as "a question of title to real property in fee," and therefore cannot, under section three hundred and eighty of the Practice Act, be submitted to arbitration; and if so submitted, an award and judgment thereon will, on motion, be vacated and set aside.

APPEAL from the District Court of the Tenth Judicial District, Yuba County.

The mining ground in controversy is situated at Young's Hill, in Yuba County. The award and judgment in favor of plaintiffs was for the possession of the ground and one thousand six hundred dollars damages, for gold extracted and taken away by defendants. The motion to vacate and set aside the award and judgment was made upon various grounds; but the only one urged upon argument in the Court below was, that the arbitrators had refused, or im-

Argument for Appellants.

properly emitted, to consider a part of the matters submitted to them; and it was upon this ground that the award and judgment were set aside.

Upon this appeal all the grounds raised by the motion were taken up by counsel and discussed at great length. Their points on the fundamental question involved were as follows.

W. C. Belcher, J. O. Goodwin, and George May, for Appellants.

The title to real property in fee, or for life, was not involved. Our statute provides that "all lands in this State shall be deemed and regarded as public lands until the legal title is shown to have passed from the Government to private parties." (Hittell Dig. 6,800.) Neither party here had, or pretended to have, any higher or better claim or title to the premises than is acquired by occupation for mining purposes under the mining rules and regulations of the district. The presumption is, that the fee to all the mineral lands of this State is in the United States, and that presumption can only be overcome by direct proof that private parties have acquired that fee.

The Acts of Congress of February 27th, 1865, May 5th, 1866, and July 26th, 1866, show the intent of the Government in regard to the fee of the mineral lands; and it is plain from them that the occupant can not acquire other than a possessory claim. In reference to gravel beds, more particularly, the right of the miner to occupy and mine is a valuable right; but it is not an estate in fee, or for life, or a tenancy for years even, but simply a right to occupy, which may be terminated at the pleasure of the Government.

Estates in fee, and estates for life, are legal terms well understood, and import naked legal titles. These being specially excepted by the statute concerning arbitrations, no other or different estate in or claim or title to real property

is excepted. All controversies with reference to other titles, and claims to lands may be referred to arbitration. (See *Blair v. Wallace*, 21 Cal. 321; *Cox v. Jagger*, 2 Cow. 649; *Blanchard v. Murray*, 15 Vt. 551.)

Hatch & Ashford and J. L. Lockwood, for Respondents.

A mining claim, or the possessory right to a given piece of the public domain, whether it be a quarter section of agricultural land or a hundred feet square of mining ground, is real estate for all purposes, as far as the rights of litigants in our Courts are concerned. A person thus having the possession, is, as to all the world, except the Government, the owner of the soil, having a vested right of property, founded upon his possession. He has the highest estate known to the law, it being an estate of inheritance. It is such a right, property, interest, and estate in lands as will pass, by operation of law, to the heirs of the intestate holder or owner. (See *Lowe v. Alexander*, 15 Cal. 302; *Merritt v. Judd*, 14 Cal. 64; *Hughes v. Devlin*, 23 Cal. 505.)

At common law any mere dispute respecting land, but not involving title, such, for instance, as arise concerning boundaries, or concerning the sale or transfer of land, might be arbitrated; the general rule being, that when the parties might, by their own act, transfer real property, or exercise any acts of ownership with respect to it, they might refer any dispute concerning it to the decision of arbitrators, who could award the same act to be done which the parties themselves might do by their own agreement. But no right or title to land, or to an interest or estate in land, could pass in virtue of an award of arbitrators. And this, we take it, is the general rule in this country and in this State. If we are correct in this, it follows that the submission to arbitration in this case was void; and if the submission was void, in

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whole or in part, the award, of course, was to the same extent void.

P. Van Clief, also for Respondents.

By the Court, WALLACE, J.:

Spencer and another brought an action against Winselman and others for the recovery of certain mining grounds, alleging themselves to be owners and entitled to the possession of the premises sued for. The defendants answered, denying the ownership of the plaintiffs, and alleging themselves to be the owners, and entitled to the possession of the premises. While the cause was pending upon these issues, the parties stipulated in writing to submit the cause to arbitration, and the stipulation was entered as an order of Court pursuant to the statute. (Practice Act, Sec. 382.)

An award having subsequently been made, and judgment entered in the judgment book pursuant to the statute, the defendants moved to vacate it upon several grounds, and, among others, upon the ground "that the matters, issues, and questions submitted to arbitration by said agreement, and actually submitted to said arbitrators by the parties, involved questions of title to real property in fee and for life," etc. The motion having been sustained, this appeal is taken.

The statute (Pr. Act, Sec. 380) provides, in substance, that any controversy which might be the subject of a civil action, may be submitted to arbitration, "except a question of title to real property in fee or for life."

In *Merritt v. Judd*, 14 Cal. 61, the question was before this Court as to the nature of the tenure by which mineral lands in this State were held. It was urged, in argument, that the occupant of a mining claim is not thereby the owner of a freehold estate in the premises, and not being such owner had, consequently, no right to the fixtures there

in controversy, but that the Federal Government is the owner of the soil. But the Court said: "From an early period of our State jurisprudence we have regarded these claims to public mineral lands as titles. They are so practically. * * * Our Courts have given them the recognition of legal estates of freehold; and so, to all practicable purposes, if we except some doctrine of abandonment, not, perhaps, applicable to such estates, unquestionably they are; and we think it would not be in harmony with the general judicial system to deny to them the incidents of freehold estates in respect to this matter."

In *Hughes v. Devlin*, 28 Cal. 501, the question again came before this Court in an action for a partition, and, in speaking of the tenure by which such property is held in this State, the Court said: "Although the ultimate fee in our public mineral lands is vested in the United States, yet, as between individuals, all transactions, and all rights, interests, and estates in the mines are treated as being an estate in fee, and as a distinct and vested right of property in the claimant or claimants thereof, founded upon their possession or appropriation of the land containing the mine. They are treated, as between themselves and all persons but the United States, as the owners of the land and the mines therein," etc.

The case of *Blair v. Wallace*, 21 Cal. 318, relied upon by the appellant, is not in conflict with these views. The controversy there grew out of a contract between the parties, and did not involve a question of title in the sense of the statute prohibiting its submission to arbitration. It is not doubted that a party who is the admitted owner of a title in fee to real estate may contract to convey it to another, and that a controversy concerning the alleged performance or non-performance of such a contract may be the subject of arbitration under the statute; and this seems to

Argument for Appellants.

have been the nature of the controversy submitted to arbitration in the case of *Blair v. Wallace*.

Order affirmed.

[No. 2,002.]

ALPHONSO B. SMITH AND GEORGE V. SMITH v.
JAMES M. McDONALD AND C. F. COLTON.

APPEARANCE FOR INFANT DEFENDANTS BY GENERAL GUARDIAN.—Where, in a suit against infants, there was no personal service upon them, but their general guardian appeared and defended for them; *held*, that such appearance gave the Court jurisdiction of their persons.

DOCTRINE OF STARE DECISIS.—When a rule, by which the title to real property is to be determined, has become established by positive law or by deliberate judicial decision, its inherent correctness or incorrectness, its justice or injustice, in the abstract, are of far less importance than that it should, itself, be constant and invariable.

APPEAL from the District Court of the Sixth Judicial District, Sacramento County.

The facts are stated in the opinions.

There having been a judgment in the Court below in favor of defendants, the plaintiffs appealed.

R. C. Clark and James L. English, for Appellants.

Under the provisions of the Practice Act, a *defendant* may appear and answer without the service of a summons; and a voluntary appearance of the *defendant* shall be equivalent to service of summons; but it is the *defendant* who must appear, and not a guardian for him. It is true section sixteen of the Guardian Act provides that the guardian "shall appear for and represent his ward in all legal suits and proceedings, unless when another person is appointed for that purpose as guardian or next friend;" but this gives him no power to bring his ward into Court, or to give a Court jurisdiction by voluntary appearance; for the voluntary appear-

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ance which will give jurisdiction of the person must be the *voluntas* of the defendant, and not of some other person. A guardian cannot bind the ward by his appearance. (*Fox v. Minor*, 32 Cal. 117.) Compare, also, Practice Act of 1850 with Practice Act of 1851, from which it will be seen that the law was expressly amended in 1851 so as to require in all cases personal service upon the infant before the Court could acquire jurisdiction of the person of an infant. "The provision of the statute requiring personal service upon the minor and also upon the guardian, is not the result of a misprint or a clerical mistake, but the deliberate will of the Legislature—as such it is our duty to carry it out." (*Gray v. Palmer*, 9 Cal. 638.)

J. W. Winans and J. K. Alexander, for Respondents.

The appearance of the infant defendants, in the case of *Smith v. Smith et al.*, by their guardian, was sufficient, and fully protected the defendant McDonald in his purchase of the property under the decree of the Court. Even if there were no other defense in this case, we submit that the decision of this Court in *Gronfier v. Puymiol*, 19 Cal. 629, settles the question in favor of respondents, and sustaining the decision of the Court below. (See, also, *Hitt. Dig.* 3362, 3368, 3377; *Stuart v. Allen*, 18 Cal. 475; *Seale v. McLaughlin*, 28 Cal. 669; *Taylor v. Atwood*, 2 Peere William, 643; *Beverly v. Miller*, 6 Munford, Va. 99; *Wells v. Dennis*, 3 Johns. Ch. 368; *Booth v. Rich*, 1 Vernon, 295; *Evertson v. Tappan*, 5 Johns. Ch. 497; *Wilkinson v. Oliver*, 4 Hening & Munf. 450; *Meriwether v. Hites*, 2 A. K. Marsh, 182; *Christman v. Wright*, 3 Tredell's Equity, 549; *Este v. Strong*, 2 Hammond, Ohio, 461.)

By the Court, WALLACE, J.:

The facts, or most of them, out of which the present controversy arises, may be seen in the report of the case of

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Smith v. Smith, 12 Cal. 217. At the sale under the decree which the Court below rendered in that case, by the direction of this Court, lot six, between M and N, and Eighth and Ninth streets, in the City of Sacramento, was purchased by the defendant McDonald. The plaintiffs here, who now seek to recover it from him, were the infant defendants in that case, and they now claim that the proceedings resulting in the sale are void as to them, on the ground that jurisdiction of their persons was never acquired.

It appears, from the findings filed in this action, that no summons was personally served upon the infant defendants in that action, but that, without such service being made or attempted, their father, F. C. Smith, who was himself a defendant, and was at the time their general guardian, duly appointed, qualified, and acting, "appeared in said action, and by attorney, for himself and them, defended the same; that said attorney, on behalf of said infants and in their names, and F. C. Smith as their guardian, demurred to the complaint therein," etc.

It is insisted by counsel that F. C. Smith, as such general guardian, had no authority to appear for his wards in that action, because no service of summons had been made upon them, or either of them; and that, in the absence of such service, the appearance so entered was of no legal import whatever, and, as a consequence, that the decree subsequently rendered therein was absolutely void, to all intents and purposes, as to them.

The question thus presented, though jurisdictional in its consequences, is purely one of practice. It is a question of correct or incorrect procedure in cases in which infant defendants are impleaded, or attempted to be impleaded, in Courts of justice. It is exactly the question which arose and was determined here in the case of *Gronfier v. Puymiol*, 19 Cal. 629, and ever since the decision there rendered, it has been regarded as definitely settled in the Courts of this

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State. In that case, Gronfier, the infant defendant, was not within the territorial jurisdiction of the Court in which he was impleaded; he was at the time in France, of which country he was a resident. No service of summons was made or attempted upon him. Mr. Lies having been appointed to be his guardian by the Probate Court, under that provision of the statute authorizing such an appointment for a minor "who shall reside without the State and have any estate within the county," entered his appearance in the action. Objection being subsequently made here to the authority of the guardian in that respect, the objection was held not well taken. Mr. Chief Justice FIELD, delivering the opinion of the Court upon this point, said: "As Lies was general guardian, there was no occasion for his special appointment as guardian *ad litem* in the action. As general guardian he was authorized—indeed it was his duty—to appear for his ward."

It is believed that the authority of that case, upon the point involved, has never been doubted or called in question until now. The construction which it gave to the statute, in the respect now under consideration, has since then been steadily adhered to by the Courts—it has been relied upon by the profession in the examination of titles, and acted upon in the purchase and sale of real estate during the intervening period, now some eight years—and property interests of immense magnitude must be imperiled if it is to be overturned now.

Under such circumstances it has arisen to the importance of a rule of property, and even though it were conclusively shown to have been, as an exposition of the statute it attempted to construe, incorrect at the outset, I think it, nevertheless, our duty to maintain it now, and not permit it to be disturbed. If its operation for eight years in practice has indeed shown it to have unnecessarily facilitated the

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despoliation of the estates of infants, it certainly is not for us to abrogate it for such a reason.

The Legislature can make such change, if it be desirable, without the disturbance of titles and the destruction of individual rights, which invariably follow such a change when brought about by a judicial decision. When a rule, by which the title to real property is to be determined, has become established by positive law or by deliberate judicial decision, its inherent correctness or incorrectness, its justice or injustice, in the abstract, are of far less importance than that it should, itself, be constant and invariable. We should not disturb such a rule of property here, even though we be satisfied that we could substitute another preferable in theory, or better calculated by its operation to promote the purposes of justice.

Entertaining these views, I am of the opinion that the judgment of the Court below should be affirmed, and it is so ordered.

CROCKETT, J., dissenting:

The defendant McDonald deraigns title to the demanded premises through a judicial sale in the case of *Augusta S. Smith v. F. C. Smith et als.*, and a Sheriff's deed in pursuance thereof. The present plaintiffs were named as defendants in that action, and were minors at the date of the decree therein. No summons, however, was ever served upon them, and being minors they were incapable of binding themselves by a voluntary appearance, had they attempted to do so. But it appears from the findings that their father (who was also a defendant, and appeared to the action) was their general statutory guardian, duly appointed and qualified, and that he employed counsel to represent them in said action; that the counsel so employed filed, in their names, a demurrer to the complaint; and the de-

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murrer being overruled, he subsequently filed an answer for them, on which the cause went to trial. Under the decree rendered therein the defendant McDonald purchased; and if the Court acquired jurisdiction of the persons of the plaintiffs by reason of the above recited facts, it is clear that McDonald has acquired whatever title they then had. On the other hand, if they are not bound by the decree, for a want of jurisdiction in the Court over their persons, the title is still in them, and they are entitled to recover, unless the action is barred by the Statute of Limitations.

Section nine of the code provides that "when an infant is a party, he shall appear by guardian who may be appointed by the Court in which the action is prosecuted, or by a Judge thereof, or a County Judge;" and the next section provides on whose motion the guardian may be appointed. Section twenty-nine prescribes the method of serving the summons on an infant defendant, to wit: If he be under the age of fourteen years, by delivering a copy "to such minor personally, and also to his father, mother, guardian, or if there be none within the State, then to any person having the care or control of such minor, or with whom he resides, or in whose service he is employed;" and "in all other cases to the defendant personally." If these provisions were alone to be appealed to, it would be plain enough, that the Court could acquire no jurisdiction of the person of an infant defendant without a personal service of the summons. The Court has no power, on the motion of any one else, to appoint a guardian *ad litem* for a minor above the age of fourteen, until after service on the minor, as is apparent from section ten, which authorizes him, if above the age of fourteen, to make his application for the appointment of the guardian *ad litem*, at any time within ten days after the service of the summons; and until he shall have

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neglected to apply within that time, no one else can make the application. It is not for us to inquire into the motives of the legislature for requiring a personal service on an infant of tender years. It is sufficient that the statute expressly requires it; and it is our duty to see that the law is obeyed in this respect, without criticising the reasons for its enactment. But it is not difficult to perceive very sufficient reasons for this provision, founded on the vigilant care which the law exercises over minors and their estates. Children are generally under the care or control of relatives or friends, who feel an interest in their welfare; and a personal service or process on a minor increases the chances of protecting his rights, and diminishes the opportunity for fraud and collusion in the disposition and management of his estate. The general guardian may, possibly, be himself a party to a contemplated fraud on the minor, or may be culpably neglectful of his duties, in either of which events the summons served personally on the minor, and which may, and very probably would, fall into the hands, or attract the notice of the friend or relative having the custody of his person, and who is presumed to feel an interest in his affairs, might possibly be the means of preventing a wrong. In a majority of cases the practical effect of personal service on a minor is to give notice of the action to the actual custodian of his person; and this was, doubtless, the chief motive for requiring such service. There may be very satisfactory reasons why the general guardian should not be allowed to defend for the minor. He may be incompetent to conduct an important litigation, or he may be liable to a suspicion of fraud or collusion, or so negligent as to render him an unfit person to prepare the defense. In such cases the personal service on the minor may be the means of bringing these facts to the attention of the Court, and thus securing the appointment of a proper guardian to conduct the defense. But by section sixteen of the Act to provide

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for the appointment and prescribing the duties of guardians it is provided, that the guardian "shall appear for and represent his ward in all legal suits and proceedings, unless where another person is appointed as guardian or next friend."

In *Gronfier v. Puymiol*, 19 Cal. 629, a general guardian appeared and defended the action for his ward, on whom there had been no service of process, and without having been appointed guardian *ad litem* by the Court in which the action was pending; and this Court held the proceedings to be valid, and that the ward was bound by the judgment. The decision is founded on the provision of section sixteen of the Act above quoted, which was held to authorize an appearance for the ward by the general guardian, when no guardian *ad litem* had been appointed. But the attention of the Court does not appear to have been called to the provisions of the code requiring a personal service on the minor, as affecting the question of jurisdiction. If service on the minor be shown, it cannot be doubted that the general guardian may appear for and represent him in the action, unless another be specially appointed for that purpose. But, as already stated, one of the principal ends to be subserved in requiring service on the minor, is to bring the matter to the attention of his friends, relatives, or custodian, so that they may have the opportunity to show that the general guardian is not a fit and proper person to represent him in the litigation. This object might, and in many cases would be wholly defeated if no service on the minor was required before the general guardian was authorized to appear for him. After service on the minor, if no one appears within the proper time to apply for the appointment of a guardian *ad litem*, the presumption is that there is no objection to an appearance on his behalf by the general guardian. But, as I construe these provisions, and in view of the policy which obviously dictated them, the general guardian has no author-

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ity to appear for his ward in the action until after the latter shall have been served with process, and until the time shall have elapsed within which an application may be made by the minor, or in his behalf, for the appointment of a guardian *ad litem*, to wit: ten days after the service. In so far as the decision in *Gronfier v. Puymiol*, contravenes this proposition, it ought, in my opinion, to be overruled.

I am not, however, to be understood as holding that if a minor be a non-resident, so that he cannot be personally served, the service may not in that case be made by publication of summons, as in other cases in which the service by publication is substituted for personal service. My conclusion on this branch of the case is, that the plaintiffs are not bound by the decree in the case of Augusta S. Smith and F. C. Smith et als., because they were not served with the summons.

But the defendants claim, on the authority of *Hahn v. Kelly*, 34 Cal. 391, that all the presumptions are in support of the decree, and that in a collateral action it cannot be shown by proof *dehors* the record, that there was no service of summons on the present plaintiffs. The record, however, in that action is not before us on appeal. The Court finds it as a fact that no summons issued and none was served on the plaintiffs, and, for aught that appears, the fact may have appeared on the face of the record itself. This is an appeal on the judgment roll alone, and we must presume that there was sufficient competent evidence to support the findings. The decree against the plaintiffs was absolutely void, and not merely voidable as to them, and their acquiescence in it, for a time after reaching their majority, does not estop them. Nor is their claim barred by the Statute of Limitations, upon the facts found by the Court.

I think, therefore, that the judgment should be reversed, and cause remanded for a new trial.

Points decided.

Mr. Justice TEMPLE did not take part in either of the foregoing opinions.

[No. 1,612.]

PHILIP SICHEL v. MARIA MERCED WILLIAMS DE CARRILLO, JOSE CARRILLO (HER HUSBAND), CORNELIA RAINS, ISAAC RAINS, ROBERT RAINS, JOHN SCOTT RAINS, AND FANNIE B. RAINS, MINOR CHILDREN OF JOHN RAINS, DECEASED, ET AL.

EFFECT OF STATUTE OF LIMITATIONS.—The expiration of the time fixed in the Statute of Limitations with reference to actions for money due on contracts, does not discharge the debt or extinguish the right, but only takes away the remedy.

MORTGAGE GIVEN BY ONE PERSON TO SECURE ANOTHER'S DEBT.—Where a promissory note is executed by one person, and a mortgage to secure the debt is given by another, and the payor of the note dies, and the holder thereof fails to present either the note or mortgage to his administrator for allowance within ten months after publication of notice to creditors, although the claim is barred as against the estate, yet the mortgage remains in full force as against the mortgager and the mortgaged property, and may be foreclosed at any time before it is barred, as against the mortgagor, by the Statute of Limitations.

IDEM.—The above rule remains the same when the note is made by the husband for his own debt, and the wife mortgages her separate property to secure it, and the husband signs the mortgage to show his assent to it. In such case the wife's liability on the mortgage is not affected by the death of the husband and the failure of the holder to present the claim for allowance to the administrator of his estate.

CONTINGENT CLAIM AGAINST AN ESTATE.—If the wife, to secure the debt of the husband, mortgages her separate property, and the husband dies, and the holder fails to present the claim to the administrator for allowance, and the mortgage is afterward enforced; whether the widow has a contingent claim which she may afterwards enforce against the estate, spoken of, but not decided.

CHANGE OF CONCLUSIONS OF LAW BY COURT.—Whether, after the Court has made its findings of fact and adopted its conclusions of law, it may change the conclusions of law, and enter a different judgment from that first ordered, spoken of, but not decided.

COST OF TRANSCRIPT.—When an appellant includes in the transcript irrelevant matter, he can not recover costs for procuring or printing the same.

Argument for Appellants.

COUNSEL FEES.—If there is no provision in a mortgage for payment of counsel fees, the plaintiff in an action to foreclose it is not entitled to such fees.

TAXES ON DEBT SECURED BY MORTGAGE.—If one person mortgages his property to secure the debt of another, and there is a provision in the mortgage for the payment of taxes on the mortgage debt, the plaintiff, in foreclosing, may retain such taxes out of the proceeds of sale.

LIMITATION OF ACTIONS AS AGAINST ESTATE OF DECEASED.—The limitation on the right to enforce a claim or debt, which is not presented to the administrator within ten months after the first publication of notice to creditors, applies solely to the claim as against the estate, and in no way affects the validity of the debt as against other persons who are liable for the debt, or whose property is liable.

APPEAL from the District Court of the Third Judicial District, County of Santa Clara.

John Rains died on the 17th day of November, 1862, and E. K. Dunlap was, on the 5th day of January, 1863, appointed the administrator of his estate. The administrator first published notice to the creditors of deceased on the 28th day of February, 1863. The notes fell due September 14th, 1863. This action was commenced on the 29th day of October, 1864. The Court below allowed the plaintiff one thousand dollars for counsel fees in foreclosing the mortgage. The administrator of Rains was not made a party to the action.

The other facts are stated in the opinion.

G. F. & W. H. Sharp and A. Glassell, for Appellants.

A presentation to the administrator of the estate of Rains was unnecessary. (*Christy v. Dana, ante*, 174.) Admitting that Mrs. Carrillo is a surety, and entitled to all the rights of one, appellant is not affected. He has not given time to the principal upon a binding agreement, received payment, or anything else. If a principal does not meet his obligation at the time and in the manner agreed upon, the liability of the surety becomes absolute. (Willard's Eq. Jurs. 108, and cases cited.) And if a demand on the principal in life is not necessary to bind the surety, his death, most certainly,

Argument for Respondents.

cannot impose on the creditor the burden of a demand (by presentation) on his representatives; if unnecessary in one case, it is in all. A release of property of the principal releases surety; but in this case it is the property of the alleged surety, and not the principal, that has been pledged. A discharge of the principal in insolvency does not affect the property pledged by surety and prevent the foreclosure of the mortgage. (*Christy v. Dana, supra.*) Appellant had two remedies; one on the personal obligation of Rains, and one on this separate property of his wife. By the general law of the State, at the time the contract is made the Statute of Limitations bar neither until four years after maturity.

Holt & Heacock, for Respondents.

An action on the notes or mortgage debt is barred by non-presentation to Rains' administrator. Upon this point there is no conflict in the authorities in this State. (*Ellison v. Halleck*, 6 Cal. 386; *Faulkner v. Folsom's Ex.*, 6 Cal. 412; *Fallon v. Butler*, 21 Cal. 24; *Willis v. Farley*, 24 Cal. 500; *Ellis v. Polhemus*, 27 Cal. 350.)

The debt being "forever barred," does an action lie to foreclose the mortgage? The solution of this question depends upon the nature and character of a mortgage in this State. What is a mortgage under our laws? It is a contract, in writing, whereby the debtor agrees that upon failure to pay a sum of money at a specified time the creditor may have his property sold, upon application to a competent Court, and out of the proceeds of the sale to have his debt paid. Beyond this he has no interest in the property mortgaged whatever. (*Godeffroy v. Caldwell*, 2 Cal. 492; *Peters v. Jamestown Bridge Co.*, 5 Cal. 336; *Ord v. McKee*, 5 Cal. 516; *Lord v. Mains*, 18 Cal. 488; *Willis v. Farley*, 24 Cal. 500; *Polhemus v. Trainer*, 30 Cal. 685.) When the debt goes out of existence, the mortgage goes with it.

Argument for Respondents.

As the surety for John Rains, Mrs. Carrillo is discharged from the payment of this money, independent of section one hundred and thirty of the Probate Act. The notes matured September 14th, 1863, and at that time, and ever since, the administrator of Rains has been acting as such, with full powers. Mrs. Carrillo, as surety, is entitled to all the rights and privileges of that relation; one of those rights is, that payment of the principal must be demanded before a suit lies against the surety. (*Riggs v. Waldo*, 2 Cal. 488; *Pierce v. Kennedy*, 5 Cal. 138; 1 Parsons on Notes and Bills, 354.)

G. F. & W. H. Sharp, in reply.

It is a well settled principle of law and equity, that no demand upon the principal is necessary to bind the surety; the latter's liability becomes absolute, if the former does not meet his obligation the day it is due. (*Orme v. Young*, Holt's N. P. Cas. 87; Willard's Eq. Jurs. 108.) If this be the rule while the principal is living, how can his death change the contract?

The sole object of section one hundred and thirty is to expedite the settlement of estates, and to protect a particular fund from old claims. There is no provision that an action should not be maintained upon the debt after ten months, as in the general Limitation Act. It would be a strange construction of this section to hold that if A. holds the joint note of B. and C., and B. should die, and A. proceeded directly against C., that he could not recover, because, not having pursued the estate of B., the note has lost its existence, consequently C. is discharged. The defense could not be, nor is it, maintainable.

C. B. Younger, also for Respondents Carrillo, Rains, and Hayes.

The bar created by section one hundred and thirty is available to the defendants, because that section is for the benefit

of the heirs and devisees, in order to discharge the estate within a reasonable time from the lien of the debts of the deceased. When an action on a promissory note is barred by the statute, the remedy upon the mortgage given to secure it is also barred; and in an action to foreclose the mortgage the bar of the note is a complete defense to the foreclosure, and is available to any one interested in the mortgaged property. (24 Cal. 497; 21 id. 495; 22 id. 100; 23 id. 16; id. 43; 24 id. 403; 26 id. 141; id. 361.)

Peachy & Hubert filed the petition for a rehearing on behalf of Mrs. Carrillo.

By the Court, SAWYER, C. J.:

On the 11th of November, 1862, John Rains executed the notes in suit, payable one year after date, for his own private debts. On the same day Rains and his wife, Maria Merced Rains, now Mrs. Carrillo, one of the defendants to secure the payment of the promissory notes, executed the mortgage in question, upon lands which were the separate property of the wife, Mrs. Rains — the wife thereby mortgaging her own separate property to secure her husband's debts, for which neither she nor her property was otherwise liable. John Rains having died, an administrator was duly appointed, the statutory notice to creditors duly published, the ten months given to creditors to present their claims expired without any presentation of the notes or mortgage for allowance, and the claim thereby became barred, under section one hundred and thirty of the Probate Act, so far as the estate of Rains is concerned.

This action was subsequently commenced against Mrs. Carrillo, the real mortgagor, who was formerly the wife of Rains, and others having interests in the land, to foreclose

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the mortgage. The Court found the facts substantially as thus briefly stated, ascertaining the amount due and unpaid, and, as a conclusion of law, added that plaintiffs were entitled to have the property sold under the judgment of the Court, and the amount found due paid out of the proceeds of the sale. Upon filing these findings, Mrs. Carrillo, the principal defendant, moved the Court to strike out the legal conclusion drawn from the facts, and substitute others of a contrary character, and the Court, upon consideration, adopted the views of defendant's counsel, and substituted conclusions to the effect that, by reason of the failure to present the notes and mortgage, or either of them, to the administrator of John Rains within ten months after publication of notice, the notes became forever barred before the commencement of suit, and that Mrs. Carrillo, being security to the extent of the property mortgaged for the payment of said notes, was thereby discharged from payment. In accordance with this view judgment was entered for defendants, from which plaintiff appealed.

The argument is that a mortgage is only an incident to the debt; that when the debt is paid, satisfied, or in any manner extinguished, the mortgage is also discharged or extinguished; that the mortgage cannot exist without a debt to support it, and that the debt, being barred by the statute on failure to present it to the administrator within the ten months prescribed, it is extinguished, and the mortgage thereby discharged for the want of a debt to support it. There is, at least, one mistake in this argument in assuming that the Statute of Limitations *extinguishes* the debt. It is well settled, with reference to actions for moneys due on contracts, that the statute does not discharge the debt, or in any way extinguish the right or destroy the obligation, but only takes away a remedy. The debt remains unsatisfied and unextinguished. It is a sufficient consideration to support a new promise. (*Townsend v. Jemison*, 9 How. U. S.

413; *Bulger v. Roche*, 11 Pick. 37; *Lincoln v. Battelle*, 6 Wend. 485; Ang. on Limit. 268, Sec. 213.)

The limitation invoked in this case is not a general statute of limitations, taking away all remedy as to every party liable, either personally or through his property, for the debt. It arises under a specific Act adopted for a particular purpose, and has reference solely to the estates of deceased persons. It applies to no other subject matter. The provision is adopted to facilitate the early settlement of the estates of deceased persons, and provides that, unless a claim be presented within ten months after publication of notice, "it shall be forever barred." That is to say, it shall be forever barred *as a claim against the estate* — the claimant shall have no right, thereafter, to payment out of the estate of the deceased. The whole subject matter of the provision is claims against the estate. It in no way affects claims against other parties or against the property of others, or the contracts of other parties, although the same demand may also be a claim against the estate. Thus, if two parties are jointly liable on a demand, and one dies, the demand would undoubtedly be barred as respects the estate of the deceased party by a failure to present the claim within the ten months prescribed; but this would in no respect affect the right of action against the survivor. The debt is not extinguished, paid, or discharged, nor is the cause of action barred as to the survivor. A payment, or valid release or discharge, or extinguishment of the debt as to the deceased, no matter in what form it might be accomplished, would also be a payment, discharge, or extinguishment as to the survivor, because the debt no longer exists. Suppose Mrs. Carrillo had not been the wife of Rains, and, having no interest in the matter herself, had indorsed the notes in suit, intending to be security for their payment; the notes had fallen due, the proper steps had been taken to charge her as indorser, Rains had subsequently died, and the holder had failed to present

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the notes to the administrator, and the claim had thereby been barred as against the estate, although four years have not elapsed since the making of the notes. We apprehend it would not be claimed that an action could not be maintained against Mrs. Carrillo on her indorsement. The bar did not attach to her contract, and the fact that she was a surety merely would not affect the question. Her contract is still in force. The failure to make the money out of the principal was the result of neglect—mere non-action on the part of the holder. The principal might be involved, and the holder look only to the surety. The surety might at any time have paid the demand and presented the claim herself, and thus protected herself. This would have been her remedy. The non-action of the holder, by which the claim became barred, would not discharge the surety. (*Dane v. Cordman*, 24 Cal. 164; *Whiting v. Clark*, 17 Cal. 410.)

In the latter case the creditor allowed the demand to become barred as to the principal, and the surety claimed that the bar discharged him. The Court held otherwise, and the case is directly in point as to this question. So, had Mrs. Carrillo not been the wife of Rains, and had the mortgage in question contained a covenant on her part to pay the debt, she certainly would not have been discharged from her own liability on her personal covenant because the creditor allowed his claim *against the estate* to become barred. Her own liability, on her own independent covenant, would have continued until it should, in some mode, become paid, satisfied, released, discharged, or extinguished, or until it should become barred, as to her, under the general Statute of Limitations; and it can make no difference in principle whether she is generally personally liable or whether she has become liable through her property to the extent of the value of a specific piece of property, which, by her contract, she has subjected to the demand, or which she has, in effect, cove-

nanted shall pay the demand so far as it will go toward payment.

It must be borne in mind, in examining the case now before us, that there are two contracts, the contract on the part of Rains to pay the debt, of which the notes are the evidence, and the independent contract on the part of Mrs. Rains that her lands shall pay it, or which is the same thing, be bound for its payment. In the older States, where a different time was prescribed in the Statutes of Limitations for simple contracts and those under seal, an action to foreclose a mortgage was held not to be barred, although the action on the note secured was barred. Thus, in *Elkins v. Edwards*, 8 Geph. 326, an action to foreclose a mortgage, the Supreme Court of Georgia say: "Because the *remedy* on the note is barred by the statute in six years, it does not follow that the creditor's remedy on the mortgage, being a *sealed* instrument, is also barred. The creditor's remedy on the mortgage is not barred until *twenty* years — the *debt being unpaid*." And it is on this very difference between our statute and those of other States, that our predecessors, in *Lord v. Morris*, 18 Cal. 483, held an action to foreclose a mortgage to be barred, in this State, at the same time with the action on the note. The Court, by FIELD, C. J., say: "It is undoubtedly true, as stated by the Court in the case from Georgia, that the creditor stipulated by contract for *two remedies* against his debtor to enforce the collection of his demand—the *one by action upon the note*, and the *other by petition and foreclosure upon the mortgage*. Similar remedies he can pursue in this State. He can proceed upon the note, and take an ordinary judgment for the amount due; or he can sue in equity upon the mortgage, and take a decree for its foreclosure and the sale of the premises. *The difference is, that here the limitation prescribed to the equitable suit is the same as that prescribed to the action at law. The mortgage is as much within the general designation of a 'con-*

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tract, obligation, or liability, founded upon an instrument of writing, as is the note itself.

"We do not question the correctness of the general doctrine prevailing in the Courts of several of the States, that a mortgage remains in force until the debt, for the security of which it is given, is paid. We only hold that the doctrine has no application under the Statute of Limitations of this State. A mortgage is a specialty, and is not within the terms of the English statute, or of the statutes of most of the States. An action founded upon such specialty can only be met by proof of payment. The payment may be established by direct evidence of the fact, and it may be presumed from the lapse of twenty years, when such presumption is not countervailed by evidence from the mortgagee. 'Thus,' says the Supreme Court of Maine, in *Joy v. Adams*, 26 Maine, 333, 'a mortgage security has not been deemed to be within any branch of the Statute of Limitations. He who would avoid such security must show payment, otherwise the mortgagee will not be precluded from entering upon and holding possession of the mortgaged premises. The mortgagor has not been allowed to defeat such right by showing merely that the personal security, to which the mortgage security is collateral, has become barred. (*Thayer v. Mann*, 19 Pick. 535.) But he has been allowed to allege payment, and for proof to rely upon the lapse of time, when it amounted to twenty years from the accruing of the indebtedment. Such a lapse of time has been deemed to be sufficient for the purpose, in the absence of any countervailing considerations. This is admitted as a presumption of law, which may be removed by circumstances tending to produce a contrary presumption.' The view thus stated is met by our statute, which embraces a mortgage security within its terms. Here payment may be pleaded, and so may the statute itself without reference to the fact of payment.

“Our conclusion, therefore, upon the first question presented is, that where an action upon a promissory note, secured by a mortgage *of the same date* upon real property is barred by the statute, the mortgagee has no remedy upon the mortgage; *that though distinct remedies may be pursued by him, the limitation prescribed is the same to both.*” (Ib. 489.)

The principle thus established is, that there are two distinct contracts, and two distinct causes of action; that the creditor has stipulated for two remedies, one on the note, and the other on the mortgage — that is to say, that there is one cause of action on the note against the maker, and another on the mortgage against the mortgagor, and these may be against different parties, or, if originally against the same party, they may subsequently become separated, and attach to different parties. This principle was affirmed in *Low v. Allen*, 26 Cal. 142, and *Lent v. Shear*, 26 Cal. 362. In *Low v. Allen* we held that the cause of action on the mortgage became barred as to two of the defendants, while that on the note secured continued against one defendant in consequence of his absence from the State during a portion of the time. We said: “The mortgage contract of Thorp and Ramsdell is distinct from the note it was given to secure, and is manifestly one of the ‘written contracts’ on which the statute provides that no action shall be brought, except within four years after the cause of action accrued. Now a cause of action accrued against Thorp and Ramsdell on their mortgage contract, as collateral to Allen’s several promises, as soon as those promises matured. Thorp and Ramsdell were both in the State at the time, and for aught that appears to the contrary, they have been here ever since.” (26 Cal. 145.) Similar views were expressed in *Lent v. Shear*, 26 Cal. 369. Now, in this case, on the principle thus established, there was a cause of action against Rains on his personal liability upon the notes to which

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Mrs. Rains was personally no party, and another against Mrs. Rains on the mortgage, by which she bound her lands, and through them herself to the extent of the lands, for the payment of the debts evidenced by the notes. Rains had no interest in the lands, and was only a party to the mortgage for the purpose of manifesting his assent to its execution, in accordance with the requirements of the statute. He was, therefore, substantially no party to that cause of action affecting the lands, and the two causes of action were in reality originally against different parties. The cause of action against the mortgagor, on the mortgage in such case, might be prosecuted to judgment, without making the maker of the notes a party. The cause of action against Rains is barred by failure to present the notes to the administrator. But it is only barred as to him. The debt is not paid, satisfied, discharged, or in any way extinguished, and the cause of action against the lands, and through the lands on mortgage against Mrs. Carrillo, remains according to the principles of the cases cited. The cause of action against her is not upon Rains' contract, but upon her own, subjecting her lands to the lien of plaintiff's demand. Although she does not covenant personally to pay the debt, she does, in legal effect, covenant that the land mortgaged shall pay it, so far as it goes. This is *her* contract, not *Rains*, and it is as effectual to bind the land as a covenant on her part, absolute in form to pay the debt herself, would be if she was competent to make such a covenant. And we have seen that an absolute covenant on her part to pay a debt would not be discharged or extinguished, or barred, simply because an action on a promise, on the part of Rains to pay the same debt, is barred as to him.

There is an obligation on the part of both to pay — one to pay the whole, the other to pay to the extent of the land bound. Rains' obligation is barred, the obligation of the land of Mrs. Carrillo is not.

If it be conceded that a mortgage is a claim within the meaning of the statute, which must be presented to the administrator, the property mortgaged in this case did not belong to the estate of Rains, and the mortgage was not his. Presenting the mortgage, as such, to the administrator would, therefore, be of no avail. It would only be necessary to present the mortgage to the administrator of Mrs. Carrillo, as a claim against her estate in the event of her death, in order to prevent a bar in favor of her estate.

A remark of the Chief Justice, in *Fallon v. Butler*, 21 Cal. 32, that a "presentation and allowance were necessary to secure the payment of the debt out of the general estate, if that were desired, and, *perhaps*, also to prevent the debt from being barred by the statute, *and thus uphold the mortgage*," and passages containing similar suggestions from *Willis v. Farley*, 24 Cal. 500, are cited as authority for the position taken by the respondents. These are but suggestions, and are made with reference to the cases then before the Court, where the maker of the note and the mortgagor were the same person. That is to say, both causes of action were against the estate. It may be that where the personal liability is against the estate, and the mortgaged property belongs to the estate, so that, in any event, the debt would have to be satisfied out of the estate, it would be necessary to present the claim to prevent a bar, and keep the remedy alive as to the debt, in order to uphold the remedy on the mortgage. But the principle can have no application to the case now in hand, where there is a contract of another party still alive — where the land is under a contract, not barred, to satisfy the demand.

In *Christy v. Dana*, *ante*, 174, where a similar question arose in an action to foreclose a mortgage executed by E. O. Dana, deceased, after the mortgaged property had

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been conveyed to other parties, it was objected that the claim had not been presented to the administrator, and we said: "Inasmuch as no relief is demanded against the estate, and the intestate, at the time of his death, had no interest in the land, there was no need for the plaintiff to present his claim to the administratrix for allowance."

It is unnecessary now to determine whether Mrs. Carrillo, under section one hundred and thirty of the Probate Act, has a contingent claim against the estate of deceased, arising out of the mortgage upon her property as security for her husband's debt, and the liability to a sale thereunder, which may yet be presented within ten months after the sale, when the claim will become absolute. If so, it is nothing more than would accrue where two parties execute a joint note, one being in fact surety for the other, and the principal dies and the surety is compelled to pay it, which he would be undoubtedly liable to do at any time within four years after maturity, notwithstanding the claim might become barred as against the estate, by neglect of the holder to present it in time. He has bound himself to pay it, and he cannot escape the obligation. By paying the money, or any portion of it, he might, from the time of the payment, acquire an absolute claim against the estate for the amount so paid. His claim, however, would not be the original notes, which were barred as to the estate, but for moneys paid on account of the deceased, contingent before, absolute after payment. (*Chipman v. Morrill*, 20 Cal. 133.) But whether Mrs. Carrillo has, or has not, such a contingent claim, that may hereafter become an absolute charge against the estate, cannot affect the question. She has undertaken absolutely, by her own independent, though collateral contract, that her land shall stand charged for the payment of the debt; and, as we have before seen, if there was danger that the holders of the note would fail to pursue the principal and make the money out of her estate, the remedy of the surety was to take up the

notes and present them herself. (*Dane v. Cordnan*, and *Whiting v. Clarke*, *supra*.)

It is unnecessary to consider some possible hypotheses, suggested in the brief of one of appellants' counsel, for it is clearly apparent from the record upon what view the Court acted in rendering judgment. Had the first conclusions of law adopted by the Court been allowed to stand, the judgment, and all presumptions of law, would have been the other way. Both conclusions are drawn from the same facts.

We think the first conclusions of law adopted by the Court correct, and the last erroneous. It is, therefore, unnecessary to determine whether it was proper for the Court to change its conclusions of law, and enter a different judgment from that at first ordered, at the time and in the manner pursued in this instance. As bearing upon the question, however, we will refer to the cases of *Carpentier v. Gardiner*, 29 Cal. 163, and *Calderwood v. Peyser*, 31 Cal. 337, in which we had occasion to consider cognate questions.

Judgment reversed, and the District Court directed to enter judgment for plaintiffs upon the findings, directing a sale of the premises, or so much thereof as may be necessary for the purpose, and payment out of the proceeds of the respective claims properly chargeable thereon, under the views expressed in this opinion, according to their respective priorities; and it appearing that the appellant has included in his transcript a large amount of irrelevant matter, it is ordered and adjudged that he recover the costs of the appeal, less one half of the expense of procuring and printing the transcript.

Mr. Justice RHODES dissented.

Mr. Justice CROCKETT, being disqualified, took no part in the decision.

Opinion of the Court — Temple, J.

By the Court, TEMPLE, J.:

A rehearing was granted in this case for certain purposes indicated in the opinion rendered on the petition for rehearing. No brief has been filed by respondent on the rehearing, except on the part of certain infants, by Benjamin Hayes, their guardian *ad litem*. In this brief no attempt is made to show that the infants have rights which ought to be saved by decree; but objection is made to the manner in which the appeal is taken. The affidavit of Glassell is sufficient to show service of the notice of appeal upon Benjamin Hayes, and it was not necessary that he should be named as *guardian ad litem*. The record shows that he had appeared and represented the infants in that capacity. There being no provision in the mortgage for that purpose, the plaintiff is not entitled to counsel fees. The agreement to pay the taxes upon the mortgage was part of the consideration for the money obtained upon the mortgage, and is binding upon Mrs. Carrillo, and the plaintiff is entitled to retain that amount from the proceeds of the sale.

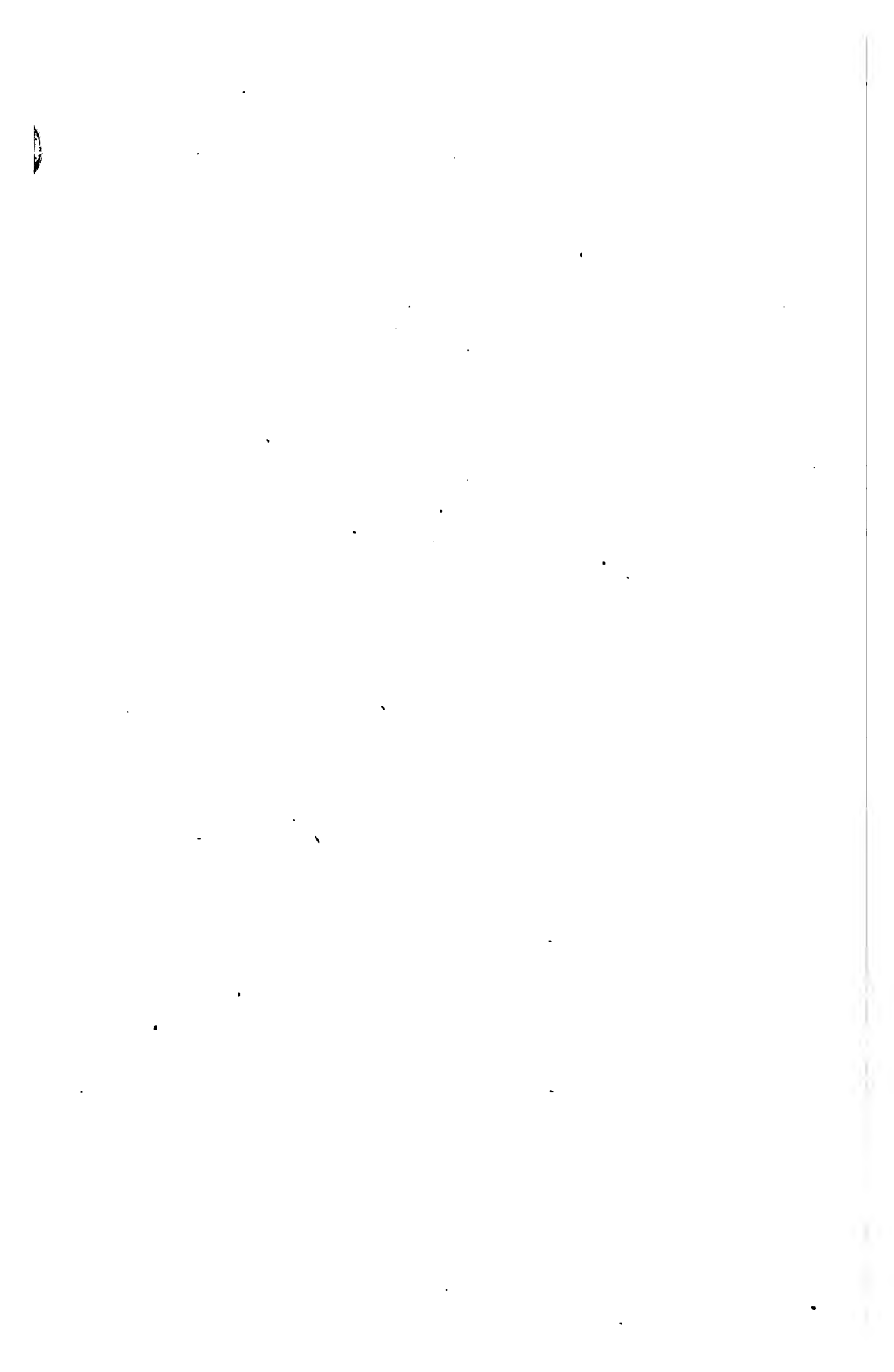
The judgment below is reversed, and the District Court directed to enter judgment for plaintiffs upon the findings, directing a sale of the premises, or so much thereof as may be necessary for the payment of the respective claims properly chargeable thereon, under the views expressed by this Court, according to their respective priorities; and it appearing that a large amount of irrelevant matter has been inserted in the transcript, it is ordered that the appellant recover but one half the costs and expense of printing the transcript.

Mr. Justice CROCKETT and Mr. Justice WALLACE did not sit in this case.

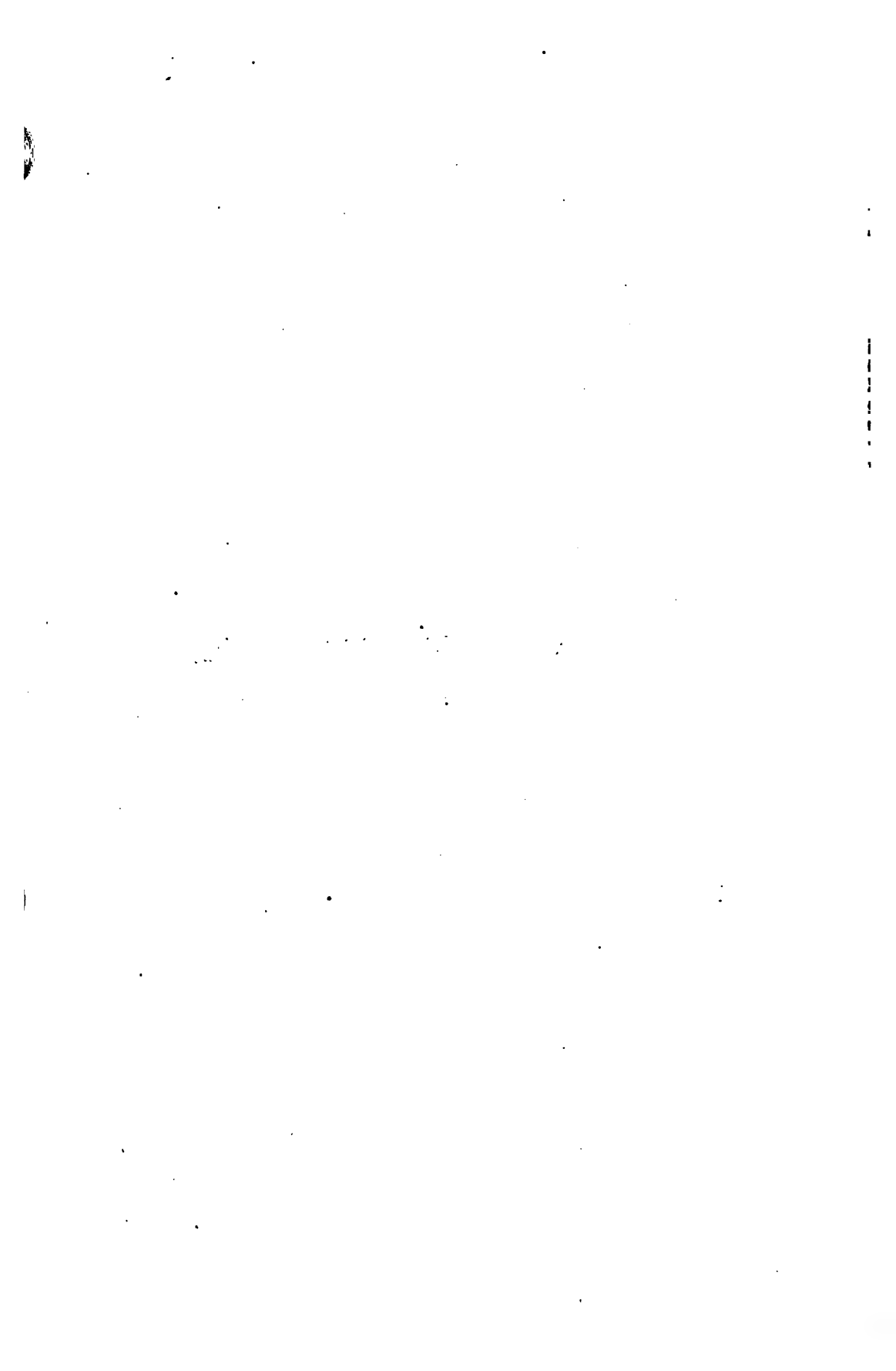
[The first opinion in this case was delivered at the April Term, 1869. At this time SAWYER, C. J., SANDERSON, J.,

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SPRAGUE, J., RHODES, J., and CROCKETT, J., were the Justices of this Court. The opinion after the rehearing, was delivered at the April Term, 1870, when TEMPLE, J., and WALLACE, J., were Justices, in place of SAWYER, C. J., whose term had expired, and SANDERSON, J., who had resigned. For some reason the case was not reported in the 39 Cal., with the other cases of the April Term, 1870.—REPORTER.]



JANUARY TERM, 1872.



REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
JANUARY TERM, 1872.

[No. 2,216.]

THE CITY AND COUNTY OF SAN FRANCISCO v.
CERTAIN REAL ESTATE.

JUDGMENT UNOPPOSED NOT NECESSARILY A CONSENT JUDGMENT.—A motion to dismiss an appeal on the ground that the judgment appealed from was entered by consent, cannot be sustained where the record, though it shows that no opposition was made, fails to show that appellant or his attorney was present in Court at its entry.

PRESUMPTION IN FAVOR OF RIGHT OF APPEAL.—Doubtful claims affecting the right of appeal should be liberally construed in favor of the right.

"SECOND STREET CUT" IN SAN FRANCISCO—DEFECTS IN PROCEEDINGS CURED.—The amendatory Act of February 1st, 1870, ratifying and confirming all the orders and resolutions of the Board of Supervisors in reference to the "Second Street Cut" in San Francisco, and the proceedings of the Superintendent of Streets, and the contract, and all the acts and doings of the contractor under it (Stats. 1869-70, p. 41), cured an omission of the Supervisors to publish notice as required by the original Act authorizing the improvement. (Stats. 1867-8, p. 595.)

STREET IMPROVEMENTS.—POWER OF LEGISLATURE TO CURE DEFECTS IN PROCEEDINGS.—In reference to proceedings of statutory creation for the

Statement of Facts.

improvement of certain streets in San Francisco; *held*, that it was competent for the Legislature, by subsequent enactment, to cure any defects or omissions in the proceedings of the Board of Supervisors or Superintendent of Streets.

FINAL DISPOSITION OF OBJECTIONS TO COMMISSIONERS' REPORT ON "SECOND STREET CUT."—The Act of February 1st, 1870, in reference to the "Second Street Cut" in San Francisco (Stats. 1869-70, p. 41), in providing that the judgment of the County Court, either confirming or setting aside the report of the Commissioners, should be "final and conclusive," obviously contemplated that all objections to the report, founded upon the errors, misconduct, irregularities, or omissions of the Commissioners, should be heard and determined by the County Court, and that it should not thereafter be open to attack in a collateral action.

EFFECT OF "ACCEPTANCE" OF STREET IN SAN FRANCISCO.—The only obligation imposed upon the City and County of San Francisco, by section twenty-one of the street law of 1862 (Stats. 1862, p. 391), if there be any, is to keep open and improved that portion of the street constructed and "accepted" in accordance therewith; and there is no obligation on the part of the city and county to pay assessments upon property for benefits derived from the opening and improvement of other portions of the same street.

APPEAL from the District Court of the Fourth Judicial District, City and County of San Francisco.

This was an action brought in accordance with section seven of the amendatory Act of February 1st, 1870 (Stats. 1869-70, p. 41), in reference to the collection of assessments for the "Second Street Cut" in San Francisco. It was an action *in rem* to subject certain real estate on the southeasterly side of Market street, one hundred and seventy-five feet southwesterly from Second street, to an assessment of four hundred dollars, imposed upon it by the Commissioners appointed under the original "Second Street Cut" Act of March 30th, 1868 (Stats. 1867-8, p. 595). An answer was filed on behalf of the real estate involved, setting up the various defenses and the cross-complaint noticed in the opinion. After the filing of the answer the plaintiff moved for judgment on the pleadings, basing his motion upon the ground that there was no plea of payment, and that under the statute, which limits the defenses to be made in opposi-

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tion to such a suit, no allowable issue had been tendered. The motion was granted, and, as appears from the minutes of the Court below, "no opposition being made thereto, it is ordered that plaintiff have and take judgment thereon for the relief demanded in the complaint."

Judgment being accordingly entered, defendant appealed.

Daingerfield & Olney, for Appellant.

The statute under which plaintiff attempts to force a lien is in conflict with Article I, section eleven, of the Constitution. There was, at the time of its passage, a general law in force providing for the change of grade of streets, and the Legislature had no power to suspend its operation for a particular locality of the city. (*French v. Teschemaker*, 24 Cal. 544; *Cooley on Com. Lim.* 391, 392, and notes; *Lewis v. Webb*, 3 Greenl. 326; *Wally's Heirs v. Kennedy*, 2 Yerg. 554; *Janes v. Reynolds*, 2 Texas, 251.)

That part of the statute which limits the proof by the defendant, on the trial, to payment, is unconstitutional. Art. I, Sec. 8, and Art. III, Sec. 1, of Con.; *Blackwell on Tax Titles*, 80; *Cooley on Con. Lim.* 368; *Abbott v. Lindenbower*, 42 Mo. 162; *Corbin v. Hill*, 21 Iowa, 70; *Watlan v. White*, 19 Ind. 470; *People v. Hastings*, 29 Cal. 449.)

The action is not brought upon a judgment of the County Court, but upon an assessment which, by the statute, is merely made evidence of the liability of the land, not conclusive evidence, nor even *prima facie* evidence. There was, in fact, no judgment of the County Court, in the sense in which the word judgment is used in Courts of law or equity. The proceedings there were not judicial proceedings. There was nothing there in the nature of an action involving the validity of the assessment. It merely supervised the action of the Commissioners, and heard objections to their report. The so-called judgment of the County Court is not a binding judgment upon a Court of law where

Argument for Respondent.

the validity of all the proceedings, prior to and including the assessments, are in dispute. (*S. F. and A. W. Co. v. A. W. Co.*, 35 Cal. 644.) Here the objectors to the assessments were condemned before they were heard. Afterwards, they were allowed the poor privilege of coming into the County Court and showing that the sentence was too severe. But now, when they ask to be heard in full vindication of their rights, they are met by the plea that the judgment of the County Court, to the effect that the sentence was not too severe, precludes them from opening their mouths in their own defense. This is not justice, and we think it is not law.

There is nothing in the statute to prevent us from setting up a cause of action by way of cross-complaint. The statute, being in derogation of the common law, must be strictly construed; and, as it does not forbid a cross-action, such an action will be allowed. Courts look with disfavor upon anything, statute or other, which precludes a party from asserting his rights. The cross-complaint sets up, in effect, a contract between the plaintiff and the property holders, by the terms of which, and the "acceptance" of Second street, the plaintiff became obligated thereafter to keep it in repair.

Joseph M. Nougues, for Respondent.

The statute regulating the mode of proceeding, and under which the plaintiff claims, is constitutional and valid. (*People v. Seymour*, 16 Cal. 332; *Ogden v. Saunders*, 12 Wheat. 262; *Oriental Bank v. Freese*, 18 Maine 109; *Fales v. Woodworth*, 23 Maine, 533; *Rich v. Flanders*, 39 N. H. 304.)

The facts stated in the cross-complaint do not show that defendant had any vested right of action against plaintiff for the amount of the assessment. The City and County of San Francisco, though designated by the statute as the

Argument for Respondent.

plaintiff, has no pecuniary interest, and by the terms of the statute is expressly exempted from liability. Besides, the facts set forth by way of cross-complaint show that the acceptance of the street—if it ever was accepted—was subsequent to the passage of the statute under consideration, and prior to the judgment of the County Court, and that the "assessment" here was not for work done in front of the property of defendant, but for work done in front of other property; and it appears that the defendant was benefited, and is within the district, and liable to assessment.

The judgment of the County Court was final and conclusive upon all matters which were or might have been presented by defendant against the confirmation of the report of the Commissioners. (See *Houghton's Appeal*, ante, 42; *Biddle v. Wilkins*, 1 Pet. 686; *Loring v. Mansfield*, 17 Mass. 394; *Le Guen v. Gouverneur*, 1 John. Cases, 492; *Mecham v. McKay*, 37 Cal. 164; *Collins v. Butler*, 14 Cal. 228; *Barnum v. Reynolds*, 38 Cal. 646; *Sullivan v. Triomfo M. Co.*, 39 Cal. 465.)

John W. Dwinelle, McAllister & Bergin, McCollough & Boyd, and Patterson, Irvine & Stow, under the designation of "*amica curæ*," also filed a "Brief for Respondent"—the real object of which, however, appears to have been to dismiss the appeal in this case, and thereby prevent a decision in advance of cases in which they were interested, and "upon a presentation which would not be satisfactory to them." They urged chiefly the point that the judgment was taken without opposition on mere reading of the motion and proof of service; that there was no point of law or fact argued or presented to the Court below; that there was no appearance of any real contest between the parties, and that the judgment was in effect taken by consent, and was, therefore, not appealable.

By the Court, CROCKETT, J.:

It is objected, *in limine*, that we ought not to entertain this appeal, for the reason that the judgment from which the appeal was taken was entered *pro forma* and by consent. If the record disclosed this fact, it would be our duty to dismiss the appeal, as we have repeatedly decided that we will not review judgments or orders entered by consent. (*Stoddard v. Treadwell*, 26 Cal. 282; *Sleeper v. Kelly*, 22 Cal. 456; *Coryell v. Cain*, 16 Cal. 572; *Brotherton v. Hart*, 11 Cal. 405; *Imley v. Beard*, 6 Cal. 666.) The order in this case, directing a judgment to be entered for the plaintiff, after reciting that the plaintiff, upon due notice, moved for judgment, continues: "And no opposition being made thereto," and then proceeds to direct a judgment to be entered for the plaintiff on the pleadings. If it had appeared from the record that the defendant's attorney was present in Court when the motion was made and the order entered, it is certainly true that without straining the language employed in the order, it might well be held to mean that the defendant consented to the judgment. In that case the recital that he made no opposition to it might possibly, under certain circumstances, be held as equivalent to the statement that he consented to it. It is unnecessary, however, to express a positive opinion on this point, as the record does not show that the defendant's attorney was present in Court, and if he did not appear to the motion there can be no inference that he consented to the judgment. If, however, he had been present, it may be that he was only passive and silent, and in that sense made no opposition to the judgment, choosing to stand on his legal rights, and leaving the court to decide the question as it saw fit, without any suggestion from him. Doubtful clauses affecting the right of appeal should be liberally construed in favor of the right. I am therefore, of opinion that we ought to entertain this appeal.

One of the defenses set up in the answer is, that the Board of Supervisors omitted to publish a certain notice as required by the provisions of the Act of March 30th, 1868 (Stats. 1867-8, p. 595), and that the publication of this notice was a jurisdictional fact, without which the Board acquired no authority to let the contract and proceed with the work. But a conclusive answer to this defense is, that by section eleven of the amendatory Act of February 1st, 1870 (Stats. 1869-70, p. 41), it is provided that all the orders and resolutions of the Board of Supervisors, and the proceedings of the Superintendent of Streets, be, and they were thereby ratified and confirmed, and the contract and all the acts and doings of the contractor under it, were affirmed and declared to be valid. The whole proceeding was of statutory creation, and "it was competent for the Legislature to cure any defects or omissions in the proceedings of the Board, or of the Superintendent of Streets." This was done, and it is too late now to inquire whether the Board strictly pursued its original authority in its mode of initiating the work.

The other defenses set up in the answer seek to attack the proceedings of the Commissioners appointed to assess the damages and benefits, and to assail their report on the ground that the Commissioners did not afford to all the parties interested in the property to be affected by the improvement, an opportunity to be examined, and to call witnesses in support of their rights. The amendatory Act of February first provides that the report shall be returned into the County Court, of which fact notice was to be given by publication, after which a reasonable time is allowed by the Act within which all persons interested were permitted to file objections to the report and to call witnesses in support thereof. A sufficient opportunity, after due notice, was thus afforded to all persons to attack the report and the proceedings of the Commissioners for irregularity, or for any other

just cause; and after hearing all the proofs and allegations of the parties, it was made the duty of the Court to set aside, modify, or confirm the report. In case the report was set aside and a new report was ordered to be made, a like opportunity was afforded for filing objections thereto and calling witnesses in support of them. After hearing the objections to the second report, it was made the duty of the Court to render a judgment, either confirming or setting aside the report; and the statute declares that this judgment "shall be final and conclusive." In the case of Houghton's appeal from this judgment, decided at the last term, we held the judgment to be final and conclusive in such a sense that no appeal would lie therefrom. It was obviously the intention of the Legislature that all objections to the report, founded upon the errors, misconduct, irregularities, or omissions of the Commissioners, should be heard and determined by the County Court, and should not thereafter be open to attack in a collateral action. The parties in interest were allowed their day in Court, after due notice, with a sufficient opportunity to be heard in their defense, and the proceeding would be interminable, if the report could be collaterally attacked after a final judgment in the County Court. This is precisely what is attempted to be done by the defense in this action. To permit such a defense would be to disregard the manifest intention of the statute, and to nullify some of its provisions. The answer, in my opinion, presented no defense to the action.

But the defendant also filed a cross-complaint, setting up that Second street, from Market to Folsom, had been constructed under and in pursuance of the provisions of section twenty-one of the Act of April 25th, 1862, amending the Consolidation Act (Stats. 1862, p. 401), and that having been so constructed at the expense of the adjoining property, it was incumbent on the city and county to defray the cost of all subsequent improvement of the street; that, by virtue of

said section twenty-one, the owners of the property, after the street was constructed at their expense, stood in the relation of contracting parties toward the city and county, and acquired a vested right of action against the latter to compel the payment of whatever costs or expenses might thereafter be incurred for improving the street or keeping it in repair. Waiving the question whether the defendant was entitled to file a cross-complaint in this action, or should be limited to the defense specified in the amendatory Act of February 1st, 1870, I think the cross-complaint contains no cause of action against the plaintiff. The defendant in this action is a lot of land situated on the southerly side of Market street, west of Second street, and the averment of the cross-complaint is, that Second street, from Market to Folsom, was constructed under and in accordance with section twenty-one of the Act of April 25th, 1862, to the satisfaction of the committee of the Board of Supervisors and of the Superintendent of Streets, and that the Board of Supervisors has accepted that portion of the street lying between Folsom and Howard streets, and that the defendant in this action was assessed for and contributed toward the expense of constructing Second street from Market to Folsom.

On these facts it is claimed that the city and county, and not the defendants, are liable for the expense of reducing the grade of Second street, between Folsom and Harrison or Bryant streets. If section twenty-one, already referred to, can be construed as creating a contract between the city and county on the one side and the property owners on the other, that when a street has been constructed in accordance with section twenty-one, at the expense of the property, the city and county would thereafter keep it open and improve it at its own expense (a point not necessary to be now decided), it is nevertheless clear that the only obligation imposed

on the city and county by section twenty-one is to keep open and improve that portion of the street which had been so constructed, and that there is no obligation upon the city and county to pay assessments upon the property for benefits derived from opening or improving other portions of the same street. There can be no reasonable interpretation of section twenty-one which would render it incumbent on the city and county to do more than keep open and improve that portion of a street which had been constructed in accordance with that section. The work for which this property has been assessed was done upon a portion of Second street, not lying between Market and Folsom, but entirely outside those limits. I imagine it never entered the mind of the Legislature, when it passed section twenty-one, that it was fastening upon the city and county a liability for all assessments for benefits accruing to a block of land situated on a street constructed under that section, from work done or an improvement made on a remote portion of the same street.

The assessment in this case is not for keeping open or improving Second street, from Market to Folsom, in the sense of section twenty-one, but for benefits which the property is supposed to have derived from work done on Second street at a different point; and it is manifest that the city and county never undertook to pay or assume this liability, either expressly or by implication. The cross-complaint, therefore, contains no valid cause of action, and judgment was properly rendered for the plaintiff on the pleadings.

Judgment affirmed.

Neither Mr. Chief Justice WALLACE, nor Mr. Justice SPRAGUE, participated in the foregoing decision.

Statement of Facts.

[No. 2,920.]

MARGARET SCOLES v. THE UNIVERSAL LIFE INSURANCE COMPANY.

LIFE INSURANCE—WHAT IS A LOCAL DISEASE.—A tubercular affection of the lungs, or tubercles upon the lungs, or tubercles on the brain, or consumption, either of them constitute a local disease, as matter of law, within the meaning of the word "local" when used by a life insurance company to an applicant for insurance, by asking him if he has a local disease.

USUAL MEDICAL ATTENDANT.—The question, who was the usual medical attendant upon an applicant for life insurance, is a question of fact for the jury, in an action on a life insurance policy.

NEW TRIAL.—The Court will not grant a new trial on the ground that the verdict was not warranted by the evidence, if there was a substantial conflict in the evidence.

APPEAL from the District Court of the Twelfth Judicial District, City and County of San Francisco.

This was an action to recover five thousand dollars, insurance upon the life of Paul Scoles, the plaintiff's deceased husband. It was tried before a jury, and resulted in a verdict and judgment for plaintiff, as prayed by her. A motion for a new trial having been denied, defendant appealed from the judgment and order.

In its answer, the defendant, after setting out the statements furnished by Paul Scoles at the time of his application, alleged that they were false and untrue, for the reason that he was at the time "in bad and feeble health, and suffering from consumption and dysentery, and an abscess and tubercles upon the right lung and from tubercles upon the brain; his health was thereby greatly impaired," and that the statements as to the age of his parents and relatives, at the time of their death, was false and untrue.

The instructions asked by the plaintiff, and given to the jury, were as follows:

"A. Who was the usual medical attendant of the party

Statement of Facts.

applying for insurance, is a question of fact for the jury to decide.

"B. The examination of the party, whose life is insured, by the examining physician of the company, and his favorable report as to the then physical condition and health of Paul Scoles, are circumstances entitled to the serious consideration of the jury, but are not conclusive or binding on the defendant.

"C. If the insurer defend on the ground that the insured misrepresented the fact in respect to his having had severe illness, local injury, or personal injuries, and was not in good health at the time of effecting the insurance, the burden of proof is on them.

"D. In cases where the testimony upon any particular issue leaves it doubtful whether the affirmative of that issue is sustained, it is a safe and proper course for the jury to find against the party who has the burden of proof upon that issue.

"E. The party upon whom is cast the affirmative of an issue, must make out the existence of the issuable fact by preponderating evidence."

The instructions asked by defendant, and refused, were as follows:

"O. If you shall find, from the evidence, that Paul Scoles represented to the defendant that he had had no local diseases or serious illness, of any kind, you are instructed that such representation was a warranty to the defendant of that fact; and if you shall further find that such representation was false in fact, you are instructed that there was such a misrepresentation as to avoid the policy sued upon, and that the plaintiff is not entitled to recover.

"P. You are also instructed, that in case you shall find, from the evidence, that Dr. Verhave had not been called upon by Paul Scoles, to attend to him in his professional

Statement of Facts.

capacity, for two years prior to August 5th, 1867, and that Dr. Holbrook had, during the year prior to that date, been consulted professionally by him, and had prescribed remedies for him, and that within said period of two years Paul Scoles had been sick, and had not called upon Dr. Verhave to attend him, then Dr. Verhave was not his usual medical attendant.

"Q. If you shall find, from the evidence, that Paul Scoles represented to the defendant that he had never had any 'local disease,' of any kind, and shall find that the contract of insurance, introduced in evidence, was entered into by the defendant upon the faith that such representation was true, and shall also find that Paul Scoles had, within a year prior to the time of making such representation, had a local disease, you are instructed that the contract of insurance sued upon never took effect, and that the policy of insurance offered in evidence never had any existence as a contract, and that the plaintiff is not entitled to recover thereon.

"R. You are also instructed that whether Paul Scoles knew that he had had such local disease is immaterial, in arriving at your determination in this matter.

"S. You are also instructed that a tubercular affection of the lungs, or tubercles upon the lungs, or tubercles upon the brain, or consumption, would either of them constitute a 'local disease,' within the meaning of that term, as used in the application of Paul Scoles."

The Court below, in its charge, instructed the jury, among other things, as follows:

"If you find that prior to making the application for the policy sued on, Paul Scoles had had any serious illness, serious local disease, or serious personal injury, the plaintiff cannot recover, whether Paul Scoles knew or remembered that he had had such illness, local disease, or personal injury, or not.

Argument for Appellant.

"On behalf of the defendant I give you this instruction: You are instructed that the plaintiff in this action is bound by all the statements and representations made to the defendant by Paul Scoles, and that any misrepresentation on his part is available to the defendant in this action, as much as if the misrepresentation had been made by the plaintiff."

Jarboe, Harrison & Robinson, for Appellant.

The policy was not binding upon defendant, for the reason that the insured made false statements to the effect that he had no local disease or serious illness; that Dr. Verhave was his usual medical attendant, and that he had omitted no material fact bearing upon his physical condition in the statements in his application. There was a warranty on his part that the statements made by him to defendant were true, and the breach of that warranty vitiated the policy. (*Clark v. Manufacturers' Ins. Co.*, 2 W. & M. 487; *Forbush v. Western Mass. Ins. Co.*, 4 Gray, 340; *De Hahn v. Hartley*, 1 T. R. 343; 35 Conn. 230; 98 Mass. 389; 12 Cush. 425; 2 Denio, 82; 6 Cush. 42; 3 Gray, 580; 2 Allen, 572.) And again, even though the statements are to be regarded as "representations" rather than "warranties," still their falseness vitiates the policy. (*Kimball v. Aetna Ins. Co.*, 9 Allen, 542; *Davenport v. N. E. M. F. Ins. Co.*, 6 Cush. 340; 2 Allen, 574; 4 Allen, 225; 10 Cush. 449; 20 N. Y. 37; 98 Mass. 403; 24 Eng. L. & E. 1.)

The Court below erred in giving instruction "A." It is true that, *which* of several physicians is to be called the "usual medical attendant" of a party, is a question of fact for the jury; but this is a very different question from determining *what* elements serve to make up the "usual medical attendant" of the party. When the question to be determined is, as it was here, whether any one of the physicians had the elements necessary to make up the "usual medical attendant," the Court must pass upon it. (*Everett*

v. Desborough, 5 Bing. 503; *Morrison v. Musygratt*, 4 Bing. 60; *Maynard v. Rhodes*, 1 C. & P. 360; *Huckman v. Fernie*, 3 M. & W. 505; *Cazanove v. British Assurance Co.*, 6 C. B., N. S. 437.)

McAllisters & Bergin and *John J. McElhinney*, for Respondent.

The points really at issue are questions of fact, which were passed upon by the jury; and the verdict will not be disturbed on the ground that it was not justified by the evidence, as there was evidence upon each point.

In reference to what was a local disease, the Court charged, in effect, that if the jury found Scoles had "any affection of the lungs," whether tuberculous or otherwise, or "any affection of the brain," or "consumption," or any other "local disease," the plaintiff could not recover.

There was no error in submitting to the jury the question as to who was the usual medical attendant. It is true that defendant might have requested the Court to have gone further and instructed the jury as to the elements that constituted the "usual medical attendant;" but failing to do this, they can take no exception to the want of such an instruction. A failure to give the jury an instruction not asked for has repeatedly been held not to be error.

By the Court, RHODES, J.:

The verdict will not be disturbed on the ground that it is contrary to the evidence, upon the issue as to whether any false statements were made by Paul Scoles, the person whose life was insured, for there is a manifest conflict in the evidence upon the points which have been discussed by counsel. It may be doubted whether any misrepresentations were in issue, except such as were specified in the answer, but we express no opinion on the point.

We see no error in the instructions given by the Court;

Points decided.

and we are of the opinion that the refusal to give those requested by the defendant was not erroneous, except in respect to one instruction. Among the questions propounded to the insured was the following: "Have you had any serious illness, local disease, or personal injury; and, if so, of what nature, and how long since?" And the answer given was: "Not any." There was evidence tending to prove that the insured had consumption, or tubercles upon the lungs, and tubercles upon the brain. The defendant requested this instruction: "You are also instructed that a tubercular affection of the lungs, or tubercles upon the lungs, or tubercles upon the brain, or consumption, would either of them constitute a local disease, within the meaning of that term, as used in the application of Paul Scoles." We think such diseases as those mentioned in the proposed instruction would clearly come within the definition of a local disease; and that the jury should have been so instructed, as matter of law. It was not enough that the jury were instructed that, if Paul Scoles had had a serious local disease, then the plaintiff could not recover; but the defendant had a right to have them instructed that a particular disease, in respect to which there was evidence before them, came within the meaning of the term *local disease*, as used in the application of the insured.

Judgment and order reversed, and cause remanded for a new trial.

[No. 3,102.]

HAYWARD H. HOWE v. UNION INSURANCE COMPANY.

ATTACHMENT LIEN DISSOLVED BY BANKRUPTCY OF DEBTOR AFTER JUDGMENT.—Where Howe commenced an attachment suit against McCann, and garnished money of McCann's in the Union Insurance Company, and afterwards recovered judgment and issued execution to the Sheriff,

Statement of Facts.

who, however, did not receive the money or actually levy the execution, and before any further steps, and within four months of the issuance of the attachment, proceedings in bankruptcy were commenced against McCann, and an assignee of his estate appointed: *held*, that the proceedings in bankruptcy dissolved the lien under the garnishment, and that neither the judgment nor execution, without an actual levy or receipt by the Sheriff of the money, would create any other lien.

JUDGMENT AND EXECUTION, WITHOUT LEVY, DO NOT CONVERT ATTACHMENT LIEN INTO "LIEN UNDER FINAL PROCESS."—In case of a garnishment in an attachment suit, the mere recovery of judgment and issuance of execution will not, without a receipt by the Sheriff of the property, or an actual levy of the execution, create any additional lien upon the fund garnished, nor convert the attachment lien into a "lien under final process," within the meaning of section twenty of the Bankrupt Law.

APPEAL from the District Court of the Fifteenth Judicial District, City and County of San Francisco.

It appears from the findings in this case, that on December 4th, 1869, plaintiff commenced a suit, to recover one thousand four hundred and sixty-five dollars, against Henry McCann, in the Sixth District Court, Sacramento County, and issued a writ of attachment to the Sheriff of the City and County of San Francisco, which was duly served, by way of garnishment, upon the Union Insurance Company. On December 18th, 1869, plaintiff recovered judgment in that action, and caused a writ of execution to be issued to, and placed in the hands of, the Sheriff of San Francisco, who, on December twentieth, proceeded with it to the office of the Union Insurance Company for the purpose of collecting the money garnished. The Secretary of the company admitted that there was then, and had been when the garnishment was served, one thousand dollars belonging to McCann in the hands of the company; but he declined to apply the same to the satisfaction of the execution at that time, on the ground that the money was due on a policy of insurance, by the terms of which the company was not required

Argument for Appellant

to pay under sixty days. There was no levy, or attempted levy, of the execution.

On December 23d, 1869, a petition in involuntary bankruptcy was filed against McCann in the United States District Court, which, on January 4th, 1870, adjudged him a bankrupt; and soon afterwards, Henry C. Hyde, who was appointed assignee of his estate, demanded of the insurance company the one thousand dollars, so in its hands, as a portion of the bankrupt effects. The company formally declined to pay, but without making any claim upon the fund except as a mere stakeholder, for whoever should be found entitled to it.

Under these circumstances, and upon proper intermediate proceedings, this action was commenced by the plaintiff as garnishor against the defendant as garnishee. Defendant answered, disclaiming any interest in the fund, but setting up the facts, and praying that Hyde, an assignee in bankruptcy, might be made a party, and judgment rendered ordering to which of the parties, plaintiff or Hyde, the money should be paid. Mr. Hyde also answered, by way of intervention, and claimed the money as against the plaintiff, by virtue of the bankrupt proceedings and his official character as assignee.

There was a judgment in the Court below in favor of Mr. Hyde, as assignee in bankruptcy; and, a new trial having been denied, plaintiff appealed from the judgment and order.

S. Solon Holl and Estee & McLauren, for Appellant.

The levy of the attachment created a lien on the funds in the hands of the defendant, to secure the payment of the plaintiff's debt, within the meaning of section twenty of the United States Bankrupt Law. (*Peck v. Jennings*, 7 How. 611; *Kittridge v. Warren*, 14 N. H. 509; *Kittridge v. Emerson*, 15 N. H. 227; *Kilborn v. Lyman*, 6 Met. 304.)

Argument for Respondents.

The lien was not dissolved by section fourteen of the Bankrupt Act. The proceedings in bankruptcy were not taken until five days after Howe obtained his judgment against McCann. After judgment attached, property is not held upon "mesne process," within the meaning of that term in said section fourteen. (*In the Matter of Cook*, 2 Story, 379; *Franklin Bank v. Bachelder*, 23 Me. 60; Practice Act, Secs. 120, 124, 127, 130, 132, and 217.)

Under our practice, an actual levy is not necessary when the property sought to be subjected to the execution is held on attachment. The attachment holds the property, and the execution comes as a power to sell or collect money. (*Bagley v. Ward*, 37 Cal. 121; *Wood v. Colvin*, 5 Hill, 228; *Cresson v. Stout*, 17 Johns. 115; *Van Winkle v. Udall*, 1 Hill, 559.)

Sidney V. Smith & Son, for Respondents.

Plaintiff's attachment was made within four months next preceding the commencement of the bankruptcy proceedings against McCann, and was therefore dissolved by operation of law upon the assignment to Hyde.

The nature of an attachment lien is not affected by the fact of a judgment obtained in the action. Even after judgment, the attachment continues to be what it was originally: "an attachment on mesne process." (*Andrews v. Southwick*, 13 Met. 535; Bump on Bankruptcy, 329; *Pennington v. Lowenstein*, 1 Bankrupt Register, 157; *Corner v. Mallory*, 31 Md. 478; 3 Bl. Com. 379; Bouvier's Law Dic. "Mesne," 31 Md. 38.)

Plaintiff had no other lien but that which depended on the attachment. The judgment gave him no lien, not being able, of its own force, to become a charge on personal property. The attempted levy of the execution was a failure, and did not affect, in any way, the moneys in the hands of the insurance company. (*Dutertre v. Driard*, 7 Cal. 549; Practice Act, Secs. 217 and 126.)

Opinion of the Court — CROCKETT, J.

The rule that an actual levy is not necessary to subject attached property to execution, applies only to cases where personal property has been taken into actual possession by a Sheriff by virtue of an attachment. Here, however, the money was not in the hands of the Sheriff, but had been merely levied upon by way of garnishment; and in order for the Sheriff to get possession of it, a regular levy of the execution was necessary.

By the Court, CROCKETT, J.:

The plaintiff having commenced an action against one McCann, sued out an attachment therein, under which the defendant in this action was duly summoned as a garnishee. When thus summoned the defendant was indebted to McCann in the sum of one thousand dollars. Whilst the attachment and garnishment remained in force the plaintiff obtained a judgment against McCann for about the sum of one thousand four hundred dollars, on which judgment an execution was immediately issued and placed in the hands of the Sheriff, who, by virtue thereof, applied to the defendant in this action for the payment of the one thousand dollars previously attached; but this request was not complied with, and the money was not paid; nor did the Sheriff levy the execution upon the fund in the hands of the defendant, supposing, from what transpired at the time, that the money would be paid in a day or two without an actual levy of the execution. Before any further step had been taken, and within less than four months from the time when the attachment was issued and served, proceedings were commenced in due form in the District Court of the United States against McCann, to have him declared a bankrupt; and, subsequently, in due time, the intervenor, Hyde, was duly appointed assignee of the bankrupt's estate, and received an assignment thereof. By section fourteen of the Bankrupt Law of the United States it

Opinion of the Court—Crockett, J.

is provided that all attachments upon mesne process within four months before the commencement of the proceedings in bankruptcy shall be thereby dissolved, in case the defendant in the attachment be declared a bankrupt. Under this section it is clear that if the proceedings in bankruptcy had been commenced before the plaintiff obtained his judgment against McCann, the attachment would have been dissolved and the plaintiff would have lost his lien upon the fund in the hands of the insurance company. It is equally clear that if the plaintiff had obtained his judgment, issued his execution thereon, and caused the same to be actually levied upon the fund before the proceedings in bankruptcy were commenced, he would have acquired a lien upon the fund which would not have been divested by the proceedings in bankruptcy. In that case his lien would have accrued under final and not under mesne process, and would have been protected under section twenty of the Bankrupt Law. But inasmuch as the execution was not, in fact, levied, neither the judgment nor execution created any lien upon the fund other than that under which it had been previously held. If the insurance company had paid the money to the Sheriff at the time when it was summoned as garnishee under the attachment, as it had the right to do, and if the plaintiff had thereafter obtained his judgment against McCann, and issued his execution and placed it in the Sheriff's hands before the proceedings in bankruptcy were commenced, it would have been the duty of the Sheriff immediately to apply the money received under the attachment toward the satisfaction of the execution; and under section one hundred and thirty-two of the code the plaintiff would have acquired a lien under final process, within the meaning of section twenty of the Bankrupt Law. But when there is no money or property in the hands of the Sheriff under the attachment prior to the judgment, I do not perceive how the mere fact that a judgment was rendered and an execution issued, but not levied, can

Opinion of Wallace, J., specially concurring.

have the effect to convert the attachment lien upon a fund in the hands of a garnishee into a lien upon final process. It appears to me to be plain that in such a case the attachment lien remains, after the judgment and before the levy of the execution, precisely what it was before, to wit: an attachment under mesne process, and is therefore dissolved under section fourteen of the Bankrupt Law, by proceedings in bankruptcy commenced within four months after the attachment.

Judgment affirmed.

WALLACE, J., concurring specially:

I concur in the judgment and in the general view expressed by my associates. I am not satisfied, however, as maintained in the opinion of Mr. Justice CROCKETT, that the case would have been substantially different, even had the Sheriff actually received and held the money in the first instance, under the writ of attachment. It is suggested in the opinion that in such case the mere subsequent receipt of the writ of execution by the Sheriff would have, *ipso facto*, converted the attachment lien into one under final process, even though the officer had, in reality, taken no step whatever in pursuance of the writ of execution.

This is supposed to result because it would, in such case, be the *duty* of the Sheriff to apply the money in his hands to the satisfaction of the execution. Though such, however, be his duty in that respect, he may, nevertheless, neglect to perform it, and in that case, should he take no step whatever pursuant to the writ of execution, it might be argued, with some degree of plausibility at least, that the money in his hands would still be held only by virtue of the attachment lien, under which it had been before then held. The question will, in my opinion, deserve consideration, should it arise in some future case; and, as it is not involved in the present

Points decided.

controversy, I do not wish to be understood as expressing an opinion upon it.

Mr. Chief Justice SPRAGUE did not participate in the decision of this case.

[No. 3,011.]

THE PEOPLE OF THE STATE OF CALIFORNIA v.
YSIDORE PADILLIA.

IN A CRIMINAL CASE THE EVIDENCE MUST APPEAR IN A BILL OF EXCEPTIONS.—Where a motion for a new trial is granted, on the ground that the evidence was insufficient to justify the verdict, the only manner in which the question as to the sufficiency of the evidence can be presented to the Supreme Court is by a bill of exceptions, duly settled and certified by the Judge who tried the cause.

CONSTRUCTION OF STATUTE RELATIVE TO DISTRICT COURT REPORTERS.—It was not intended by the Act concerning District Court Reporters (Stats. 1865-6, p. 232), that the report of the testimony, transcribed into longhand from the reporter's notes, should be a substitute for the bill of exceptions. Such report is only prima facie a correct statement of the evidence and proceedings therein contained, while a bill of exceptions imports absolute verity, and is not to be taken as merely prima facie.

DUTY OF ATTORNEYS AND COURT AS TO REPORT OF TESTIMONY.—Before incorporating the reporter's transcript of the testimony in a bill of exceptions it is the duty of attorneys to eliminate from it all matter not necessary or proper to illustrate the points to be presented on the appeal. The Judge of the Court should not permit the report to be used until it has been revised by him.

TRANSCRIPT TO SHOW AFFIDAVITS WERE USED.—Where, on an appeal from an order granting a new trial, there is no evidence to show that the affidavits contained in the transcript were used or referred to on the hearing of the motion for a new trial, they will not be considered by the Supreme Court.

INCORRECT INSTRUCTION TO BE CONSIDERED.—Alleged errors in the instructions given to the jury may be considered on appeal, in the absence of testimony, if the instructions are incorrect in every conceivable state of the evidence.

INSTRUCTION AS TO CIRCUMSTANTIAL EVIDENCE.—In order to convict on circumstantial evidence, the evidence should be such as to produce nearly the same degree of certainty as that which arises from direct testimony.

Opinion of the Court — Rhodes, J.

EVIDENCE NECESSARY TO CONVICT.—The evidence in a criminal case must satisfy the jury, to a moral certainty and beyond a reasonable doubt—that is, it must entirely satisfy the jury—of the guilt of the defendant, before they can convict. If the jury are not entirely satisfied, they should acquit.

APPEAL from the District Court of the Fifth Judicial District, County of San Joaquin.

The defendant was convicted of the crime of murder in the first degree. He moved for a new trial, the motion was denied, and he appealed.

The other facts are stated in the opinion of the Court.

D. S. Terry, for Appellant.

Attorney General Jo Hamilton, W. S. Montgomery, and J. H. Budd, for Respondents.

By the Court, RHODES, J.:

The motion for a new trial was made on the ground, among others, that the evidence was insufficient to justify the verdict. That question cannot be considered on the record now before us. The record contains no bill of exceptions. The only manner in which that question can be presented to the appellate Court is by a bill of exceptions—or a statement, as it is sometimes called—duly settled and certified by the Judge who tried the cause. In this case, the transcript contains a longhand copy of the notes of the official reporter, certified by him to be correct; but there is no evidence, that the report was used or referred to on the hearing of the motion. The same observation will apply to the affidavits which are contained in the transcript. The Act concerning District Court Reporters (Stat. 1865-6, p. 232) provides that the reporter shall write out, in longhand, verify, and file the report of the testimony, etc.; and that the report shall be deemed prima facie a correct statement of the evidence and the proceedings therein contained.

Whatever may be the value of the report on the motion for a new trial, it is very apparent that it was not intended by the statute that it should be a substitute for a bill of exceptions. A bill of exceptions imports absolute verity, and is not to be taken merely as *prima facie* correct. And even if a bill of exceptions were prepared, it would be a gross abuse of the provisions of the statute to make the entire report by reference or otherwise, a part of the bill of exceptions. For, whatever may be the grounds of the motion, or whatever may be the alleged errors of the Court, it is almost impossible that the entire report will be necessary or proper to illustrate the grounds or points. Page after page of the report, where it contains the testimony of many witnesses, may be, and usually is, taken up with matters which throw no light on the questions which are the subjects of review by this court. There may be many protracted discussions between counsel and the court as to the form of questions which are ultimately withdrawn, or, if not withdrawn, were asked by the respondent and overruled by the Court. There may have been a series of questions, which were propounded in many different forms, because the witness did not understand the inquiry, or because the court required the questions to be so general as not to be subject to the objection of being leading. Many questions and answers are found to be utterly immaterial, or, if material, at the trial, were asked for the purpose of testing the recollection of the witness. In many instances the question is repeated, and the answer is again repeated; and perhaps the answer is repeated by counsel, and the witness is asked if that is his answer to the question. And, without going into further detail, it is sufficient to say that the reports are often filled with matters which should be eliminated before the reports are permitted to form parts of bills of exceptions.

Opinion of the Court — Rhodes, J.

It is well known that it is scarcely possible for the stenographic reporter, in the hurry of a trial, to present a report which is in all respects accurate. It often happens that a witness illustrates his testimony by reference to a diagram or some object in or about the Court-room, and his answers to questions, as taken down by the reporter, are *here, there, this direction, along here*, and the like; and the report is, in that respect, entirely meaningless, without an explanation of the diagram or other objects referred to by the witness. For these and other reasons, which we think must be obvious upon slight reflection, the judge should not permit the report to be used in any proceeding until it has been revised by him. And it might be added that counsel could readily agree upon the omission, from the bill of exceptions or statement, of the larger portion of the immaterial and useless matter of the report, and thus they might save the parties the expense of copying or printing immaterial matter, and relieve the court of the trouble and annoyance of its examination. We are fully aware of the great labor imposed upon some of the Judges of the District and County Courts, and do not desire to add further burdens; but we doubt not that counsel will, upon the request of the Judges, perform the labor necessary for the proper explanation and expurgation of the report. We do not wish to be understood as intimating that the report in this case is particularly obnoxious to the objections of the character mentioned, nor that the Court or counsel have been more than usually derelict or negligent, for it is the common practice to send up the entire report; and it should be added that the records from that Court are generally prepared with commendable brevity. We repeat that the report forms no part of a bill of exceptions in this case, and cannot be permitted to be used as a substitute for it. (*People v. Thompson*, 28 Cal. 218; *People v. Martin*, 32 Cal. 91; *People v. Ferguson*, 34 Cal.

309; *People v. Trim*, 37 Cal. 274; *People v. Tetherow*, 40 Cal. 286.)

For the reasons above given we cannot consider the other grounds of the motion for a new trial, nor any of the alleged errors which depend for their illustration on the report. The affidavits and copy of record annexed to the transcript are subject to the objections already mentioned. They form no part of a bill of exceptions, and they do not appear to have been read on the hearing of the motion.

Alleged errors in the instructions given to the jury may be considered, in the absence of the testimony, if the instructions are incorrect in every conceivable state of the evidence. It is apparent, from the body of the instructions, that the evidence was mainly of a circumstantial character, and the two instructions, which we shall notice, were evidently given in view of that kind of evidence.

The objection to the tenth instruction—in which the Court states to the jury that “circumstantial evidence should be such as to produce *nearly* the same degree of certainty as that which arises from direct testimony”—was fully disposed of in *People v. Cronin*, 34 Cal. 201; and, indeed, the instruction seems to have been extracted from the opinion in that case.

The seventeenth instruction is as follows: “All that is necessary in order to justify the jury in finding the defendant guilty is, that they shall be satisfied, from the evidence, of the defendant’s guilt to a moral certainty and beyond a reasonable doubt, although they may not be entirely satisfied from the evidence that the defendant, and no other or different person, committed the alleged offense; and if the jury are satisfied from the evidence, beyond a reasonable doubt, that the defendant committed the crime charged against him, they are not legally bound to *acquit* him because they may not be *entirely satisfied* that the defendant

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and no other or different person committed the alleged offense."

The first clause of the instruction is undoubtedly correct in stating that the jury must be satisfied from the evidence of the defendant's guilt, to a moral certainty, and beyond a reasonable doubt; but the next clause of the instruction — "although they may not be entirely satisfied that the defendant, and no other or different person, committed the alleged offense" — was intended as a material qualification of the first clause. The purpose was to tell the jury that they might be satisfied to a moral certainty, and beyond a reasonable doubt, but at the same time not entirely satisfied of the defendant's guilt.

This, in effect, assigns a lower grade to moral certainty beyond a reasonable doubt, than is given to it by the law, and permits the jury to convict without being entirely satisfied that the defendant is guilty of the offense charged. When the jury are satisfied to a moral certainty and beyond a reasonable doubt, they are entirely satisfied. The truth of any fact which is to be proven by evidence cannot be established beyond the possibility of a doubt, and yet the jury may be entirely satisfied of its truth. Anything short of entire satisfaction on the part of the jury of the truth of the charge necessarily implies, in case of conviction, that in their opinion the charge is sustained by a mere preponderance of evidence. A mere preponderance of evidence is not sufficient for a conviction; and, on the other hand, it is not required that the inculpatory facts shall be absolutely incompatible with the innocence of the accused. (*People v. Murray*, 41 Cal. 66.) The true medium is, that the evidence shall satisfy the jury to a moral certainty and beyond a reasonable doubt — that they shall be entirely satisfied — of the guilt of the accused. The instruction was calculated to mislead the jury.

Judgment reversed and cause remanded for a new trial.

Points decided.

[No. 3,080.]

THE CITY OF SAN FRANCISCO v. P. H. CANAVAN, JOS. G. EASTLAND, CHARLES E. McLANE (BOARD OF CITY HALL COMMISSIONERS), ROBERT GEORGE (SECRETARY), JOHN MIDDLETON, SAMUEL P. MIDDLETON (COMPOSING THE AUCTION FIRM OF JOHN MIDDLETON & SON), AND THE BOARD OF CITY HALL COMMISSIONERS. ALSO, A. P. HOTALING AND JAMES MOFFITT v. THE SAME DEFENDANTS.

DEDICATION OF LAND TO PUBLIC USE MUST BE IRREVOCABLE.—It is one of the essential elements of a good dedication that it shall be irrevocable, and that the land shall be forever dedicated for the public use which is designated, provided the public see fit to use it for that purpose. A reservation of the right to revoke the dedication, defeats the dedication.

VALID AND COMPLETE DEDICATION.—To constitute a valid and complete dedication, there must be an intention by the owner, clearly indicated by his words or acts, to dedicate the land to public use, and an acceptance by the public of the dedication.

ACCEPTANCE OF DEDICATION.—An acceptance of a dedication is generally established by a use by the public of the land for the purpose to which it had been dedicated. Until accepted, the dedication, whether made by deed or otherwise, may be revoked by the owner of the land.

NATURE OF USE NECESSARY TO CONSTITUTE ACCEPTANCE.—The public use, necessary to constitute an acceptance of a dedication, must be of such duration that the public interest and private rights would be materially impaired if the dedication were revoked and the use by the public discontinued.

EVIDENCE OF DEDICATION.—Where land was used in San Francisco as a cemetery, and was so marked upon the Van Ness map, and where the Legislature subsequently authorized the removal of the dead bodies and the dedication of the land to such public use as the Board might deem proper, and the Board undertook to dedicate it as a park: *held*, that the map was not evidence tending to prove a dedication as a public park.

TITLE OF SAN FRANCISCO TO PUEBLO LANDS.—Neither the former pueblo nor the City and County of San Francisco, as its successor, ever held an indefeasible proprietary interest in the pueblo lands. Such lands are held in trust for certain municipal purposes.

POWER OF THE STATE OVER MUNICIPALITIES AS TO PUEBLO LANDS.—When California was erected into a State of the American Union, it succeeded to the power which the Government of Mexico had before exercised over its municipalities, in respect to the control and disposal of

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the pueblo lands, so soon as the title of the pueblo, or its successor, and the nature of the trust on which the lands were held, should be recognized by the proper tribunals of the United States.

PUEBLO LANDS IN SAN FRANCISCO.—The tenure by which the pueblo lands are held by San Francisco, is of a fiduciary nature, and cannot be alienated except in accordance with the trust.

POWER OF LEGISLATURE AS TO TRUST.—It is for the Legislature to decide how the trust, for which San Francisco holds the title to the pueblo lands, shall be performed.

MUNICIPAL CORPORATIONS SUBORDINATE SUBDIVISIONS OF THE STATE GOVERNMENT.—Municipal corporations are but subordinate subdivisions of the State Government, which may be created, altered, or abolished, at the will of the Legislature, which may enlarge or restrict their powers, direct the mode and manner of their exercise, and define what acts they may or may not perform, subject, however, to the limitation that the Legislature cannot direct the performance of an act which will impair the obligations of a contract.

POWER OF LEGISLATURE OVER MUNICIPAL CORPORATIONS.—The Legislature has the constitutional power to direct a sale of pueblo lands owned by a municipal corporation, by Commissioners, and an application of the proceeds to the erection of public buildings.

APPEAL from the District Court of the Fourth Judicial District, City and County of San Francisco.

The facts are stated in the opinions.

McAllisters & Bergin and *W. C. Burnett*, for Appellants.

1. The land in suit was dedicated as a public park to the use of the public. This is shown by the Acts of the Legislature of April 27th, 1860, of April 4th, 1864, of March 14th, 1868, and of March 4th, 1870; by the Order No. 447 of the City and County of San Francisco, and by the official acceptance on the part of the Board of Supervisors in appropriating the necessary moneys to improve and promote the usefulness of the park. (Wash. on Easements, 139, Sec. 21.) In *Rowan's Executors*, 8 B. Mon. 250, the Court say: "The dedication having been made * * * did not require a subsequent use to establish or prove it. (*Godfrey v. City of Alton*, 12 Ill. 35; *State v. Wilkinson*, 2 Verm. 485; *Abbott v. Mills*, 3 Verm. 527; *Brown v. Manning*, 6 Ohio, 298; *Lo*

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Clercq v. Gallipolis, 7 Ohio, 218; *Grant v. City of Davenport*, 18 Iowa, 186; *Warren v. Mayor of Lyons City*, 22 Iowa, 356; *Commonwealth v. Rush*, 14 Penn. St. 189.)

The learned counsel of the respondents claim that there was no dedication, because the audience reserved to the Board of Supervisors the power to alter or change the dedication. But the answer is, that the city has never attempted to do so. Whenever the city shall attempt to do so, then it will be time to consider the question of her power. But whatever may have been the infirmities of the dedication, if any, which we do not admit, the repeated Acts of the Legislature cured them all. (*Friedman v. Macy*, 17 Cal. 230; *Seabury v. Arthur*, 28 Cal. 150; *People v. Law*, 34 Barb. 571; *McCauley v. Brooks*, 16 Cal. 26, 27.)

A public park or square is an easement in which the inhabitants of the city have a vested right of which the Legislature cannot deprive them, except in exercise of the right of eminent domain. (*New Orleans v. The United States*, 10 Pet. 660; *Van Ness v. The Mayor of Washington*, 4 Pet. 232; *Commonwealth v. Rush*, 14 Penn. St. 188; *Alves' Executors v. Henderson*, 16 B. Monr. 170; *Common Council of Indianapolis v. Croas*, 7 Ind. 12; *Trustees of Augusta v. Perkins*, 8 B. Monr. 441; *Lackland v. North M. R. R.*, 31 Mo. 187; *Yates v. Milwaukee*, 10 Wall., U. S., 504.)

2. The land attempted to be sold is the corporate property of the city, which the Legislature cannot aliene without the consent of the city.

In support of the first branch of this proposition we have the direct admission of the Legislature in the very Act under which respondent profess to act — "they [the Commissioners] shall take possession of all that certain tract of land belonging to said city and county, and known as Yerba Buena Park" (Stats. 1869-70, p. 728, Sec. 2), and upon sale of it they are to make deeds in the name of the City and County of San Francisco, which shall be evidence of title

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and right of possession in the grantee, etc. (Id. Sec. 5; see Stats. 1851, p. 307; Stats. 1860, p. 277; Stats. 1858, p. 70; Stats. 1863-64, p. 260; 13 U. S. Stats. p. 333, Sec. 5; U. S. Stats. 1865-66, Chap. 13.)

It must be admitted that after the cession of the country, and prior to the admission of the State into the Union, the title to these lands was either in the city or in the United States. During this period there could be no title in the State, as the State was not then in existence, and during the same period it is evident this alleged plenary power of the Governor and Departmental Assembly did not exist, as they were not in existence to exercise it, and the United States could not. It was a political power foreign to our system, which the cession of the country to the United States displaced. (*Pollard v. Hagan*, 3 How. 225; Vattel's Law of Nations, Book I, Chap. 19, Secs. 210, 244, 245, and Book 2, Chap. 7, Sec. 80.) It is clear, then, that during this period no Departmental Assembly, no Governor, could arbitrarily or otherwise dispose of public land; they were not in existence; they were unknown to the law. (*Mumford v. Wardell*, 6 Wal. U. S., 435; *Merryman v. Bourne*, 9 id. 601; *Fremont v. United States*, 17 How. 563; *People v. Folsom*, 5 Cal. 378; *Merle v. Mathews*, 26 Cal. 477.)

Now the State of California never owned the pueblo lands; did not, in fact, own a foot of land within her borders, save what she succeeded to in virtue of her right of sovereignty, or subsequently to her admission acquired by grant from Congress. She was admitted into the Union "upon the express condition that the people of said State, through their Legislature, or otherwise, shall never interfere with the primary disposal of the public lands within its limits, and shall pass no law and do no act whereby the title of the United States to, and right to dispose of the same, shall be impaired or questioned." (Brightly Dig. 105; *Ward v. Mulford*, 32 Cal. 372.)

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The Legislature has the power to repeal the charters of municipal corporations, but as long as they are allowed to coexist as a part of the State Government they are not liable to be stripped of their property or funds. The acknowledged principle of constitutional law that forbids the State to tax the property or securities of the Federal Government or the salaries of its officers, and that vice versa precludes the United States from taxing State agencies, etc., applies with full force, and demonstrates the inadmissibility of any such power in the Legislature. (*McCullough v. The State of Maryland*, 4 Wheat. 316; *Weston v. The City of Charleston*, 2 Pet. 467; *The Collector v. Day*, 11 Wall., U. S., 113; *The Banks v. The Mayor*, 7 Wall., U. S., 24; *The Banks v. Supervisors*, 7 Wall., U. S., 28; *Dobbin v. Commissioners Erie Co.*, 16 Pet. 435; *Cooley Const. Limitations*, 482; *The State v. Haben*, 22 Wis. 665.)

Municipal corporations are like any other citizen, within the constitutional guaranty that "no person shall be deprived of life, liberty, or property, without due process of law." (*People v. Haws*, 37 Barb. 445.)

J. C. McCeney, J. P. Hoge, I. M. Wilson, and J. B. Felton, for Respondents.

Mexican pueblos did not have the absolute ownership of property, with full right of disposition. They held the pueblo lands merely in trust for municipal purposes. These purposes were to dispose of them by donation or sale to individuals, or to apply them to public uses, as directed by the Departmental Assembly, or other superior authority. The pueblo authorities could only alienate the lands by a power previously conferred on them, which the Sovereign could authorize or forbid. In the meantime, the Governor or other superior authority could dispose of the lots to individuals.

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[Counsel here cited *Hart v. Burnett*, 15 Cal. 568, and the other cases which are cited on this point in the opinion in this case.—REPORTER.]

The City of San Francisco, and the city and county, became successors of the pueblo, and took and held the lands, not as proprietors, but merely in trust for municipal purposes, in the same manner that the former pueblo held them. For this reason, sales on judgments and executions against the city were not good. (See cases above, particularly *Townsend v. Greeley*, 5 Wall. U. S. R. 337.) The decree of the Circuit Court of the United States (Judge FIELD presiding) recognizes the same view. The Acts of Congress cited in the complaint affirm the same principle. Congress could not change the character of these trusts. (*Hart v. Burnett*, 15 Cal. 575.) The power of the Legislature over these lands is complete and paramount. (*Payne v. Treadwell*, 16 Cal. 233; cases cited *supra*, and also *Dartmouth College Case*, 4 Wheat. 660; *East Hartford v. Hartford Bridge Co.*, 10 How. 533, et seq.; *State of Maryland v. Balt. and O. R. R.*, 3 id. 550.) The Van Ness Ordinance, having been repealed before confirmation, by the Act of the Legislature, the vast amount of property described in it depends for validity solely on the power of the Legislature. (*Hart v. Burnett*, 15 Cal. 624; *City v. Beideman*, 17 id. 461, 462. See other cases cited above.) The Fund Commissioners act under the Acts of the Legislature, and independently of the municipal authorities. They have sold hundreds of lots, and these titles have always been held good. (*Babcock v. Middleton*, 20 Cal. 655; *Thornton v. Hooper*, 14 id. 9; *Davis v. Middleton*, id. 540.)

As to the general powers of the Legislature over the property and affairs of municipal corporations, see, in addition to the above cases: *People v. Board of Supervisors San Francisco*, 11 Cal. 211; *People v. San Francisco*, 36 id. 595;

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Napa V. R. B. v. Supervisors, etc. 30 id. 436; *Mayor, etc. of New York v. Hurze*, 3 Hill, 615; *French v. Teschemacher*, 24 Cal. 518; *People v. Com. Council Brooklyn*, 22 Barb. 412; *People v. Morris*, 18 Wend. 237; The Act of Congress of March 8th, 1866 (14 Stats. at Large, 4), which is referred to in the complaint, recognizes the power and control of the Legislature.

2. The triangular block in question never was dedicated to the public as a park. The complaint of the city and county does not allege any dedication of this land, but only that the city and county "has kept and reserved, and dedicated the same to the public use, forever, as a public park or plaza, at the future will and pleasure of said plaintiff." This would make a mere reservation, not a dedication, and in the future the lands could be devoted to other purposes. (*Pitcher v. New York and Erie Railroad Company*, 5 Sand. S. C. R. 608; *Board of Education v. Fowler*, 19 Cal. 24; *Grant v. City of Davenport*, 18 Iowa, 186.) This amounts, at most, to a mere license; acts of dedication must be clear, conclusive, and free from doubt or ambiguity. (*Harding v. Jasper*, 14 Cal. 649, and cases cited.) The ordinance introduced as proof of dedication is, if anything, stronger in negation of a dedication, for it expressly provides "that nothing contained in this order shall prevent the said city and county from devoting said land, at any time, to any public purposes, either State or municipal." It is of the essence of a dedication that it be irrevocable. (*Irwin v. Dixon et al.* 9 How. U. S. R. 30, and cases cited; *Washburne on Easements*, 139; *State v. Trask*, 6 Vermt. 355; *N. O. v. U. S.*, 10 Pet. 622; *Commonwealth v. Alburger*, 1 Whart. 469; *Huber v. Gazley*, 18 Ohio, 18; *Missouri Inst. v. Horr*, 27 Mo. 211.)

The complaint of *Hotaling et al.* relies on what is called the Van Ness Ordinance Map, and the ordinances relating to the same, as effecting a dedication. This block lies in-

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side, or to the eastward of Larkin street, whilst the Van Ness Ordinance Map applies entirely to lands west of Larkin and southwest of Johnson streets. When the map was introduced, it showed no plaza, or land designated as such, but merely a cross indicating, doubtless, a cemetery, as it had for years previously been used as such. The city could dedicate only by ordinance; its powers are to be exercised in the mode prescribed by the charter; the mode is the measure of the power; the city could make no implied contract; nor be bound by any act treating the land as dedicated. (*Grogan v. San Francisco*, 18 Cal. 590; *McCracken v. same*, 16 id. 616; *Pimenthal v. same*, 21 id. 363; *Satterlee v. same*, 23 id. 318; *Herzo v. same*, 33 id. 140; *Zottman v. same*, 20 id. 96; *Murphy v. Napa Co.* 20 id. 508; *French v. Teschemacher*, 24 id. 550.)

An acceptance by the public is necessary to constitute a dedication. Had the ordinance introduced to show dedication been clearly and unreservedly such, still its acceptance by the public was necessary to make it effectual. It would have been "but an offer to dedicate, by which the city could lose nothing, and the public could acquire nothing, until the offer should have been accepted. The doctrine upon this point is so well settled as to leave neither encouragement nor chance for discussion." (*San Francisco v. Calderwood*, 31 Cal. 589, citing Washburne on Easements, 132, and cases there cited; *Harding v. Jasper*, 14 Cal. 647; *Child v. Chapel*, 9 N. Y. R. 257.)

Ordinarily there is no other mode of proving acceptance than by a use by the public sufficiently long to evince an acceptance. (Washburne on Easements, 139, 140.) "This use ought to be such length of time that the public accommodation and private rights will be affected materially by an interruption of the enjoyment." (*Cincinnati v. White*, 6 Peters, 431-439; 2 Smith's Lead. Cases, 182, and cases cited.) Here it was clearly shown that this block of land never had

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been used as a public park, and that its condition rendered such use impossible. It had been a cemetery for many years. The dead bodies had, to some extent, been removed, but many still remained when the Commissioners took possession. They, in grading and preparing the block for sale, removed several hundred dead bodies. Only after the Commissioners removed these remains, and graded the block, was it in a condition for any other use than a cemetery.

Where, by laying out a town and selling lots on the faith of streets, squares, and parks laid out, purchasers can claim a dedication, it is on the doctrine of estoppel — an estoppel in pais. (See Washburne on Easements, 144, et seq.; 2 Smith's Lead. Cases, 182; *State v. Trask*, 6 Vermont, 365; *State v. Cullen*, id. 530; *Rowan's Ex. v. Portland*, 8 B. Mon. 232-237; *Noyes v. Ward*, 19 Conn. R. 251-265.) The city here, in setting up this estoppel against herself, occupies a curious position. As was said in a similar case: "It is a new doctrine that a party can, without authority of law, create an estoppel for himself, and be permitted to say he is estopped by his own act. It is for others to interpose the objection of an estoppel, and not him who created it." (*Rector v. Hart*, 8 Mo. R. 457, et seq.) The use of a park or public square is never an appurtenant to property. It is not necessary to the use of the property adjacent. The property holder is only affected like the rest of the community. It is not like cutting a man off from the use of a street necessary to his property. (*De Armas et al. v. Mayor of New Orleans*, 5 La. R. [O. S. 125] 192.) This block of land, if ever dedicated at all, was dedicated as a cemetery. It has been doubted whether the common law principle of dedication applies to public burial grounds. It rests upon the principle that it would be "immoral, indecent, and even sacrilegious to reclaim at pleasure property which had been solemnly devoted to the use of the public in furtherance of some pious or charitable object." (See *Hunter v. Trustees*

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of *Sandy Hill*, 6 Hill, 407, 442; 2 Smith's Lead. Cases, 182, 183, 193, et seq.; *Beatty v. Kentz*, 2 Pet. 584.) No complaint is made on this ground. All unite in desiring a removal of the cemetery — the municipal and State authorities as well as the individuals. Of course, such an act, by the direction of the Legislature, could not be pronounced "indecent or immoral." The plaintiffs proceed, in their complaints, on the ground that this was a pleasure ground, not a graveyard. The above authorities also show that when a cemetery has ceased to be such in fact, a dedication for that purpose ceases.

By the Court, CROCKETT, J.:

The only question which we are called upon to consider in these cases is, whether in enacting the Act of April 4th, 1870 (Stats. 1869-70, p. 738), providing for the erection of a City Hall in the City of San Francisco, the Legislature exceeded its constitutional power. The Act authorizes the Governor to appoint three Commissioners to superintend the work of erecting a City Hall, and directs them to take possession of all that certain tract of land belonging to said city and county, and known as Yerba Buena Park, to grade it to the official grade of the surrounding streets, and directs how the work shall be let and paid for. It also directs that a portion of Yerba Buena Park be subdivided into lots and subdivisions, and provides for the manner of doing it, and that, after the land is laid out, the Commissioners shall immediately proceed to sell, at public auction, the lots and subdivisions in such manner as will bring the largest sum or price possible, and directs the mode of doing it, and that, upon payment of the purchase price and interest, as therein provided, the Commissioners are to execute deeds, in the name of the City and County of San Francisco, to the purchasers, and that these deeds shall be *prima facie* evidence

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of the regularity of the proceedings, * * * and shall be evidence of the title and right of possession in the grantees, upon which actions for the recovery of real property, or injuries thereto, may be maintained and defended in all the Courts of this State. It is then provided, that all moneys received from sales of the lots shall be paid into the City Treasury, there to constitute a fund to be known as City Hall Fund, and not to be drawn out or used except as provided in the Act. Provision is then made for the erection of a City Hall, at a cost not exceeding one and a half millions of dollars, on that portion of the land not sold, and for the manner in which warrants are to be drawn on the City Treasury, as funds are needed for the prosecution of the work. If vacancies should occur in the Commission, they are to be temporarily filled by the Board of Supervisors until the next meeting of the Legislature, when the vacancies shall be permanently filled. On the completion of the work, the Commissioners are to make a report and render an account to the Board of Supervisors; and if any surplus remains of the City Hall Fund, one hundred thousand dollars thereof, if there be so much, shall be placed to the credit of the School Department Fund of the city, to be used for the erection of a normal school building in the city. These actions are brought for the purpose of enjoining the Commissioners from proceeding with the work, on the ground that the Act of the Legislature is unconstitutional and void. The plaintiffs applied for a temporary injunction, which was denied, and they appeal from the order denying it. The Act is alleged to be unconstitutional on the ground — first, that Yerba Buena Park was dedicated to the public as a public park, and that the Legislature has no power to divert it to any other use; second, that it is the property of the City and County of San Francisco, as a municipal corporation, in its capacity of a proprietor of lands, and is as much protected by the Constitution from invasion by the Legisla-

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ture as the property of a private individual; third, that the Constitution provides for the formation of counties, cities, incorporated villages and towns, as subdivisions of the State Government, with the intention that they should exercise all the powers of local self-government which usually pertain to municipal corporations; and whilst it is conceded that the Legislature may create, modify, or abolish these corporations, and may direct the mode and manner in which they shall exercise their powers, or may limit the extent of their powers, it is denied that the Legislature can itself usurp their functions or interfere with their proprietary rights as owners of lands. In discussing the first point, it is necessary to ascertain, primarily, whether or not the land has been dedicated to the public as a park. It appears that up to the time of the passage of the Act, this land had been used as a public burying ground, and had never at any time been used as a public park. On the contrary, since the Commissioners commenced the work of grading the land very many dead bodies had to be removed and buried elsewhere. So far, therefore, as an acceptance of the dedication by the public might be inferred, from a public use of the ground as a park, there is no proof in the record of such an acceptance. But it is claimed that there was an express dedication, by ordinance by the proper city authorities, and that if an acceptance by the public was necessary, there has been such an acceptance by reason of the appropriation of large sums of money out of the City Treasury, under the authority of the legislature, for the purpose of removing the dead bodies from the ground, in order to prepare it for use as a public park. The ordinance referred to is in the following words: "The Mayor is authorized and empowered to take possession of the lot or parcel of ground, in the City and County of San Francisco, situated between Market, McAllister, and Larkin streets, and keep possession thereof for and in the name of the City and County of San Fran-

cisco; and that the said land be, and the same shall be, known as Yerba Buena Park. That the same shall hereafter be known and designated as a public park, to be held and used for public and municipal purposes, and the same shall be, and is hereby dedicated to public uses as a public park or plaza; provided, that nothing contained in the said order shall prevent the said city and county from devoting the said land, at any time, to any public purpose, either State or municipal." It is one of the essential elements of a good dedication, that it shall be irrevocable, and that the land shall be forever dedicated to the public use which is designated, provided the public see fit to use it for that purpose. If a private person should, by deed, attempt to dedicate a parcel of land to public use, as a highway, street, park, or for any other public use whatsoever, and should, in the same deed reserve the right, at his pleasure, to revoke the dedication, and to devote the land to any other use he might see proper, this would be no dedication. (*Irwin v. Dixon et al.*, 9 How. U. S. R. 30, and cases cited; *Washburne on Easements*, 139; *State v. Trask*, 6 Vermont, 335; *N. O. v. U. S.*, 10 Pet. 622; *Commonwealth v. Alburger*, 1 Whart. 469; *Huber v. Gazley*, 18 Ohio, 18; *Missouri Ins. v. Horr*, 27 Mo. 211.) The proviso in the ordinance, reserving to the city and county the right to devote the land, at any time, to any other public use, State or municipal, defeats the alleged dedication of the grounds as a public park, so far as a dedication is supposed to result from the ordinance itself. But if there had been no reservation in the ordinance, it would not, *proprio vigore*, have operated as a dedication of the land until the dedication had been accepted by the public. Until accepted, the dedication, whether made by deed or otherwise, may be revoked by the owner of the land. To constitute a valid and complete dedication, two things

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must occur, to wit: an intention by the owner, clearly indicated by his words or acts, to dedicate the land to public use and an acceptance by the public of the dedication. This acceptance is generally established by the use by the public of the land for the purpose to which it had been dedicated. These propositions are thoroughly established by a long line of decisions, and it will only be necessary to refer to the following: *San Francisco v. Calderwood*, 31 Cal. 580; *Washburne on Easements*, 132; *Harding v. Jasper*, 14 Cal. 647; *Child v. Chappel*, 9 N. Y. Reports, 257; *Washburne on Easements*, 239, 140. This use must be of such duration that the public interest and private rights would be materially impaired if the dedication were revoked, and the use by the public discontinued. (*Cincinnati v. White*, 6 Peters, 431, 439; 2 Smith's Leading Cases, 182, and cases cited.) In order to establish the dedication, the plaintiff also produced what is known as the Van Ness Ordinance Map. But the Van Ness Ordinance relates only to lands lying west of Larkin street, and on the map made in pursuance of the ordinance, this land is marked only by a cross, to indicate its use as a cemetery. This map, therefore, did not tend to prove the dedication as a public park. My conclusion on this branch of the case is, that the land has not been dedicated to the public use as a park. I do not understand counsel to claim that it was dedicated as a public cemetery; but if it had been so dedicated, it had practically ceased to be used as such, through the action of the city authorities, before the passage of the Act; and I presume it will not be contended that it was not competent for the Board of Supervisors, as a police regulation merely, to prohibit the use, as a public burying ground, of a parcel of land situate nearly in the heart of a large and growing city.

In discussing the second ground on which the Act is alleged to be unconstitutional it becomes material to inquire into the tenure by which the title to this land was acquired

and is now held by the city and county. It is conceded to be a portion of what are known as the pueblo lands held by the City and County of San Francisco, as the successor of the former Mexican Pueblo of Yerba Buena. The nature of this title has been so often discussed and repeatedly adjudicated by this Court that it would now be a work of supererogation to undertake anew a critical analysis of it. It will be sufficient to state generally that it has been established by these decisions too firmly to be shaken or overthrown at this late day that neither the former pueblo, nor the city and county, as its successor, ever held an indefeasible proprietary interest in these lands. On the contrary, they were and are held only in trust for certain municipal purposes. Under the Mexican system, while the pueblo might dispose of the lands or use them in pursuance of the trust on which they were held, they were nevertheless subject to the disposition of the Governor without the consent of the municipal authorities. On the change of Government what had before been known as the Pueblo of Yerba Buena was incorporated as the City of San Francisco, and afterwards as the city and County of San Francisco. As the successor of the former pueblo the city presented to the Board of United States Land Commissioners its claim for a confirmation of its title to these lands. These proceedings resulted in a final decree of confirmation by the Circuit Court of the United States (to which Court the case had been transferred), by which decree the trust on which the lands were held is distinctly recognized. Subsequently the Congress of the United States, by two special Acts, released the fee of the land to the City and County of San Francisco; but upon the trusts already referred to. Whilst the Mexican Government exercised dominion over this territory, it had the power to direct how the trust should be executed by the pueblo, and to enlarge or limit its power in respect to the disposition of these lands: and when California was erected into a State of the Ameri-

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can Union, it succeeded to the power which the Government of Mexico had before exercised over its municipalities, in respect to the control and disposal of the pueblo lands so soon as the title of the pueblo, or its successor, and the nature of the trust on which the lands were held, should be recognized and ascertained by the proper tribunals of the United States created for that purpose. This has been done. The title has been recognized and the trust declared, not only by the Courts of the United States, to whom the subject was referred, but also by special Acts of Congress, as already stated. Acting upon its power to control and enforce this trust, the Legislature, as early as the year 1851, directed certain of these lands to be conveyed to several persons as Commissioners of the Funded Debt of the City of San Francisco with power in the Commissioners to sell and convey said lands, and out of the proceeds to pay off the funded debt of said city. Numerous sales were made by these Commissioners, and the titles conveyed by them have been repeatedly recognized by this Court as valid. We have also decided, and it is now perfectly well settled in this State, that the City of San Francisco had no such proprietary interest in these lands as was subject to levy and forced sale on execution; that the tenure by which the lands were held was of a fiduciary nature, and could not be alienated except in accordance with the trust, and it was for the Legislature to decide how the trust should be performed. In support of these propositions, I refer to the following authorities: *Hart v. Burnett*, 15 Cal. 568, 573, *et passim*; *Payne v. Treadwell*, 16 id. 220; *Brown v. San Francisco*, id. 457; *City and County of San Francisco v. Biedeman*, 17 id. 461; *Leese v. Clark*, 18 id. 573; *Brenham et al. v. Mayor of San Jose*, 24 id. 602; *Greeley v. Townsend et al.*, 25 id. 610; *Redding v. White*, 27 id. 285; *Grogan v. San Francisco*, 18 id. 614; *Steinback v. Moore*, 30 id. 506; *Board of Education v. Fowler*, 19 id. 20; *Fulton v. Hanlon*, 20 id. 480, *et seq.*; *White v. Moses*,

21 id. 41; *Carleton v. Townsend*, 28 id. 223; *Halliday v. Frisbie*, 15 id. 635; *Townsend v. Greeley*, 5 Wallace, U. S. R. 326; *Townsend v. Burbank*, id. 337; *Seale v. Doane*, 17 id. 484; *Kissling v. Shaw*, 23 id. 445; *Hubbard v. Sullivan*, 18 id. 525; *McCracken v. San Francisco*, 16 id. 621; *People v. Coon*, 25 Cal. 649; *People v. San Francisco*, 36 id. 601; *San Francisco v. Calderwood*, 31 id. 588; *People v. Doe*, 36 id. 222. These authorities conclusively establish that the tenure by which these lands are held is wholly different from that by which lands acquired by a municipality by gift or purchase are ordinarily held; and whatever may be the extent of the legislative power over the latter class of lands, there can be no doubt, I think, that in respect to pueblo lands it is competent for the Legislature to control and direct how they shall be managed and controlled, or disposed of by the municipal corporation.

The last proposition urged by the appellants is, that, inasmuch as the Constitution provides for the organization of county, city, and town governments for the administration of their local affairs, the necessary implication is, that it was intended to prohibit the Legislature from usurping the functions of these municipal bodies by taking upon itself, through its constituted agents, against the will and without the consent of the municipal authorities, the performance of duties which pertain only to the municipal body itself. In support of this argument it is said that the erection of a City Hall is a purely local improvement, and that it was for the city and county to determine for itself whether it needed such an improvement, and if so, when and how it should be made, and at what cost, and how the expense should be defrayed. But it is well settled, in this State at least, that municipal corporations are but subordinate subdivisions of the State Government, which may be created, altered, or abolished, at the will of the Legislature, which may enlarge or restrict their powers, direct the mode and manner of their exercise,

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and may define what acts they may or may not perform, subject, however, to the limitation that the Legislature cannot direct the performance of an act which will impair the obligation of a contract. On the theory of the appellants it would be difficult, if not impracticable, to define the line at which the power of the Legislature to interfere in the affairs of a municipal corporation would terminate. We have already decided that it may compel the corporation to reduce the grade of a street, and may prescribe the details for letting out the contract, etc. (*People ex rel. Ferguson v. San Francisco*, 38 Cal. 595, 601.)

In *Payne v. Treadwell*, 16 Cal. 238, this Court says: "The principal of the numerous cases cited is, that a municipal corporation is a public institution, created for public purposes; that the municipality is a political subdivision or department of the State, governed and regulated and constituted by public law; that the agents who administer its affairs derive their power from the Legislature, and can only act in obedience to legislative authority; that the original power to control, as well as to create them, therefore, is in the Legislature, and that the Legislature can as well immediately direct the use and disposition of the public property, as a general rule, as it can mediate do this by appointing or providing for the appointment of agents, or giving authority for that purpose; in other words, what the Legislature can authorize to be done, it can itself do. The agents of the corporation can sell or dispose of the property of the corporation only in the way and according to the order of the Legislature; and, therefore, the Legislature may, by law operating immediately upon the subject, dispose of this property, or give effect to any previous disposition or attempted disposition of it. The property itself is a trust, and the Legislature is the prime and original controlling power, managing and directing the use, disposition, and direction of it. Otherwise the solecism would appear of a derivative

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power higher in degree and different in kind from the source of its derivation." In *Hart v. Burnett*, 15 Cal. 568-573, *et passim*, the same views substantially, if not directly expressed, were distinctly intimated. These decisions have been too long acquiesced in to be now overthrown; and so many valuable property rights have, doubtless, been acquired on the faith of them, that disastrous consequences would ensue if a different rule was now established. In my opinion the Act in question is not unconstitutional, and the application for an injunction was properly denied.

Order affirmed.

[No. 2,824.]

DOMINGO PUJOL v. JAMES McKINLAY, CARMEN AMESTI DE McKINLAY, ELENA B. McKINLAY, MARIA F. G. McKINLAY, JOSE G. F. A. McKINLAY, PRUDENCIA G. McKINLAY, AND JANE KRAMPNER.

INTEREST STIPULATED BY CONTRACT ONLY PARTLY EXECUTED.—Where an agreement was made between Pujol and McKinlay that Pujol should advance money to redeem McKinlay's land from an execution sale; that he should be paid interest at the rate of two and a half per cent per month, compounding quarterly on his advances; that after redemption he should advance a further sum sufficient to make the whole advance three thousand dollars, for which sum at the said rate of interest McKinlay was to give his note and mortgage; and it appeared that after redemption and the taking of a Sheriff's deed by Pujol, he made no tender of the additional sum, nor did McKinlay tender the note and mortgage: *Held*, that Pujol was entitled to interest on his advances at the stipulated rate; that McKinlay could not defeat it on the plea that such was not to be the rate unless the full amount of three thousand dollars was advanced, because Pujol was not in default so long as no tender of the note and mortgage had been made by McKinlay; and that before McKinlay could ask equity to compel Pujol to transfer the legal title acquired by the Sheriff's deed, he must do equity by paying Pujol his advances with the interest stipulated.

HE WHO SEeks EQUITY MUST DO EQUITY.—Where parties come into a Court of equity seeking to enforce a trust created in their favor under a

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contract, their right to the relief demanded being founded on the contract itself, they cannot claim the benefit of such portions of it as are to their advantage and repudiate the rest.

UNLIQUIDATED DAMAGES NOT PAYMENTS ON ACCRUING INTEREST ACCOUNT.—

Where Pujol leased a ranch from McKinlay at a rent of a certain number of calves to be delivered annually; and afterwards advanced money to redeem the ranch from an execution sale under an agreement, that he was to be repaid the advance with interest at the rate of two and a half per cent per month, compounding quarterly; and no calves were delivered or rent paid: *held*, on a settlement of accounts that McKinlay's claim for non-delivery of the calves was in the nature of unliquidated damages; and that, though equity in making a settlement might, for the purpose of avoiding a multiplicity of actions, estimate such damages and deduct them from Pujol's demand, it would not compute the interest on his demand with rents—in other words, it would not treat such damages as *pro tanto* a payment of Pujol's demand at the several dates when the calves were to be delivered.

INTEREST BY WAY OF DAMAGES ON VALUE OF PROPERTY CONVERTED.—It is well settled that in an action at law for the conversion or non-delivery of personal property agreed to be delivered, interest may be awarded by way of damages for a breach of the contract; and there are even more cogent reasons why equity should adopt the same rule in the settlement of a long standing account.

ACCOUNT FOR RENTS IN EQUITY THOUGH MERGER OF LEASE AT LAW.—Where a lessee, having redeemed the property leased from an execution sale and received the Sheriff's deed, recovered in ejectment against the lessor; but it appeared that as a matter of fact the lessee, in making such redemption, did it in trust for the lessor: *held*, that although at law the lease was merged in the lessee's new title and recovery in ejectment, in equity there was no merger; and that on a settlement of accounts the lessee was chargeable with rents during the whole time.

APPEAL from the District Court of the Third Judicial District, Monterey County.

This was an action to quiet the plaintiff's alleged title to the Rancho "Moro y Cayucos," in San Luis Obispo County, to set aside a deed thereto made on November 24th, 1857, by James McKinlay to his wife Carmen Amesti de McKinlay, and for general relief. The defendants answered, and among other things set up, by way of cross-complaint, that plaintiff held the possession of said property as a lessee, and also held the legal title, under a Sheriff's deed, by way of

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mortgage, or in trust, to secure certain advances made by him; and they prayed for an account of the moneys due him; also, for an account of the rents due them; also, that plaintiff should be enjoined from asserting title against them, or right of possession, except as lessee of an unexpired term, and compelled to convey to them the title acquired under the Sheriff's deed, and for general relief. The action was originally commenced in 1865, in the District Court of the First Judicial District, for San Luis Obispo County, but seems to have been afterwards transferred to the District Court of the Third Judicial District, for Monterey County, where it was tried, and findings filed on September 22d, 1869.

From the findings it appears, among other things, that in 1857 James McKinlay, the owner of the ranch in question, being involved in certain litigation, conveyed to his wife the whole of that part of the ranch known as the "Cayucos," and one half of that part known as the "Moro," in trust, to receive and apply the rents, issues, and profits to her support and maintenance, and to the support, maintenance, and education of the children then born or which might thereafter be born unto them; that this deed was made with intent to hinder, delay, and defraud one Jane Allen in enforcing any judgment which she might recover in an action brought by her and then pending against him, but that neither his wife nor the children knew of any such intent, or were privy to it; that Jane Allen afterwards recovered judgment, upon which execution was issued, and all the right, title, and interest of James McKinlay in said ranch was sold thereunder, and a Sheriff's certificate of sale issued to her; that under these circumstances, and while affairs were in this condition, on December 29th, 1859, James and his wife leased the ranch (except three hundred acres of arable land, which,

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with the privilege of pasturage on the ranch for two hundred or three hundred head of cattle and horses and their increase, they reserved to themselves) to Domingo Pujol, the plaintiff, for the term of six years from March 1st, 1860, with the privilege of surrendering it at the end of three years — the plaintiff to deliver to them, as rent, two hundred calves (one hundred heifer and one hundred bull calves) annually, and to pay the taxes; that plaintiff entered into possession of the ranch, under the lease, on March 1st, 1860, and stocked it with cattle and horses belonging to the firm of Sanjurjo, Bolado & Pujol; that when the time for redemption from the Allen sale was about expiring, James applied to Pujol for a loan of money to redeem, which the latter at first refused to make, on the ground that James had conveyed to his wife and children, but upon James' assurance that he had made that conveyance for his own ends, plaintiff, on June 19th, 1860, made him a loan of two hundred dollars, to secure the payment of which, with interest thereon, at the rate of two and a half per cent per month, he took a note and mortgage on the ranch, and at the same time, and simultaneously therewith, the two entered into a written agreement to the effect that Pujol was to redeem the ranch from the Allen sale, and after the redemption loan a further sum, which, with the redemption money and money loaned, would make up an amount of three thousand dollars, for which James was to give his note, bearing interest at two and a half per cent per month, compounding every three months, and a mortgage, executed by himself and wife, upon the ranch to secure the same; that the plaintiff did redeem from the Allen sale, and afterwards, on November 14th, 1860, there having been no redemption made from him, the Sheriff executed his deed for the ranch to Pujol, which was duly recorded; that Pujol did not offer to pay to James the additional sum necessary to make up the amount of three thousand dollars contemplated in the agreement,

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and the note and mortgage therein provided for, though executed and ready to be delivered on the payment of such additional amount, were never in fact delivered or tendered; that the plaintiff remained in possession of the ranch, but never paid any rent, nor was any rent demanded of him; that in May, 1861, James' indebtedness to the plaintiff, or rather to the firm of Sanjurgo, Bolado & Pujol, was two thousand nine hundred and sixty-five dollars and sixty-five cents for redemption money and money loaned, with interest, and they proposed, upon the payment to them of three thousand dollars and the release of the plaintiff from paying rent for the ranch for a number of years, to reconvey the ranch to him, which proposition he agreed to, but failed to raise the necessary money; that on further negotiation it was agreed that James should give a note, by himself and wife, for three thousand dollars, bearing interest at two and a half per cent. per month, and a mortgage on the ranch, by both, to secure it, and receive a reconveyance, and the papers were accordingly prepared, but, when the parties met to execute them, James refused to do so, and the transactions of the parties remained unsettled; that in March, 1862, plaintiff, while still in possession of the ranch, except the portion reserved, commenced an ejectment suit in San Luis Obispo County, against James, to recover possession of the ranch and damages, and about the same time, but after James was served in that suit, plaintiff wrote to him to go to Monterey, where he would meet Bolado, his partner, who was authorized to make a settlement of the matter in dispute; that James proceeded to Monterey and found Bolado, and various negotiations took place, which resulted in no definite settlement; that while James was absent, engaged in the negotiations pending, a default was taken in the ejectment suit, a judgment entered against him, a writ of restitution issued, and a return made by the Sheriff of its execution "by dispossessing the defendant James and delivering

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peaceable possession to the plaintiff;" that the ranch continued to be assessed to James, and he paid the taxes; that in October, 1864, James being in possession of the portion of the ranch reserved in the lease, the plaintiff commenced an action of forcible entry and unlawful detainer against him, in which he recovered judgment, and on June 16th, 1865, a writ of restitution, issued thereon, was executed by the Sheriff "by causing the plaintiff to have possession of the premises described in the writ;" and that the next day the plaintiff commenced the present suit.

As conclusions of law, the Court below found that the deed of trust to Carmen Amesti De McKinlay was delivered before the plaintiff had acquired any title to the ranch, and that it vested title in her as against all persons, but creditors of her husband, subject to any liens upon it against him, and to the right of his creditors to attack it as fraudulent; that plaintiff was not a creditor at the time of its execution, and therefore not in a position to attack it as fraudulent; that on the redemption from the Allen sale plaintiff became subrogated to the position of Jane Allen, but subject to the relation between him and the defendants created by the agreement under which he became such redemptioner; that by virtue of the lease, entry, and possession under it, there having never been any surrender, plaintiff was estopped from denying Mrs. McKinlay's title; that the redemption from the Allen sale was for the benefit of the defendants, and the deed obtained from the Sheriff in the ejectment case vested title in the plaintiff only in trust, until the debt for three thousand dollars should be secured by note and mortgage; that defendants were not in default for not tendering the note and mortgage, for the reason that plaintiff did not tender the sum necessary to make up the amount of three thousand dollars, as contemplated by the agreement; that the relations of debtor and creditor still existed; that the judgment in the ejectment suit not being

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fraudulent, nor anything having been done to prevent the defendant therein from putting in an answer and defending the case, was conclusion of title in fee as against James, and as to him merged the term of the lease to plaintiff, but did not affect the rights of Mrs. McKinlay or her children; that consequently plaintiff was not entitled to the relief demanded; that defendants, on their cross-complaint, were entitled to an account of the rents of the ranch from the date of the lease, and also to an account showing the moneys advanced by plaintiff for redemption, loans, and taxes, and the interest thereon; that upon payment of the amount found due the plaintiff on such accounting, defendants would be entitled to a reconveyance, and that the matter should be referred to the Court Commissioner to state the accounts.

The Court Commissioner, in stating the accounts, found that the amount advanced by the plaintiff for redemption was two thousand and forty-six dollars, the amount loaned two hundred dollars, and the amount paid for taxes nine hundred and sixty-four dollars and sixty-five cents; that plaintiff was entitled to interest on these advances at the rate of two and a half per cent per month, compounding quarterly, amounting in all to thirty-five thousand five hundred and forty-four dollars and forty-eight cents; that the defendants were entitled to credit for the value of the calves reserved as rent as the same became due, with legal interest thereon, amounting to two thousand and eighty-four dollars and seventeen cents, to James McKinlay, up to the judgment in ejectment, and seven thousand three hundred and twenty-four dollars and seventy cents to Mrs. McKinlay up to date, leaving the amount due the plaintiff twenty-six thousand one hundred and thirty-five dollars and sixty-one cents.

Exceptions being taken to the accounts as stated by the Commissioner, new accounts were filed, which reduced the amount of plaintiff's demand to thirty-four thousand eight

hundred and forty-five dollars and eighty-four cents; struck out interest on the value of the calves, and thereby reduced the credits in favor of defendants to eight thousand one hundred and forty-three dollars and seventy-five cents, leaving the amount due the plaintiff twenty-six thousand seven hundred and two dollars and nine cents.

Upon the findings of the Court, the report of the Commissioner, and the last accounts filed, final judgment was entered in accordance therewith, and further providing that upon the payment to the plaintiff of the amount so found due him within one hundred and twenty days, he should reconvey said ranch to defendants as they held it before; and that in default of such payment the cross-complaint should be dismissed and defendants barred and foreclosed of all equity of redemption in the ranch.

The plaintiff moved for a new trial, which was denied; and he then took an appeal from the judgment and order. In the meanwhile the defendants also took an appeal from the judgment, and urged as objections the points discussed in the opinion. Both appeals were heard together.

William J. Graves, Walter Murray, and Edward Pringle,
for Plaintiff, Appellant, and Respondent.

S. Heydenfeldt, D. S. Gregory, and P. K. Woodside, for
Defendants, Appellants, and Respondents.

By the Court, CROCKETT, J.:

In this case there were cross-appeals, and so much of the judgment as the plaintiff appealed from was affirmed from the bench. The defendant's appeal relates only to the accounting which was had under the order of the Court, and the errors alleged are: First, that the Court computed interest at the rate of two and one half per cent per month, compounded quarterly and without rests, upon the amount ad-

vanced by the plaintiff to effect the redemption from Allen, and upon the sums paid by the plaintiff for taxes on the land; second, that the Court refused to allow to the defendant interest on the value of the calves, which were to be paid annually by the plaintiff as rent for the land under lease; third, that the Court erred in refusing to charge the plaintiff with the value of James McKinlay's one quarter interest in the calves, after the date of the judgment in ejectment in favor of the plaintiff against McKinlay.

In considering the first point, it is to be observed that, by the contract of the 19th of June, 1860, McKinlay stipulated that the plaintiff should be paid interest on his advances at the rate of two and one half per cent. per month, compounded quarterly, and the only reason now urged against this rate of interest is, that under the contract the plaintiff was to advance a further sum, which, when added to the other advances would aggregate the sum of three thousand dollars, and it is said that inasmuch as the last named advance was never made by the plaintiff, the contingency did not happen upon which McKinlay agreed to pay so high a rate of interest; hence it is claimed that the plaintiff is entitled only to legal interest on the sums actually advanced. But under the contract of June nineteenth, the undertaking of the plaintiff to make the last advance, and of McKinlay, that he and his wife would make and deliver their promissory note and mortgage to secure the three thousand dollars, were mutual and dependent covenants; they were concurrent acts, to be performed at the same time, and neither of the parties could put the other in default, except by an offer to perform on his part; and McKinlay having failed to tender the note and mortgage, on or before September 3d, 1860, the plaintiff was in no default in omitting to tender the additional advance before that period, and on that day he became entitled, under the contract, to the Sheriff's deed for the property. Assuming that he held the legal title thus

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acquired, subject to a trust created under the contract of June nineteenth, in favor of McKinlay and wife, nevertheless when they come into a Court of equity, seeking to enforce the trust, their right to the relief demanded is founded on the contract itself, and they cannot claim the benefit of such portions of it as are to their advantage, and repudiate the rest. The plaintiff, as we have seen, was in no default until after he had obtained the Sheriff's deed, and the defendants are not entitled to divest him of the legal title, except on payment of his advances, with the stipulated rate of interest. The maxim, that he who seeks equity must do equity, applies to the defendants' case. In *Hidden v. Jordan*, 28 Cal. 313, the plaintiff sought to enforce a parol trust, similar to that in this case; and it was held that he could enforce the trust only by the payment of the stipulated sum, with the agreed rate of interest, which was largely in excess of the legal rate when none was agreed upon. I think that case is decisive of the point now under discussion, and that the Court did not err in computing interest at the stipulated rate. Nor did the Court err in refusing to deduct the value of the calves from the plaintiff's demand, as of the several dates at which they were to be delivered under the lease. The defendants' demand for the non-delivery of the calves was in the nature of unliquidated damages, the amount of which could not be ascertained until the accounting was had. Neither at common law, nor under our statute, could unliquidated damages of this nature be the subject of a set-off or counterclaim in an action at law for a liquidated money demand, not connected with or growing out of the same transaction in which the alleged set-off, or counterclaim, originated; and though a Court of equity, in making a final settlement of the accounts between the parties, in order to avoid a multiplicity of actions, will estimate the damages and deduct them from the plaintiff's demand, with a view to end the litigation, it will not, in such cases, com-

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pute the interest on the plaintiff's demand with rests. The calves can in no just legal sense be regarded as a payment *pro tanto* of the plaintiff's demand, as of the several dates when they were to be delivered under the lease. The defendants, at most, had only a cause of action against the plaintiff for the value of the calves, which was unascertained and sounded in damages. A cause of action of this nature could not stop the running of interest on the plaintiff's demand until the final accounting, and the value of the calves was ascertained. But I think the Court erred in refusing to compute interest at the legal rate on the value of the calves from the respective dates at which they ought to have been delivered. It is well settled that in an action at law for the conversion or non-delivery of personal property, the Court or jury may award interest by way of damages for a breach of the contract; and there are even more cogent reasons why a Court of equity should adopt the same rule, in the settlement of a long standing account between the parties, as in this case. The plaintiff has had the use of the calves, or their value for many years, and there is no reason, founded either in law or justice, why he should not be chargeable with interest on their value. In respect to the third point, the Court below proceeded on the theory that James McKinlay's interest in the lease became merged in and terminated by the judgment in ejectment, and consequently, that said McKinlay's interest in the rent, under the lease, was henceforth extinguished. This was undoubtedly true in respect to McKinlay's *legal* title to the rents. If McKinlay had brought an action at law to recover the rents, the judgment in ejectment would have been a sufficient answer to it. He would have been estopped thereby from asserting title, in an action at law, to the land or its rents.

Points decided.

But he was not bound to set up his equitable defense in that action; and now that he has appealed to a Court of equity, it appears for the first time that the legal title acquired by the plaintiff, under the Sheriff's deed, and which was the foundation of the judgment in ejectment, was and is held by him, subject to the equities created by the contract of June nineteenth; and consequently the judgment in ejectment did not have the effect in a Court of equity to merge or extinguish McKinlay's interest in the lease, or the rents reserved thereby. I am therefore of opinion that the Court erred in refusing to deduct from the plaintiff's demand the amount due to James McKinlay for his portion of the rents, during the whole term of the lease, with interest thereon.

That portion of the judgment from which the defendants appealed is therefore reversed, and the cause remanded, with an order to the Court below to modify its judgment in accordance with this opinion.

Mr. Chief Justice SPRAGUE and Mr. Justice WALLACE, the latter being disqualified, did not participate in the foregoing decision.

[No. 2201.]

CARMEN AMESTI DE McKINLAY, THOMAS MADARIAGA DE MENDIA, AND PUDENCIANA VALLEJO DE AMESTI v. DANIEL TUTTLE, GUADALUPE RODRIGUES, A. MORRIS, CHARLES MOSS, HENRY MARTIN, JOHN GRIMER, AND JOSHUA BROWN.

JUDGMENT FOR DAMAGES.—A judgment for damages, in an action of ejectment, where no damages are alleged in the complaint, is clearly erroneous.

RECORD ON FORMER APPEAL, HOW FAR TO BE CONSIDERED.—The record on a former appeal in the same action may be looked into for the purpose of ascertaining what facts were then before the Court, so as to see to the correct application of the rule that such decision is the law of the

Points decided.

case; but except for such purpose the former record, unless it is stipulated by the parties, cannot be considered.

DECISION ON FORMER APPEAL, HOW FAR THE LAW OF THE CASE.—The principles and rules announced by the Supreme Court on a former appeal will be recognized on a subsequent appeal as the law of the case, if the same questions are again presented on the same state of facts.

DOCTRINE OF HAHN v. KELLY, 34 CAL. 391.—The doctrine announced in *Hahn v. Kelly*, 34 Cal. 391, as to the presumptions indulged in favor of the jurisdiction and correctness of recitals of judgments of Courts of general jurisdiction, applies only in cases where the attack is collateral, and not where the attack is direct.

WHAT RECORD MUST SHOW AS AGAINST DIRECT ATTACK.—In order to maintain a judgment on the merits, directly attacked as on appeal therefrom, it is requisite that the record should show that the Court had jurisdiction of the person against whom the judgment was rendered, and that such judgment was warranted by the pleadings of the party in whose favor it was rendered; and in determining these questions recitals in the judgment cannot be regarded.

RECITALS IN JUDGMENT NOT RECEIVED ON DIRECT ATTACK.—Upon a direct attack, the recitals in a judgment will not be accepted as a substitute for the summons and proof of service, to show jurisdiction of the person of defendant, any more than would recitals in it be received instead of the necessary allegations of the pleadings.

JUDGMENT IN EJECTMENT NOT AUTHORIZED UNLESS DEFENDANT PROPERLY CHARGED.—In ejectment it is an indispensable averment of the complaint that the defendant ousted and withholds possession from the plaintiff; and no judgment can be regularly taken in such case against a person, as to whom there is no such allegation.

ACTION AGAINST PERSONS SUED BY FICTITIOUS NAMES.—Where persons are sued by fictitious names, judgment against them will not be binding unless the complaint be amended, as provided by section sixty-nine of the Practice Act, by inserting their true names, so as to allege that they are the persons charged.

ANSWER BY PERSONS SUED UNDER FICTITIOUS NAMES NOT A WAIVER OF AMENDMENT OF COMPLAINT.—Where persons sued and served under fictitious names appear and answer the complaint, such answer is not a waiver of an amendment of the complaint describing them by their true names.

COMPLAINT AGAINST "JOHN DOE" DOES NOT SUPPORT JUDGMENT AGAINST "GUADALUPE CASTRO."—Where in ejectment against John Doe and others, the complaint alleged that the true names of such defendants were unknown, and prayed that when ascertained they might be inserted with apt words to charge them; and Guadalupe Castro answered by his true name; and there was judgment against him, but the record

Statement of Facts.

showed no amendment of the complaint by inserting his true name: held, on a direct appeal by him, that the judgment was not binding and should be reversed.

APPEAL from the District Court of the Third Judicial District, County of Santa Cruz.

This was an action of ejectment, commenced February 12th, 1866, to recover possession of the Rancho "Los Corralitos," in Santa Cruz County. The complaint did not aver any damages, and named sixty-seven defendants, and averred that the true names of twenty-eight of them, sued as John Doe, Richard Roe, and others, were unknown to plaintiffs, and prayed that, when ascertained, they might be inserted with proper and apt words to charge them and each of them. On January 7th, 1868, Guadalupe Castro, Simeon Castro, and Joaquin Castro, none of whom were named in the complaint, filed a separate answer, naming themselves as defendants in the action. At the April Term, 1869, the cause came on for trial in the Court below, and a judgment was rendered against said Castros for possession of the property and five thousand dollars damages, and reciting, among other things, "That the defendants, Guadalupe Castro, Simeon Castro, and Joaquin Castro, were duly personally served with the summons and complaint in this action; that they demurred to said complaint, and, after argument, said demurrer was duly overruled; that thereupon said last named defendants answered said complaint, and subsequently, by leave of the Court, held January 7th, 1868, filed an amended answer."

There does not appear to have ever been any amendment of the complaint, inserting the true names of the Castros as defendants therein; but the plaintiffs (respondents here) appended to their argument the record of an appeal in the same case, taken in 1867, and reported in 34 Cal. 235 — "not as adding anything to the recitals in the judgment in the

Argument for Appellants.

transcript before this Court, but as showing that those recitals are, in fact, supported by the whole record, and the steps which these defendants took seriatim, after being served in the action."

Guadalupe Castro, Simeon Castro, and Joaquin Castro appealed from the judgment.

John Currey, for Appellants.

The Castros, who alone have appealed to this Court, are not named in the complaint. They are not charged in or by the complaint with anything—hence the judgment against them is without any basis on which it can stand. There is no principle more completely settled than that the allegations and proofs must correspond. The plaintiff cannot be entitled to a judgment against any person, unless that person is charged by the plaintiff—that is, unless a cause of action is alleged against that person. It is true that by section sixty-nine of the Practice Act, the Castros might have been made parties; but that section required and still requires that when the true names of defendants are discovered, the complaint shall be amended by the insertion of the true names. Except for that section the plaintiffs could not have sued any person by a name not belonging to him; and, consequently, the Castros could not become charged by the complaint, and legally bound by the judgment, without being made defendants by an amendment, as therein provided.

Again, the complaint contains no allegation in relation to damages, yet the Court below gave judgment against the Castros in the sum of five thousand dollars as damages. It will be observed that no issue was tendered or joined as to damages, and nothing in the pleadings is said in relation to damages to which evidence could have been directed. It cannot be presumed the Court admitted any evidence upon the *ex parte* trial on the subject of damages, because there

Argument for Respondents.

was no issue tendered or joined on the subject. If the Court did admit such evidence, it could not authorize a judgment for the plaintiffs, for the reason that there was nothing in the complaint to sustain such judgment. To entitle the plaintiffs to damages there must be an averment of the facts necessary to establish a cause of action for damages. (*Green v. Covillaud*, 10 Cal. 324; *De Castro v. Clarke*, 29 Cal. 16.)

The record in the case before the Court is all that counsel for the parties have any right to refer to, and beyond which the Court will not look. If the plaintiffs are to be permitted to refer to the case reported in 34 Cal. 235, the defendants may claim the like privilege of referring to the record and judgment in *Castro's Executors v. Amesti*, 14 Cal. 38, as a complete bar to plaintiffs' right of action in this case.

William A. Cornwall, also for Appellants.

William Irvine and *William H. Patterson*, for Respondents.

It was the opinion of the Court below, at the trial, that as the defendants (who take this appeal) had appeared and answered the complaint, it was within the province of the Court to hear proof and allow recovery for rents and profits. Under this State of facts the plaintiffs now offer to remit all claim for rents and profits and herewith offer to file a release thereof, and, if the judgment for damages has been to any extent executed, to make restitution. And upon these conditions they ask an affirmance of the judgment. (*Carpentier v. Gardner*, 29 Cal. 160; *Curtiss v. Herrick*, 14 Cal. 114; *Prince v. Payne*, 14 Cal. 419; *Doll v. Fuller*, 16 Cal. 432; *Union Water Company v. Murphy's Flat Fluming Company*, 22 Cal. 620.)

The appeal here is upon the judgment roll, and upon this must the efficiency of the service be decided, it being always presumed that a Court of general jurisdiction has

Argument for Respondents.

acquired the necessary jurisdiction over the parties to support the judgment, unless the record shows to the contrary. The judgment here recites the fact that the defendants—the Castros—have been duly served with process, and it is a direct adjudication by the Court upon the point, and is as conclusive upon the parties as any other decided in the cause. (*Hahn v. Kelly*, 34 Cal. 391; *Barrett v. Carny*, 32 Cal. 537; *Sharp v. Lumley*, 34 Cal. 615.)

We do not overlook the real distinctions which obtain, with respect to the conclusiveness of judgments attacked collaterally, and those directly brought up for review on suggestions of error in the rendition thereof. But unless alleged errors are reserved in a statement on appeal, or bill of exceptions, so as to be proved by the record, we recognize only the following causes for which a judgment will be reversed, on appeal, upon the judgment roll, where the same judgment would be sustained against a collateral attack (excepting judgments by default): 1. Where the complaint does not state facts sufficient to constitute a cause of action. 2. When within the issues made by the pleadings they do sustain the judgment. 3. A decision sustaining or overruling a demurrer erroneously rendered. 4. A final judgment awarding, sustaining, or dissolving an injunction not authorized or justified by the record.

The Castros, by their answer, allege they are in possession of the demanded premises, and set up title in themselves. Under such claim they had a right to defend the action of ejectment prosecuted by the plaintiff to recover the possession of the premises. (*Roland v. Kreyenhagen*, 18 Cal. 455.) Does it matter, then, with what formalities they came into Court—whether under the cover of the fictitious names of John Doe or Richard Roe—so that their true names were discovered, and they were permitted to defend (all of which the record shows); and whether their names were formally inserted in the complaint, or whether a formal order of

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amendment was entered in the minutes? At most, it was a personal privilege of the defendant; and they were competent to waive it, and they will be presumed to have done so.

By the Court, RHODES, J.:

The appeal is taken by defendants Guadalupe Castro, Simeon Castro, and Joaquin Castro, and they appeal from the judgment alone. The record in this Court consists of the complaint, summons, Sheriff's return of service, answer of the above named defendants, and the judgment.

The judgment for damages is clearly erroneous, for no damages are alleged in the complaint.

The defendants — the Castros — are not named in the complaint, summons, or Sheriff's return, but long prior to the rendition of the judgment, they filed their answer, and it is recited in the judgment that they were duly served with the summons; that they demurred to the complaint, and that the demurrer having been overruled, they answered the complaint. The question is whether a judgment can be sustained against persons who are not mentioned in the complaint. A controversy has arisen between the parties, as to whether they are entitled to read, in connection with the record now before us, the record in the former appeal. (See 34 Cal. 235.) That record may be looked into for the purpose of ascertaining what facts were before this Court on the former appeal, so as to see the application of the rule, that the decision then made is the law of the case. In other words, we must examine the former record, in order to ascertain what was then decided. The principles and rules then announced would be recognized as the law of the case on this appeal, if the same questions were now again presented on the same state of facts, but the questions then presented do not now arise. The facts presented on that appeal — or more generally stated, the former record — cannot, except

upon the stipulation of parties, be added to, and read as a part of, the record now before us.

The plaintiff invokes the doctrine announced in *Hahn v. Kelly*, 34 Cal. 391, and kindred cases, following the authority of that case; but it has no application here, for in those cases the attack was collateral, while here it is direct.

In order to maintain a judgment when it is directly attacked, as in this case by an appeal, it is requisite that the record should show that the Court had jurisdiction of the person against whom the judgment was rendered, and that the judgment was warranted by the allegations of the pleadings of the party in whose favor it was rendered. We refer only to the judgments on the merits. In determining that question, recitals which may be found in the judgment cannot be regarded, for the question is whether the record sustains the judgment. Such recitals, therefore, will not be accepted as a substitute for the summons and the proof of service; and, indeed, it would be as illogical so to do, as to receive such recitals in the stead of the allegations of the pleadings.

It will not be doubted that in the action of ejectment, it is an indispensable averment of the complaint that the defendant ousted the plaintiff, and still withholds the possession of the premises; and it is equally clear, that if the plaintiff brings in a new party as a defendant, the ouster and withholding of the possession by him must be averred, otherwise no judgment can be taken against him for the recovery of the possession of the premises. We can see no reason why the same rule will not apply when the names of defendants are ascertained, who have been sued by fictitious names. It must be alleged that *they* are guilty of the ouster, otherwise there will be no relation between the complaint and the judgment. When the names of the defendants, who are sued by fictitious names, are ascertained, whether

Points decided.

before or after service of process, the complaint must be amended by inserting their true names. Section sixty-nine of the Practice Act, provides that when the true name is discovered the pleading may be amended, but in our judgment the pleading *must* be amended, if it is intended to bind such persons by the judgment.

There is as little room for question that such is the proper course, as there would be in a case where the plaintiff discovers that, by mistake, he has sued the defendant by a wrong name. When the defendants, who are sued by fictitious names, are served with process (as is claimed by the plaintiffs here), appear and answer the complaint, their answer is not a waiver of an amendment of the complaint, describing the defendants by their true names. The averment that John Doe ousted the plaintiffs from the possession of the premises, will not support a judgment that the plaintiffs recover the possession from Castro. The recovery must be according to the allegations of the complaint.

Judgment reversed and cause remanded.

Mr. Justice WALLACE, being disqualified, did not sit in this case.

[No. 2,639.]

THE STATE OF CALIFORNIA v. THE STEAMSHIP
"CONSTITUTION," WILLIAM H. HUDSON, MAS-
TER OF SAID SHIP, THE PACIFIC MAIL STEAMSHIP
COMPANY, OWNERS, AND OLIVER ELDRIDGE, CON-
SIGNEE OF SAID STEAMSHIP.

POWER OF A STATE TO EXCLUDE PAUPERS, ETC., FROM ITS LIMITS.—A State has the power, by proper police and sanitary regulations, to exclude from its limits paupers, vagabonds, and criminals, or sick, diseased, infirm, and disabled persons, who are liable to become a public charge, or to admit them only on such terms as will prevent the State from being burdened with their support.

Argument for Appellants.

ITEM.—The exercise of such a power is a police or sanitary regulation for preserving the health and morals of the people.

POWER OF A STATE TO EXCLUDE ABLE-BODIED PERSONS NOT PAUPERS OR CRIMINALS FROM ITS LIMITS.—The power to exclude from the limits of a State, or to admit within its limits upon terms, persons in the full possession of their faculties, sound in body, and neither paupers, vagabonds, or criminals, and in all respects competent to earn a livelihood, is a regulation of commerce, of such a nature that it can be most advantageously exercised by Congress; and a State, even in the absence of legislation by Congress upon the subject, cannot exercise it.

POWER OF A STATE TO REGULATE COMMERCE.—If a regulation of any kind of commerce is local in its character, demanding varying rules, so as to adapt it to particular localities, it is within the province of the State Legislature to adopt such local rules and regulations, in the absence of legislation by Congress on the subject.

APPEAL from the District Court of the Twelfth Judicial District, City and County of San Francisco.

The facts are stated in the opinion.

McAllisters & Bergin, for Appellants.

The term "commerce," as used in the Constitution, includes intercourse with foreign nations and between the several States. (*Gibbons v. Ogden*, 9 Wheat. 1; *People v. Raymond*, 34 Cal. 497.)

The power to regulate commerce includes the power to regulate the transportation of passengers. (*Smith v. Turner*, and *Norris v. The City of Boston*, 7 How. U. S. 983; *id.* 401.)

Congress has prescribed regulations for the transportation of passengers, and its action in regard thereto is exclusive. Congress has, from time to time, prescribed all the regulations deemed necessary for the transportation of passengers. The number of persons, extent of accommodation, character and treatment of passengers, are all matters that it has already fully regulated. The "wearing apparel in actual use, and other personal effects (not merchandise), professional books, implements, instruments, and tools of trade,

Argument for Respondent.

occupation or employment, of persons arriving in the United States" are exempt from duty. (13 United States Statutes at Large, 390; 12 United States Statutes at Large, 3; 10 United States Statutes at Large, 69, 715; 1 Brightly's Dig. p. 373, Sec. 236; 2 Brightly's Dig. p. 159, Sec. 28.) These Acts of Congress indicate the manner and extent to which Congress has deemed it necessary to regulate commerce in this particular.

The Acts of the Legislature upon the point now under consideration cannot be maintained as an exercise of the police power.

Under the police power the State has the right to exclude from its territory all paupers, vagabonds, and fugitives from justice. This results from the inherent right existing in all communities of self-preservation, but this right does not sanction or justify the exclusion of persons who are not vagabonds, paupers, or fugitives from justice. (7 How. U. S. 426, 427; *Crandall v. The State of Nevada*, 6 Wallace, 48.)

H. H. Byrne, District Attorney of San Francisco, T. W. Freelon, and Jo Hamilton, Attorney General, for Respondent.

The law in question is a regulation of internal police. The bond required, or the commutation money under it, are neither of them a duty, nor are the alien passengers named in the complaint imports. An import is an article upon which a duty may be levied. The duty is specific or *ad valorem*. (*Brown v. Maryland*, 12 Wheaton, 437.) Commerce does not mean anything that is not connected with buying or selling. (7 How. U. S. 416.) Congress has not legislated upon the subject before the Court, and until it does so the States under their reserved power can do so. (*Gilman v. Philadelphia*, 3 Wallace, 713; *Steamship Co. v. Port Wardens of New Orleans*, 6 Wallace, 31; *Steamship Co. v. Joliffe*, 2 Wallace, 450.)

By the Court, CROCKETT, J.:

This is an action against an American passenger vessel, built, owned, and registered at the port of New York, and engaged in the passenger trade between the ports of San Francisco, in this State, and of Panama, in the Republic of New Granada, to enforce the collection of certain forfeitures alleged to have been incurred for the violation of the provisions of an Act of the Legislature of this State, entitled "An Act concerning passengers arriving in the ports of the State of California," approved May 3d, 1852 (Stats. 1852, p. 78), as amended by the Act of April 2d, 1853 (Stats. 1853, p. 71.) The Act provides, in substance, that the master of any vessel arriving at the port of San Francisco from any port out of this State shall make to the Commissioner of Emigrants a report in writing, duly verified, stating the name, place of birth, time and place of naturalization, last residence, age, and occupation of every person or passenger who shall have landed from such vessel on her last voyage to such port, not being a citizen of the United States, and who shall have, within the last preceding twelve months, arrived from any country out of the United States, at any place within the United States, and who shall not have been bonded, or who have paid the commutation money, according to the provisions of this Act or any former Act. The master is also required to state in said report if any of said passengers or persons so reported are lunatic, idiot, deaf, dumb, blind, crippled, or infirm; and if so, whether they are accompanied by any relatives likely to be able to support them, and also whether any of said passengers are persons convicted of any infamous crime, or of a felony, so far as the same may be within the knowledge of said master. Certain penalties are imposed on the master for his failure to make the required report, or for making a false report. It is then made the duty of the Mayor, on receiving said report,

to require, by his indorsement thereon, that the owner or consignee of the vessel shall give a joint and several bond, with two sureties, in the sum of five hundred dollars, for each and every passenger included in such report, conditioned to indemnify and save harmless each and every county, town, or city in this State, and also the Trustees or the several State hospitals, against all costs and expenses which may be by them, or any of them, necessarily incurred for the relief, support, or medical care of the persons named in the bond, within two years from the date of such bond, or in lieu of sureties, the bond may be secured by a mortgage on real estate, or by a deposit of bonds of the United States or of this State. The sureties are required to justify as to their sufficiency, and a fee is to be paid by the owner or consignee for the justification. A separate bond with separate sureties is required for each passenger; but, in lieu of the bond, the owner or consignee may commute therefor by paying five dollars in cash for each passenger included in said report. It is further provided that whenever, in the opinion of such Mayor, there be among the passengers in any vessel any lunatic, idiot, deaf, dumb, cripple, or infirm person not members of families, or who, from attending circumstances are likely to become permanently a public charge, or who have been paupers in any other country, or who from sickness or disease existing either at the time of departure from the port of departure, or at the time of their arrival in any part of this State, are a public charge, or likely soon to become so, it shall be the duty of such Mayor to require in the indorsement made according to section two of this Act, or in any subsequent indorsement or indorsements, in addition to the bond provided for in section two, that the owner or consignee of such vessel shall execute for every such passenger a further bond, joint and several, to the people of this State, in the sum of one thousand dollars. Such bond shall be conditioned and secured in the man-

ner already stated. If any person for whom a bond is given shall, within the period specified in the bond, become a charge upon any city, town, or county in this State, or upon either of the State hospitals, suit may be brought on the bond, and a recovery had for such sum as was expended in the care or support of the person named in the bond; and all moneys received for commutation are to be paid into the State Treasury, into the Hospital Fund, and to be applied exclusively towards the support of State hospitals.

The Act further provides that in lieu of the bond for blind, deaf and dumb, cripples, or other disabled persons, the owner or consignee may commute by the payment of such sum as the Commissioner of Emigrants shall deem reasonable.

The complaint alleges that on a voyage from Panama to San Francisco the steamship Constitution brought as passengers, and landed at the latter port, four persons as passengers who were natives and citizens of New Granada; that the Master on his arrival duly made his report to the Commissioner of Emigrants, including therein the names of the four passengers aforesaid, and that the Mayor, by his indorsement on said report, had duly required bonds to be given for those passengers, as required by the statute; but that neither the owner or consignee had given the required bond or paid the requisite commutation money, and had refused either to give the bond or pay the commutation. The statute declares that all forfeitures incurred under the Act by the owner or consignee shall be a lien upon the vessel, to be enforced by a proceeding *in rem*, and the action is brought to enforce this lien. The answer admits that the passengers were brought and landed as charged in the complaint, and that they were natives and citizens of New Granada, and avers that they were taken on board as passengers in the ordinary course of the business of the vessel, and that when landed in San Francisco they were persons in the prime of life, in the full possession of their faculties, perfectly sound in body and mind,

neither paupers, vagabonds, or criminals, and in all respects competent to earn a livelihood. The Court sustained a demurrer to the answer, and the defendant declining to amend, a final judgment was entered for the plaintiff, from which the defendant appeals. The only question presented for our decision is, whether or not so much of the statute as requires a bond to be given or commutation money to be paid on the passengers described in the answer is in violation of the Constitution of the United States, and therefore void. The Act is claimed to be repugnant to that portion of Article I, section eight, of the Federal Constitution, which provides that Congress shall have the power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes," and to that portion of section ten of the same Article which provides that "no State shall, without the consent of the Congress, lay any imposts or duties or imports or exports, except what may be absolutely necessary for executing its inspection laws."

In considering the grave question here presented, it is to be observed *in limine*, that whatever may have been the real purpose of the statute, its ostensible purpose was to provide police and sanitary regulations, to prevent the people of this State from becoming chargeable with the support and maintenance of persons imported from foreign countries, who either then were, or were soon after, liable to become a public charge. If it were conceded that this was the real purpose of the statute, and that its provisions are reasonably adapted, and were intended to secure this result, and this only, there would be an end to the argument; for in all the numerous adjudications which have been had in respect to the power of the several States to interfere with commerce under the clauses of the Constitution above referred to, it has never been doubted that a State has the power, by proper police and sanitary regulations, to exclude from its limits paupers, vagabonds, and criminals, or sick, diseased,

infirm, and disabled persons, who were liable to become a public charge, or to admit them only on such terms as would prevent the State from being burdened with their support. To surrender this power would be to abandon one of the highest prerogatives of local self-government, one of the chief functions of which is to preserve the public health and to repress crime. In this respect the statute under consideration differs widely from that which we had occasion to consider in *People v. Raymond*, 34 Cal. 495. The statute discussed in that case was designed solely for revenue purposes, and was intended to raise revenue for the support of the State Government from a stamp tax, imposed on passenger contracts with persons about to depart from this State on passenger vessels. We held this to be a regulation of commerce, within the meaning of section eight, Article I, of the Federal Constitution, and that Congress having legislated on the same subject, by requiring a Federal revenue stamp to be affixed to all passenger contracts, its authority was paramount, and when exercised excluded all State legislation on the same subject. We, therefore, held the statute to be void. But we did not decide whether or not, in the absence of legislation by Congress on the same subject, the State would have had the constitutional power to enact the statute which was considered in that case. But whilst conceding the authority of the State to enact police and sanitary regulations for preserving the health and morals of the people, counsel insists that this statute is neither the one nor the other, so far as it operates upon persons who at the time of landing are neither paupers, vagabonds, or criminals, or affected with any mental or bodily infirmity, but on the contrary are perfectly sound in body and mind, and in every way fitted to earn a support. It is said that police and sanitary regulations can have no just application to persons of

this description, and that it is an abuse of terms to say that they are proper subjects for such regulations, because, possibly, they may at some future day become paupers, vagabonds, or criminals, or sick, infirm, or otherwise disabled. This view of the question appears to me to be unanswerable. It is a misnomer to call that a police regulation, in the sense in which that term is here applied, in so far as it operates upon persons of good morals and upright character, and who are not more likely than the average of mankind to become paupers, vagabonds, or criminals; and it is equally a misnomer to term that a sanitary regulation which applies only to persons in good health and of sound mind, and who are not more liable than other people hereafter to become a public charge from sickness or infirmity. The power to make police or sanitary regulations prescribing the terms on which certain classes of persons shall be admitted into this State, necessarily includes the power to exclude them altogether if they fail to comply with the prescribed conditions. If a criminal from a penal colony should be required to pay one hundred dollars upon his entrance into this State, he might be excluded altogether, if he refused to pay the required sum, or a pauper from a foreign almshouse might be refused permission to land in this State on any terms, or might be received on such conditions as the State may prescribe. These would be merely police regulations, in the proper and just sense of that term. But if the State, under the pretense of police or health regulations, should enact that no person should hereafter enter this State, unless he would first pay a sum of money, or give a bond, with sureties, for his future good behavior, or conditioned that he would not become a public charge during his sojourn in this State, this could in no just sense be termed a police or sanitary regulation, in so far as it would be applicable to persons of good character and morals, and who were sound in body and mind. If the State could exercise such a power as this

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under the pretense of preserving the public health and morals, it is obvious that it might destroy the entire passenger traffic between this State and foreign countries, and even with our sister States. It might, for the same reason, prohibit the importation of all merchandise from foreign countries, for fear that it might be infected with some secret cause of disease which in the future might possibly damage the health of the community. Whilst the Legislature may exercise a wide discretion as to the proper subjects for police and sanitary regulations, and as to the proper mode of preserving the health and morals of the community, by means of these regulations, it cannot, under color of this power, enact laws which in no proximate degree are germane to the subject. I am, therefore, of opinion that a statute which obstructs the entrance into this State of persons who are neither paupers, vagabonds, or criminals, or in anywise unsound or infirm in body or mind, is not an exercise of the police power of the State, in any just sense of that term.

Assuming these conclusions to be correct, and that the statute in question is not a police or sanitary regulation, as applied to these passengers, it remains to be considered whether it is not, nevertheless, a valid enactment. Conceding it to be a regulation of commerce between this State and foreign nations, the grave question arises whether it was within the constitutional power of the Legislature to enact it. There is, perhaps, no question of constitutional construction which has been so elaborately discussed by the highest Court in this country as that which relates to the power of Congress, and of the several States respectively, in regulating commerce with foreign nations. Whatever doubts may originally have existed in respect to the concurrent power of Congress and the several States over this subject, it is now well settled that when Congress undertakes, by its legislation, to regulate a particular branch of our foreign commerce, its authority in this respect is para-

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mount, and is exclusive of all action by the several States on that particular subject. (*People v. Raymond, supra*, and cases there cited.) But it has long remained a doubtful question, of the gravest import, whether or not, in the absence of legislation on the same subject by Congress, a State might not legislate for itself in respect to its commerce with foreign nations. This question was elaborately reviewed by the eminent jurists who then composed the Supreme Court of the United States, in what are known as *The Passenger Cases*, 7 How. 283. In the very able opinions which were delivered by the several members of the Court in these cases the argument on this question was apparently exhausted; and yet, notwithstanding the great learning and ability which characterizes them, so voluminous are these opinions, and so great the variety of topics discussed, that it is not easy to determine what was the precise result reached by a majority of the Court on this particular point. A similar doubt as to the result of these conflicting opinions, on this point, appears to have been entertained by the same Court in the late case of *Crandall v. State of Nevada*, 6 Wall. 35. In delivering the opinion of the Court in that case, Mr. Justice MILLER says:

“The proposition that the power to regulate commerce, as granted to Congress by the Constitution, necessarily excludes the exercise by the States of any of the power thus granted, is one which has been much considered in this Court, and the earlier discussions left the question in much doubt. As late as the January Term, 1849, the opinions of the Judges in *The Passenger Cases* show that the question was considered to be one of much importance in those cases, and was even then unsettled, though previous decisions of the Court were relied on by the Judges themselves as deciding it in different ways. It was certainly, so far as those cases affected it, left an open question.

“In the case of *Cooley v. Board of Wardens*, four years later, the same question came directly before the Court in reference to the local laws of the port of Philadelphia concerning pilots. It was claimed that they constituted a regulation of commerce, and were therefore void. The Court held that they did come within the meaning of the term ‘to regulate commerce,’ but that, until Congress made regulations concerning pilots, the States were competent to do so.

“Perhaps no more satisfactory solution has ever been given of this vexed question than the one furnished by the Court in that case.

“After showing that there are some powers granted to Congress which are exclusive of similar powers in the States, because they are declared to be so, and that other powers are necessarily so from their very nature, the Court proceeds to say that the authority to regulate commerce with foreign nations and the States includes within its compass powers which can only be exercised by Congress, as well as powers which, from their nature, can best be exercised by the State Legislature—to which latter class the regulation of pilots belongs. ‘Whatever subjects of this power are in their nature national, or admit of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress.’

“In the case of *Gilman v. Philadelphia* this doctrine is reaffirmed, and, under it, a bridge across a stream navigable from the ocean, authorized by State law, was held to be well authorized, in the absence of any legislation by Congress affecting the matter.”

The proposition here announced is, that when a regulation of our foreign commerce is national in its character—that is to say, when it is of such a nature that the power to

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enact it can be most advantageously and appropriately exercised by Congress under a general system, applicable alike to the whole nation and all its parts, then Congress has the exclusive power to legislate upon it, and the States, severally, have no power to deal with it. But, if the regulation be local in its nature, and demanding varying rules, so as to adapt it to particular localities, it is within the province of the State Legislatures to adopt such local rules and regulations, in the absence of legislation by Congress, on that particular subject. This must be accepted as the latest expression of opinion, on this vexed question, by our highest judicial tribunal, to whose authority it is our duty to defer in its construction of the Constitution of the United States. Tested by this rule, the statute under discussion is, in my opinion, unconstitutional.

It seeks to apply to emigrants from foreign countries, landing on our shores, onerous conditions not exacted from them at other of our domestic ports, and not imposed upon them by any Act of Congress. The regulation is not local in its nature or character, and, if Congress deemed it wise to do so, could as well be enforced at the port of New York, or any other of our great ports, as at San Francisco. Congress having omitted to establish such regulations, and to impose such burdens on foreign emigrants, the presumption is that it deems it unwise or impolitic to do so. But, however this may be, under the construction given to the Federal Constitution in *Crandall v. State of Nevada*, Congress has the exclusive power to establish such regulations as these.

Judgment reversed and cause remanded, with an order to the District Court to overrule the demurrer to the answer.

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[No. 1,705.]

JACOB A. MORENHOUT, THOMAS B. VALENTINE, AND BENJAMIN S. BROOKS v. WILLIAM E. BARRON.

CONTRACT TO SELL LAND.—A provision in a contract for the sale of land that the purchaser may make inquiry and satisfy himself with its quality, situation, and title, and, if not satisfied, may rescind the contract, is solely for the purchaser's protection, which he may waive; and a conveyance taken by him, without such inquiry, is valid and effective.

EXECUTION OF DEED IN PURSUANCE OF CONTRACT TO SELL LAND.—Where the owner of a Mexican grant, in California, in 1847, contracted to sell it for a certain price, if the purchaser should, after inquiry, be satisfied with the title, and pay the price, and after more than half the price was advanced, the vendor executed and the purchaser received a deed, in the Mexican form, in which the contract was set forth as a part thereof: *held*, that by the execution of the deed, all the purposes of the contract were accomplished, and that the provision that it should be attached to the deed amounted to no more than a recital, and did not have the effect of keeping it on foot as a subsisting contract.

FINDINGS OUTSIDE OF THE ISSUES USELESS.—A finding is useless and idle unless the facts found are within the issues, and a judgment based upon such finding cannot be sustained.

APPEAL from the District Court of the Fourth Judicial District, City and County of San Francisco.

This was an action brought for the purpose of having a certain tract of eight leagues of land, called the Rancho "Caslamayomi," in Lake County, adjudged to be held by the defendant in trust for the plaintiffs, to compel a conveyance thereof to them, and to enjoin defendant from setting up any title thereto adverse to the plaintiffs.

It appears that on August 23d, 1847, one Eugenio Montenegro, being the owner by grant from the Mexican Government of the rancho named, entered into an agreement, in writing, with William Forbes, of the house of Barron, Forbes & Co., of Tepic, Mexico, as follows:

"By this document it appears that I, Eugenio Montenegro, being the owner in property of a tract of land, situated in

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Sonoma, Alta California, the extent of which is eight square leagues, suitable for sowing and grazing purposes; which tract of land I have proposed to sell to Don Guillermo Forbes, of this place, for the sum of two thousand dollars; which purchaser, being satisfied with the price, is desirous of ascertaining the quality and situation of the land referred to; for which purpose he will appoint a confidential agent to make the necessary examination, and report in relation thereto, as well in respect to the character of the lands as in relation to the title under which the same has been guaranteed to me; and if said examination shall result in his determination to consummate the proposed purchase, from the present time I obligate myself, in the most solemn manner, to transfer to the said Señor Forbes the eight square leagues of land referred to, for the said sum of two thousand dollars, under the condition that he, in the meantime, supply me with partial sums, from one to five hundred dollars, on account of the value of said land, with the understanding that if the sale should not be consummated, I shall return to the purchaser the amount he may have advanced me under the foregoing condition, as soon as the business may be determined; and, as a security for the return of what I may receive, the Señor Don José Castro binds himself to do it in my name, in case I should fail to do so, assuming my obligation and, for the purpose, obligating the property of which he is now possessed, as well as that which he may hereafter acquire; who, with me and the Señor Forbes, signs this, in witness of the same, in Tepic, on the 23d of August, 1847."

In pursuance of this agreement, Forbes paid to Montenegro several sums, amounting to one thousand five hundred and fifty-two dollars and fifty cents; and on August 7th, 1848, at the same Town of Tepic, in Mexico, Montenegro executed and delivered to Forbes a deed of conveyance [escritura], according to the Mexican formula, as follows:

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"In the City of Tepic, on the 7th day of August, 1848, before me, the Notary, and witnesses, the Señor Don Eugenio Montenegro, a resident of this place, whom I certify that I know, said: That in Alta California he owns a tract of land, called 'Caslamayomi,' which he has contracted to sell to Don Guillermo Forbes, of this place, according to a private obligation which he executed on the 23d day of August, 1847; that upon said contract the said Forbes has already paid, on account, the sum of one thousand dollars, which he received in two payments, and receipted for the same, as appears at the end of said obligation; and finally, as it has been determined to sell and he has received from the said Forbes another sum of a thousand dollars, in completion of the sale stipulated, wherefore acknowledging the receipt of the two thousand dollars mentioned in the contract, he renounces all exceptions which might be taken, and that of not having referred to the Law 9, Tit. 1, Part 5, which treats thereof, and the two years allowed for proof of the receipt of the same. In consequence whereof, and in due form of law, he declares that for himself, and in the name of his heirs and successors, or whomsoever of them, who may have any right, title, or interest in the matter, he sells forever, with the right of inheritance, to the said Don Guillermo Forbes, the said land or rancho situated on the frontier of Alta California [describing it]. That Señor Forbes is satisfied with the titles under which the vendor holds said land, and for this reason said titles are not presented. That said land is free from all incumbrances, express or implied, by mortgage, sale, or otherwise; and in this condition it is sold, with right of entrance and exit, with its depths and heights, and with all the uses, privileges, and servitudes, that he has had or could have, by law, in and to said land, for the sum of two thousand dollars; that

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this sum is the value of said land, and that, although it should be worth more, of the excess, whatever the same may be, he makes a donation thereof to the purchaser and his representatives, by judicial intervention and other securities, renouncing Law 2, Tit. 1, Book 10, of the New Recop., and the four years provided for asking a rescission of the contract or a supplement to its just price, which are considered as having passed, as if in fact they had; wherefore he relinquishes all right that he may have had or could have, to the said land, since he cedes, renounces, and transfers to the purchaser and his representatives all his right in the same, real, mixed, direct, and executive, in order that he may possess the same as his own, cultivate, or make donation thereof at his will. He confers power on him, in his own cause, to take the real possession of said land, on the presentation of this writing alone, of which he consents legalized copies may be given to the purchaser, which shall serve him as a title and security for his property. And for the bona fides of this sale, and for the security and firmness of this instrument, the vendor obligates his present property, and such as he may hereafter acquire, to be subject to the fulfillment thereof, as by judgment rendered by competent authority; renouncing his domicile, and the laws and privileges that may favor him, and the generalities of the law in form. Thus he executed and signed, consenting that the obligation referred to, for what it may import to the purchaser, be annexed to this writing, since he hereby admits that the same was executed in due form. Don Santos Gallego, Don Rosario Romero, and Don Dionisio Garcia y Corona, being the witnesses present.

“EUGENIO MONTENEGRO.

“Which I attest: JESUS VIJAR.”

It further appears, that in 1849, Forbes, not having obtained possession of the land, and not being satisfied with the title, wrote to Montenegro as follows:

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"TEPIO, July 31st, 1849.

"*Senor Don EUGENIO MONTENEGRO:*

"MY DEAR SIR: Your favor of the present month is before me, and to which I reply that I have actually sent instructions to Don Diego Aleje Forbes for the settlement of the matter pending. There is no doubt that for more than a year you have been in want of the remainder of your money; but you must not expect that I will advance this money for a property which I now see no probability whatever of obtaining, on account of the difficulties that have arisen; and as I am of opinion that these cannot be overcome, I avail myself of your offer to return me the sum received by you, which amounts to one thousand five hundred and fifty-two dollars and fifty cents, and our contract remains null, which you can do at once, placing that sum at the disposition of Señor Forbes, whom I will advise to the same effect.

"Trusting that you are in good health, I remain your obedient servant,

"GUILLERMO FORBES."

Various other letters were written, from which it appears that Forbes offered and desired to get back his money and give up his deed, but that neither the money was refunded or the deed given up.

In December, 1853, Montenegro, claiming that the letters of Forbes amounted to a rescission of the contract and deed, made another conveyance of property to the plaintiff, Jacob A. Morenhout, who afterwards conveyed undivided interests therein to his co-plaintiffs, Valentine and Brooks.

In June, 1857, Forbes conveyed the land to the defendant, William E. Barron; but before the making of the last conveyance, the claim was presented by Forbes to the United States Land Commission. It appears to have been rejected

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there, but was afterwards appealed to the United States District Court, where, chiefly through the exertions of Mr. Brooks, it was finally confirmed in the name of Forbes. It further appears, that after the making of the deed to Barron, the plaintiffs offered to pay him the sum of one thousand five hundred and fifty-two dollars and fifty cents, with interest, upon his executing to them a deed of the ranch, which he refused; and that neither party had been or were in possession of the property.

On substantially the foregoing state of facts, the Court below, on November 27th, 1867, found, among other things, that "though the deed of August 7th, 1848, was absolute on its face, there was, at the time of its execution and delivery, an understanding and agreement between Forbes and Montenegro, that if the former, upon examination, should find that he could not get possession of the land, or the title was not good, he should have the right to rescind the purchase and demand his money." The Court also found that Forbes had, "on July 31st, 1849, exercised his right to rescind the contract of purchase, and did rescind it, by sending to Montenegro the letter aforesaid, and other letters, by himself and his agent, to that effect," and that "Montenegro accepted said rescission, and agreed to repay said Forbes said sum due him." And as a conclusion of law, the Court found that plaintiffs were entitled to a conveyance of the property from the defendant, upon the payment to him of one thousand five hundred and fifty-two dollars and fifty cents, with interest thereon at the rate of ten per cent per annum, from March 4th, 1849, and that defendant should be enjoined from setting up any claim or title thereto, adverse to plaintiffs. In accordance with these findings, a decree was entered; and a motion for new trial having been overruled, defendant appealed from the judgment and order.

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Wilson & Crittenden, for Appellant.

The findings are not only unsustained by the evidence, or by any particle of evidence, but are in direct conflict with the evidence, and entirely negatived and disproved by it. The main and material error into which the Court fell was that there ever was any understanding or agreement whatever in respect to any right of rescission on the part of Forbes, or any rescission consented to by Forbes. There is no room for doubt or misunderstanding about the meaning of this contract, or the intention and objects of the parties, in entering into it. Montenegro's object was to sell the land for the sum mentioned. Forbes' object was to buy it for that sum, if, after inquiry, he should be satisfied in respect to its quality and the title of the vendor. Neither party contemplated a loan or borrowing of money on the land itself. And afterwards Montenegro actually did sell the land, and executed his deed of it, in which he refers to the contract, and recites that it had been executed in due form.

After the execution of the deed, the contract out of which it grew had no longer any existence. It was then carried into execution, and the parties discharged from all further obligations upon it. The right on the part of Forbes to decline the purchase and demand his money was gone the moment he accepted the deed, and Castro, who had been security for its return, was then absolved from liability. Thenceforth Forbes was the absolute owner of the land.

The title to the land having thus been vested in Forbes, absolutely, how did he ever become converted into a trustee, holding it for the benefit of Montenegro? None of the letters and none of the testimony has any tendency to prove anything of the kind in the remotest degree. The letter of July 1st, 1849, upon which the finding of rescission pur-

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ports to have been based, was evidently in answer to a proposition made by Montenegro to return the money and take back the land. Forbes by this letter simply expresses assent, and says: "Pay at once and our contract shall be null; pay to James Alexander Forbes. I will advise him to this effect."

John Currey, for Respondents.

In 1848, at the time of making the contract with Forbes, Montenegro was a Mexican soldier in actual service against the United States. He wanted money and he had no security to offer except an imperfect grant to land in a State at that time in the possession of the enemy, and the war actually going on. A mortgage on the property could not be foreclosed, and the contract itself would be void and could not be enforced in California. There remained no way but to give the transaction the character of a sale. They intended to give that character to it, and did, and the transaction is a bargain and sale, and the last instrument is an *escritura deventa*, and vested in Forbes the title (*titulo*), but not the estate (*dominio*).

If the act of sale had been absolute there would have been no object in the provision contained in the instrument itself, that the contract of sale should be annexed to the *testimonio*. "Consenting that the obligation referred to for what it may import to the purchaser, be annexed to this writing."

It is not proper to call the *escritura* a deed, because it differs essentially from our deed. Our deed conveys the estate; the Spanish *escritura* does not; no estate passes by the writing. We call our conveyance properly a deed, because it is not a contract, but an act *factum*. By its own force it transfers the estate. But under the Spanish law the estate passed by delivery of possession, as it did anciently under the common law by livery of seizin. Both laws were

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originally the same; the common law has changed, the civil has not. There was no such thing as a deed in the civil or Spanish law. There was no law that required a conveyance to be in writing—a verbal sale of land, accompanied by delivery, passed the title *dominio*—a written contract would not pass the title without delivery of possession, nor would it pass the title without payment of the consideration money. (Alvarez, Derecho Real, Lib. 2, Part II, Sec. 3; Lib. 2, Tit. I, Part II, Sec. 7; Sala, Ilustracion del Derecho Real, Lib. 2, Tit. I, Sec. 20; Lib. 2, Tit. XVI; *Merle v. Matthews*, 26 Cal. 673.)

If the sale was complete, Montenegro would have insisted upon the payment of the price. It is admitted in the pleadings, and shown by the evidence, that the two thousand dollars were not paid; that a balance thereof remained unpaid. According to the Spanish law, the title did not pass until the price was paid. This law is as old as the Partidas, and is repeated in every code and text book down to the present day.

The letters and the parol evidence show that the transaction, though in form a sale, was not absolute. Forbes always speaks of the money given to Montenegro as an *advance*, and never as a *payment*. He sometimes calls it the *debt* of Montenegro to him.

Again: Whatever may have been the fact as to the continuance of the original contract or the purpose of the act of sale, there can be no doubt from the evidence that there was a contract between Montenegro and Forbes, by the terms of which Forbes had the right to rescind the contract and demand back his money. And it is plain that Forbes availed himself of his right to rescind, and did rescind, the contract. He said that he would not pay the balance; he demanded a return of his advances; and he annulled the contract. He said, "Our contract remains null;" in other

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words, our trade is at an end. (See *Foster v. Nelson*, 2 Peters, 306; *United States v. Perchman*, 7 Peters, 86.)

The effect of the rescission of the contract by Forbes was to reverse the relation of the parties. Montenegro became the debtor to Forbes for the money advanced, and Forbes became creditor of Montenegro for the same, with a lien on the land for repayment. The relation which was thus created conferred the rights upon each other which pertained to that relation, and neither party could deprive the other of his rights without his consent.

After the cause had been argued and submitted, the Supreme Court directed a reargument upon the following questions:

First—Upon what particular ground of equity jurisdiction, does the complaint here rest?

Second—Was Forbes, in the first, and Morenhout in the second instance, a purchaser from Montenegro of a new (mere) equity?

Third—Supposing Barron to have subsequently obtained the legal title from the United States, as the conferee of this equity, if it was one, what circumstances disclosed it inequitable for him to retain that title for himself?

Fourth—Supposing, however, that the parties dealt with the legal title in the first instance, and that Morenhout was a subsequent purchaser of that title, in good faith, for a valuable consideration, and without notice of the previous conveyance made to Forbes, is he entitled, upon that ground, to maintain this bill for equitable relief?

B. S. Brooks, for Respondents, on reargument, in answer to the first question, made citations from 2 Story's Eq. Jur. 976, 1,059; *Bagnell v. Broderick*, 13 Peters, 450; *Estrada v. Murphy*, 19 Cal. 272; *Garland v. Wynn*, 20 How. 8; *Townsend v. Greeley*, 5 Wallace, 335; *Salmon v. Symonds*, 30 Cal. 306; *Wilson v. Castro*, 31 Cal. 434; *O'Connell v. Dougherty*, 32 Cal. 459; *Bludworth v. Lake*, 33 Cal. 262.

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In answer to the second question, counsel contended that the subject of sale by Montenegro was a Mexican concession under the colonization law, and should be considered as addressed to a Mexican tribunal; and that in a country where the distinction between legal and equitable titles is unknown, no answer could be given to it. He claimed that the right was a legal one, and cited *Fremont v. United States*, 17 How. 557; 13 Peters, 454; *Wilcox v. Jackson*, 18 Pet. 516; *Wilson v. Castro*, 31 Cal. 437.

In answer to the third question, counsel referred to the authorities cited, to the effect that whenever a party has obtained a confirmation of a title or concession which legally or equitably belongs to another, whether that confirmation is obtained innocently or wrongfully, in good faith or in bad faith, a Court of equity holds it to be inequitable for him to retain the title, and will decree him to convey it to the real owner.

In answer to the fourth question, counsel contended that Morenhout would unquestionably be the owner of the land, and that it would be his title which was confirmed; and he cited *Bludworth v. Lake*, 33 Cal. 263.

Wilson & Crittenden, for Appellant, on reargument.

The protection given by equity to a purchaser for a valuable consideration, without notice, is invoked in favor of a defendant. The title of such a purchaser has been said to be a shield to defend his own possession, not a sword to attack the possession of others. (*Patterson v. Slaughter*, Ambler, 292; *Strode v. Blackburn*, 3 Vea. Jr. 225; *Beekman v. Frost*, 18 Johns. 544; 1 Cow. 642; 2 Sugd. on Vendors, 572; 2 Leading Cases in Eq. 60; 10 Pet. 210.)

The complaint falls far short of the requirements of a plea setting up such a defense. Among other things, it

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ignores entirely the deed of August 7th, 1848, executed in pursuance of the prior agreement, and, throughout, places Forbes, and Barron, his successor in interest, in the position of having no other interest in or claim to the land than such as might arise out of the agreement. Instead of stating the title of Barron as it was known to the plaintiffs when the action commenced—that is, instead of alleging that there had been, in 1847, an agreement between Montenegro and Forbes for the sale and purchase of the land, and a year afterwards that agreement had been carried into effect, and a deed made by Montenegro to Forbes; and, claiming under that deed, Forbes had presented the title and procured its confirmation to himself; and then, after setting up the defendants' title truly, proceeding to show the supposed better right of the plaintiffs, and explicitly denying notice of the title of Forbes and Barron, the complaint ignores the deed altogether, and sets up the old contract as still subsisting, and as the only source of right in the defendant. In short, it asserts for the defendant a title not claimed by him, and then proceeds to demolish it.

B. S. Brooks, for Respondents, in reply.

The bill was substantially a bill to redeem. We set forth in detail the history of the transaction; but the substance of the whole is, that the defendant holds a conveyance of the property as security for the repayment of a certain sum due from the late Eugenio Montenegro to defendant's assignor, and the plaintiffs, as assignees of Montenegro, have offered to pay that sum with interest, and all expenses, which the defendant declines to receive. We are ready and willing to pay, and ask that he may be compelled, on receipt of this money, to convey to us. We ask to redeem.

A decree was entered, and a motion for a new trial having been overruled, defendant appealed from the judgment and order.

By the Court, RHODES, J.:

One of the questions which the Court proposed to counsel on the reargument was: Upon what particular ground of equity jurisdiction does the complaint rest? In view of the peculiar circumstances of the case, and of the numerous positions taken by the plaintiffs, it was very proper that they should state the ground, or if they proceeded on more than one theory, the grounds on which they claimed relief. Instead of responding directly to the question, they have furnished us with long citations from the opinions in numerous cases in equity, in which questions similar to those discussed by counsel in this case were considered. They have in effect replied: The books furnish an answer to the question.

Whatever may have been the grounds upon which the plaintiffs claimed relief, it is apparent from the findings of fact and conclusions of law that the Court tried the cause, and rendered judgment for the plaintiffs, on the theory that the deed of Montenegro to Forbes, of August 7th, 1848, had been rescinded, and that thereafter Forbes, and, after the conveyance by Forbes to Barron, the latter, held the title (including whatever was acquired by means of the confirmation of the title) in trust for Morenhout and his co-plaintiffs. The case will be considered on that theory.

The grant to Montenegro, whatever may be its character as to being inchoate or imperfect, passed to him a legal title. That is the position of the plaintiffs, and it is not controverted by the defendant. (See *Freemont v. U. S.*, 17 How. 557; *Estrada v. Murphy*, 19 Cal. 270; *Wilson v. Castro*, 31 Cal. 437.) Indeed, that position is sustained by all the cases in which a recovery in ejectment on Mexican grants has been had.

The contract of August 23d, 1847, of Montenegro with Forbes, for the conveyance of the rancho to Forbes, it is not doubted was in all respects valid, and gave Forbes the

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right to a conveyance, when he should become satisfied in respect to the quality, situation, and title of the rancho, and pay the remainder of the purchase money. He could, of course, waive the inquiry as to those matters, and take a conveyance of the rancho, if he so elected, without any investigation, or a complete investigation, as to the title, quality, or situation of the rancho, for that provision in the contract was intended solely for his protection.

The deed of 1848 was executed under and in pursuance of that contract. By the execution of the deed all the purposes of the contract were accomplished. It no longer remained as a subsisting contract. The provision in the deed, that the contract should be attached to the deed, did not have the effect to keep the contract on foot. It amounted to no more than would a recital that the deed was made in pursuance and in performance of the terms of the contract. It makes no difference what may have been the understanding of the parties at the time the deed was executed, as to the right of Forbes to make a further examination in respect to the title or situation of the rancho; for it is a matter of legal construction that, upon the execution of the deed, all the title that Montenegro then held passed to and vested absolutely in Forbes.

What has just been said develops a point which, in our opinion, is decisive of the appeal, on the theory on which it was tried by the Court below. The plaintiffs set up the contract of 1847, and allege that prior to Montenegro's return from Tepic to California, which was in 1848, it was agreed between him and Forbes that the latter should inquire into the condition of the title, etc., of the rancho, and if dissatisfied with the title, might rescind the sale; and that Forbes made inquiries as to the title, became dissatisfied therewith, and elected to rescind the sale. The precise date of the agreement mentioned in the complaint, giving Forbes the right to rescind, is not averred, and as no

facts are stated by which such agreement can be distinguished from that which is mentioned in the contract of 1847 — that contract in effect giving Forbes the right to rescind, if dissatisfied with the title, quality, or situation of the rancho — the complaint will be construed as referring to the agreement contained in the contract. And the sale, which it is alleged Forbes had the right to rescind, is evidently the sale evidenced by the contract of 1847. This conclusion is strengthened by the admission of the plaintiffs, in one of their briefs, that they did not know of the deed of 1848 until after the commencement of the action. The Court finds the making of the contract of 1847, the execution and delivery of the deed of 1848; that there was an agreement contemporaneous with the execution of the deed by which Forbes had the right to rescind the sale; and that he exercised that right, and rescinded the sale. The finding, both as to the agreement reserving to Forbes the right to rescind the sale, and as to the rescission in fact, cannot be sustained for several reasons. The complaint does not aver the agreement reserving the right to rescind, which is found by the Court. Nor does the complaint aver that the sale, which is evidenced by the deed of 1848, was rescinded; but rather that which is mentioned in the contract of 1847, while the finding evidently has reference to the deed of 1848. A finding is useless and idle, unless the facts found are within the issues; and a judgment based upon such facts cannot be sustained. It is very apparent from the finding, and in some degree from the evidence, that the plaintiffs might, with propriety, have obtained leave to amend, so as to have made their attack upon the deed of 1848, instead of alleging that the contract of 1847 was rescinded — the latter after the execution of the deed being no longer a subsisting contract, and being for every purpose, except to show what were its terms, *functus officio*. The allegation and proof by the defendants of the deed of 1848 ended all

Points decided.

question as to the rescission of the contract of 1847. The deed of 1848 not having been attacked, it is impossible, in the present state of the pleadings, for the plaintiffs to maintain the position that any equity in favor of Montenegro arose out of the rescission alleged in the complaint—the rescission of the contract of 1847.

Judgment and order reversed, and cause remanded for a new trial.

[No. 1,335.]

**B. POPPE v. P. A. ATHEARN, AND P. A. ATHEARN
v. B. POPPE.**

FAILURE TO FILE PRE-EMPTION CLAIM.—One who settles on unsurveyed public land as a pre-emptioner, but who fails to file with the Register of the proper Land Office his declaratory statement within three months after the plat of survey of the land is filed in the Register's office, loses his pre-emption claim, as against one who in the meantime has taken the necessary steps to acquire the title to the land.

EVIDENCE OF FILING PAPER.—An indorsement on the plat of the survey of public land, that it was filed in the Land Office on a day named therein, which is not signed by any one, will, in the absence of other evidence on the subject, be taken as fixing the time of filing the plat.

WHO CAN COMPLAIN OF JUDGMENT.—A party to a judgment who has not appealed will not be heard to allege errors in the Court below.

For RHODES, J., NILES, J., concurring:

MAKING HOLDER OF UNITED STATES TITLE TRUSTEE FOR HOLDER OF STATE TITLE TO LAND.—One who purchases public land from the State, as a part of the five hundred thousand acres to which it became entitled by the Act of Congress of April 4th, 1841, cannot claim the benefit of a patent for the same land, issued by the United States to another person as a pre-emption, and make him his trustee holding the legal title.

REGULATIONS FOR DISPOSAL OF PUBLIC LANDS.—The Commissioner of the General Land Office has authority to make regulations respecting the disposal of the public lands, and such regulations, when not repugnant to the Acts of Congress, have the force and effect of laws.

CONSENT OF UNITED STATES TO ENTRY OF LAND BY STATE.—A certificate of the Register of United States lands, issued to one who applies to him to locate a State land warrant on public land, that he

Opinion of Rhodes, J., Niles, J., concurring.

approves of the location by the State, is a legal and valid consent of the United States to such location, because it is prescribed by the Commissioner of the General Land Office. It is also correct to surrender to the Register the State land warrant.

SURVEY OF PUBLIC LANDS.—The provisions of the Act of May 3d, 1852, for the survey of public land by County Surveyors, apply to such lands only as have not been surveyed by the United States.

APPEAL from the District Court of the Fifth Judicial District, County of San Joaquin.

The Court below gave judgment in favor of Poppe in the ejectment suit, and dismissed Athearn's bill in equity against Poppe. Athearn appealed.

The other facts are stated in the opinion delivered by Mr. Justice CROCKETT, which is here published.

George Cadwalader, for Appellant, argued that as the State patent to Athearn was issued in accordance with the laws of the State, it was valid, and that it devolved on the State to provide for the selection of lands donated to it, and cited *Megerle v. Ashe*, 27 Cal. 325; *Lester's Land Laws*, p. 61, Sec. 8; *Bludworth v. Lake*, 33 Cal. 262; *Cooper v. Roberts*, 18 Howard, U. S., 176.

G. W. Tyler, for Respondent.

By the Act of April 16th, 1859 (Hittell's Dig. Art. 4044), under which appellant's patent was issued, the patent was not entitled to issue, unless the location was made by the State, with the consent of the Register and Receiver of the United States Land Office (Hittell's Dig. Art. 4045), and the certificate shows that the assent of the Register only was obtained, which was insufficient to warrant the issuance of the patent.

By RHODES, J., NILES, J., concurring:

The Court did not find the time of the filing with the Register of the Marysville Land Office of the plat of the survey

Opinion of Rhodes, J., Niles, J., concurring.

of the township in which the lands in controversy are situated, but the evidence tending to show the time is recited in the finding. That consisted of the unsigned indorsement on the plat: "Filed in Marysville Land Office, December 5th, 1855" — the same indorsement which was in controversy in *Megerle v. Ashe*, 27 Cal. 322, and the subsequent appeal in the same case. The Court also found that the Register and Receiver, on the 15th of February, 1856, published a notice requiring all persons claiming rights of pre-emption to file their declaratory statements on or before the 15th day of May, 1856. This finding is attacked, as unsupported by the evidence. The record contains no evidence tending to prove that fact. Both parties proceed on the theory that the plat was filed in the Register's office. The indorsement, though slight evidence — as was held in *Megerle v. Ashe*, 33 Cal. 74 — will, in the absence of other evidence, be taken as fixing the time of the filing of the plat. Poppe's declaratory statement having been filed on the 16th of April, 1856 — which was more than three months after the filing of the plat — came too late to preserve his pre-emption claim as against one who had, in the meantime, taken the necessary steps to acquire the title to the land.

Poppe insists that the indorsement on the plat was not given in evidence; but, as he has not appealed, he is not in a position to allege that the Court erred in reciting the indorsement in the finding.

The purpose of the suit brought by Athearn against Poppe is, to compel Poppe to convey to Athearn the legal title to the premises in controversy, on the alleged ground of fraud on the part of Poppe in perfecting his pre-emption claim, and, in pursuance thereof, in procuring a patent from the United States. A conclusive answer to the position of Athearn is, that he claims not as a pre-emptioner, but as a purchaser from the State; and as such he is not entitled to a patent from the General Government, and, therefore, cannot

Opinion of Rhodes, J., Niles, J., concurring.

claim the benefit of the patent issued to Poppe. That suit was properly dismissed.

The questions discussed at the last argument were whether the surrender of the land warrant and the issuing of the Register's certificate were authorized by any law then in force, and whether a location so made authorized the issuing of a patent. The Commissioner of the General Land Office has authority to make regulations respecting the disposal of the public lands, and such regulations, when not repugnant to the Acts of Congress, have the force and effect of laws. In the letter of the Commissioner of the 14th of February, 1854, addressed to the Register of the Land Office at Benicia, he refused to return the warrant to the person who had located it on a tract of land, and directed the Register in such case to issue to the person locating a warrant, a certificate of location. The Commissioner described the form of the certificate, and that form was adopted in this instance, and generally in all other cases of the location of warrants since that time.

Those instructions recognize the surrender of the warrants as the correct practice, and make the certificates issued thereupon by the Register legal and valid. Those certificates of location become the basis of the patents issued by the State. Leaving out of view the question whether the patent should issue before the lands have been listed to the State by the Land Department — as the question has not been discussed in this case — there seems to be no valid ground for saying that the Register's certificate is not sufficient to authorize the proper officers of the State Government to take the requisite steps for the issuing of the patent. The provisions of the Act of May 8d, 1852, for the survey of the lands by the County Surveyor, and all the proceedings founded on such survey, are applicable only to unsurveyed lands. The observance of those provisions would be useless and vain where the lands have been surveyed by the United States.

Opinion of Crockett, J.

Judgment in *Athearn v. Poppe* affirmed, and judgment in *Poppe v. Athearn* reversed, and cause remanded for a new trial.

CROCKETT, J., concurring:

I concur in the judgment on the grounds stated in the opinion which I have heretofore delivered in this case.

Mr. Justice WALLACE being disqualified, did not sit in these cases.

[The opinion to which Mr. Justice CROCKETT refers in his concurring opinion was filed at the April Term, 1868, and was concurred in by SAWYER, C. J., SANDERSON, J., RHODES, J., and SPRAGUE, J. The Court afterwards granted a rehearing, and the foregoing opinion was delivered after reargument. The following is the opinion delivered at the April Term, 1868, and to which reference is made as containing the facts of the case. The first three head notes cover the points on which both opinions agree. After a rehearing the first opinion is understood to be no longer the opinion of the Court, unless it is adopted in the subsequent opinion.—REPORTER.]

By CROCKETT, J.:

The respondent, Poppe, brought ejectment against the appellant Athearn to recover a tract of land in San Joaquin County, in which action an answer was filed denying title in the plaintiff, and setting up title in fee in the defendant. During the pendency of this action the defendant filed his bill in equity against the plaintiff, setting forth in substance that the land in contest, which is the southeast quarter of section eleven, township four north, range eight east, was, in the year 1850, in the actual and exclusive occupation of

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Elliott and Loring; that Loring conveyed his interest in the tract to Elliott, and in March, 1852, Elliott conveyed to Vance; that Vance was the owner of a school land warrant issued under the Act to provide for the disposal of the five hundred thousand acres to which this State became entitled under the Act of Congress of April 4th, 1841; that in accordance with the Act of the Legislature, Vance located his warrant on the land in contest; that subsequently the United States caused the land to be surveyed and sectionized, and the plat of the survey was filed in the proper United States Land Office on the 5th December, 1855; that on the 10th March, 1856, Vance applied to the proper United States Register to locate his warrant on the quarter section in dispute; that the location was approved by the Register, who, on that day, issued his certificate to that effect to Vance, and the warrant was thereupon surrendered and canceled; that Vance afterwards assigned the certificate to the appellant Athearn, who, on the 8th January, 1862, obtained a patent from the State; that in 1851 the respondent Poppe occupied for a time a cabin on this tract, as the tenant of Elliott and Loring, but in September, 1852, left the cabin and moved into a house he had built on the adjoining quarter in section ten, where he continued to reside until October, 1855, when he sold his improvements on section ten and moved back to the quarter section in contest on section eleven, into a house he had erected thereon, and on the 16th April, 1856, filed in the proper Land Office a notice of his intention to claim as a pre-emptor the quarter section in contest; that by the laws of the United States he was not entitled to pre-empt the land, and the appellant was entitled to hold it under his school land warrant; but notwithstanding all the facts above stated and with a full knowledge of them, the Secretary of the Interior, in violation of law, awarded the land to the respondent as a pre-emptor, who subsequently, in 1863, obtained from the United States a patent therefor; that the respondent is

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in possession of forty-seven acres, and the appellant of the remainder of the quarter section, on which he has erected permanent and valuable improvements; that the respondent had commenced an action of ejectment against the appellant to recover the whole quarter section, relying on the patent from the United States as conclusive evidence of title; that said patent is a cloud on appellant's title, and was fraudulently obtained and issued in violation of law. The prayer of the complaint is that the respondent be decreed to release his title to the appellant, and for an injunction against the ejectment suit.

The answer denies the possession of Elliott and Loring, the deraignment of title from them to appellant, the issuing of the school land warrant and the location thereof by Vance; it also denied that the respondent ever occupied the land as the tenant of Elliott and Loring, or that the township plat was filed in the Land Office on the 5th December, 1855, or at any time earlier than March 1st, 1856. In short, it denies every material averment of the complaint, and sets up, as affirmative matter, that he settled upon the land as a pre-emptor and was entitled by law to pre-empt it, and, after complying with the requirements of the law in that respect, obtained his patent therefor; that appellant contested his rights before the Land Department, and that all questions of fact in regard to the settlement, residence, and bona fides of the respondent were heard and decided by the proper officers of the United States; after which hearing the land was awarded to the respondent; and thereafter the appellant, by perjury and fraud, procured a patent to be issued to him by the State of California.

The two actions were heard together before the Court without a jury.

In its findings the Court finds that there was no fraud on the part of Poppe in obtaining his patent, and also the following facts:

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First—That in August, 1851, Poppe settled upon the quarter section in controversy, which was then unsurveyed public land of the United States, and has ever since been in the exclusive possession of about forty-seven acres thereof.

Second—That said land was surveyed by the United States in the Summer of 1855, and the township plat was duly filed in the proper Land Office; that, after the filing of the plat, the Register and Receiver, on the 15th of February, 1856, gave notice through the public press (being the first notice given in the premises), requiring preëmptioners to appear and file their preëmption claims on or before the 15th of May, 1856, and that Poppe filed his notice on the 16th of April, 1856.

Third—That the only evidence produced as to the date at which the township plat was filed in the Land Office was an indorsement on the plat itself of the words: "Filed in Marysville Land Office, December 5th, 1856," which indorsement was not signed by any one, and there was no evidence to show when, or by whom, or by whose authority the indorsement was made; that Athearn was in possession of all the quarter section, except the forty-seven acres in possession of Poppe.

Fourth—That prior to the Government survey, to wit, in December, 1852, Vance being then in possession of one hundred and thirteen acres of the tract, located a school land warrant on that quarter section; and after the survey, to wit, March 10th, 1856, applied to the United States Register for permission to locate it on the same quarter section, and surrendered the warrant to be canceled; whereupon the Register approved the location, and issued his certificate to that effect; after which Vance assigned the certificate to Athearn, who afterward, to wit, on the 8th of January, 1862, obtained a patent from the State.

Fifth—That Athearn and Poppe, pending the proceedings before the United States Land Department, both appeared

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and litigated their rights, and after the decision in favor of Poppe, a patent was issued to him in October, 1863.

Sixth—That for a long time prior to and ever since the date of the patent to Poppe, Athearn was in the actual possession of the one hundred and thirteen acres, claiming title in himself; and the Court finds the value of the rents and improvements.

As a conclusion of law, the Court finds that Poppe is entitled to judgment for the possession, and for the value of the rents, and judgment was entered accordingly.

The appellant moved to correct the findings, and submitted to the Court a series of findings, which, in the main, were not only different from, but, in some respects, contradictory to the findings of the Court. The Court refused to change or modify its findings, and the appellant excepted.

A motion for new trial was made by appellant, which was denied by the Court, and the case comes here on appeal from the judgment as well as from the order denying the motion for new trial.

The first point to be considered is, whether or not Athearn can appeal to a Court of equity, upon the facts stated in his complaint, to revise the decision of the Secretary of the Interior in respect to the preliminary steps which were necessary to be performed by Poppe to entitle him to a patent on his application for a preëmption.

In cases of fraud there can be no doubt that a Court of equity will give relief, not only when the officers of the Government have been parties to the fraud, but also when they have been made the innocent instruments of perpetrating a wrong by means of the fraudulent practices of others. Hence it has been held that when the United States Register and Receiver have been imposed upon by false affidavits or perjured witnesses, whereby the land has been awarded and patented to the wrong person, the Courts will interfere and redress the wrong. Otherwise there could be no relief in

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such cases. (*Garland v. Wynn*, 20 How. 6; *Lytle v. State of Arkansas*, 22 How. 192.) But even in cases of fraud the Court will not, in a collateral action, go behind the patent to inquire into the regularity or sufficiency of the preliminary proceedings, except at the instance of an adverse claimant, who has acquired an equity in the land which entitles him to protection. Whenever such equities exist, a Court of equity will look behind the patent and award the legal title to the party holding the oldest and best equity.

Even in actions at law, where there are conflicting patents for the same land, the Court will go behind the patents to ascertain which party had the prior equity; and if the junior patent is founded on the prior equity, it will take effect by relation from the time when the equity accrued, and override an older patent founded on a junior equity. (*Ross v. Barland*, 1 Pet. 655; *Bagnall v. Broderick*, 13 Pet. 436; *Smith v. Athearn*, 34 Cal. 506.)

In the case under consideration, Athearn had the oldest patent, founded on his school land warrant, which was located on the 10th of March, 1856, after the lands had been duly surveyed. In the action of ejectment, without the aid of a bill in equity, the production of his patent and proof of the location of the warrant, after the survey, would have established a *prima facie* case as against Poppe's junior patent, standing alone, and without proof of the preliminary acts on which the patent was founded.

This rendered it necessary for Poppe to support his patent by proof of the preliminary steps, in order to show that, before the location of the school land warrant, he had acquired an equity in the land which exempted it from location under the school land warrant.

It was, therefore, competent and proper for the Court to hear proof on that subject, in order to ascertain which party had the prior equity. To establish Poppe's prior equity, it was incumbent on him to show at what date he

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commenced to perform the series of acts which culminated in his patent. The patent itself, without further proof, raises a presumption that he possessed the proper status as a pre-emptioner, and had performed the necessary acts to entitle him to a patent; but it raises no presumption as to the time at which the performance of the acts commenced; and all the presumptions arising from the patent were liable to be rebutted by proof.

In respect to the time at which Poppe performed the first act, the Court finds that he "settled upon" the land in August, 1851, and from that time up to the trial had been in the exclusive possession of forty-seven acres of the tract. It does not find that he ever resided on the tract, unless that is to be inferred from the term "settled upon," nor does it find that he erected a dwelling house, or other improvements, or ever cultivated any portions of the premises.

The incipient steps toward a valid pre-emption claim are that the party shall "cultivate and improve the same," and "shall erect a dwelling thereon." This is expressly required by the tenth section of the Act of Congress of September 4th, 1841. Without a performance of these acts there can be no valid foundation of a pre-emption claim.

But although the findings are silent on these points, the "Act to regulate appeals in this State," approved May 20th, 1861 (Stats. 1861, p. 589), which was in force when this case was tried, provides that "in cases tried by the Court, without a jury, no judgment shall be reversed for want of a finding, or for a defective finding of the facts, unless exceptions be made in the Court below to the finding or the want of a finding;" and the statute points out how defective findings may be remedied.

In construing this statute we have repeatedly held that where the findings are silent as to material facts necessary to support the judgment, and no effort is made to correct them, we will presume in aid of the judgment that the

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necessary facts were proved, unless the contrary appears. (*Hidden v. Jordan*, 28 Cal. 301; *Lucas v. San Francisco*, 28 Cal. 591; *James v. Williams*, 31 Cal. 213; *Lyons v. Leimbach*, 29 Cal. 139.)

It follows that if Athearn intended to controvert the fact that Poppe had resided upon the land, and erected a dwelling thereon, prior to the time when Vance's equity accrued, and if he believed that these facts were not proved on the trial, he should have moved to correct the findings in that respect; and if the Court refused to find at all on the point, or found contrary to the evidence, the statute points out the remedy.

But as the case is now presented, we must assume, in support of the judgment, that these essential facts were proved, inasmuch as Athearn did not except to the findings in this particular.

In this view of the case it would be our duty to affirm the judgment, if no error had occurred in denying the motion for new trial.

But the Court finds facts sufficient to show that the township plat was filed in the office of the Register and Receiver on the 5th of December, 1855; and it finds as a further fact, that the Register and Receiver, "on the 15th of February, 1856, gave notice through the public press," for the first time, that all persons claiming preëmption rights upon any of the lands in that township should appear and file their notice of preëmption on or before the 15th of May, 1856.

One of the grounds for new trial was that the Court failed to find it as a fact that the township plat was filed in the office of the Register and Receiver on the 5th December, 1855, and that there was no evidence to support the finding that the Register and Receiver published the notice on the 15th of February, 1856, as set forth in the finding.

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These grounds for a new trial were well taken. Instead of finding distinctly, as it should have done on the evidence, at what date the township plat was filed, the Court only reports the evidence on that point; and in respect to the publication of the notice by the Register and Receiver to preëmptioners, we find no evidence whatever in the record to support the finding on that branch of the case. These were material facts, which may be decisive of the action; for if the township plat was filed on the 5th of December, 1855, and notice thereof was immediately given by the Register and Receiver, then the notice of his intention to claim a preëmption, which was filed by Poppe on the 15th April, 1856, came too late. The Act of Congress of March 3d, 1853, regulating the survey of public lands in California, provides that the declaratory statement must be filed within three months after the return of the township plat to the Land Office, and there is no authority in the Land Department to dispense with this condition. (*Megerle v. Ashe*, 33 Cal. 74.)

It was, therefore, a most material fact to ascertain whether or not Poppe's notice was filed within the proper time; and in order to do this, it is necessary to ascertain with certainty when the township plat was filed, and when the notice to preëmptioners was published — if any such notice was published; of which fact, however, there is no proof in the record.

For the reasons stated above the Court below ought to have granted the motion for a new trial.

The counsel for the respondent has pressed upon our consideration, with much earnestness, the proposition that both the appellant and the respondent having appeared before the United States Land Department, and litigated their respective rights, the appellant is estopped thereby from requiring further proof that the respondent has the prior equity to the land.

Statement of Facts.

We deem it proper to say for the guidance of the District Court on another trial, that we do not acquiesce in his view of the law. The Land Department had no power to adjudicate the rights of the appellant. After his warrant was located and canceled, and the location approved by the Register, the equity of the appellant attached; and it was not in the power of the Land Department to detract from or add to his rights. His appearance before the Land officers of the United States could confer upon them no jurisdiction, where none existed by law. (*Megerle v. Ashe, supra.*) It follows that their decision was not obligatory upon him, and so far as it affected his rights was *coram non judice*.

Judgment and order denying a new trial reversed, and cause remanded for a new trial.

[No. 2,285.]

C. D. SEMPLE v. G. W. WARE.

SURVEY OF MEXICAN GRANTS.—The proceedings of the District Court of the United States under the Act of Congress of June 14th, 1860, relative to surveys of Mexican grants of land, are of a judicial nature.

WAIVER OF AN ESTOPPEL.—A party who has a judgment in his favor which would be an estoppel, may waive the benefits of the estoppel, in a case in which it is set up as a bar, by consenting in open Court to a judgment, notwithstanding the estoppel.

APPEAL from the District Court of the Tenth Judicial District, Yuba County.

Ejectment for part of lot number six, in block number six, in the Town of Colusa. The defendant recovered judgment in the Court below, and the plaintiff appealed.

The other facts are stated in the opinion, and in *Yates v. Smith*, 40 Cal. 662; and same case, 88 Cal. 60. The cases of

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Treadway v. Semple, 28 Cal. 652, and *Semple v. Wright*, 32 Cal. 659, throw light on the litigation.

Semple, per se, and *L. J. Ashford and Jo Hamilton*, for Appellant.

W. C. Belcher, and *W. F. Goad*, for Respondent.

By the Court, NILES, J.:

The opinion in *Yates v. Smith*, 40 Cal. 662, disposes of all the points made upon this appeal except the fifth, which is that "the Court erred in giving a judgment in favor of defendant, the plaintiff holding the older and superior title." We shall concede, for the purposes of the appeal, that this point is properly presented by the record.

The plaintiff claims under a final decree of the District Court of the United States, made on the 2d day of February, 1861, confirming the survey of the Colus Rancho. The defendant claims under a final decree of the same Court, made on the 6th day of April, 1861, confirming the survey of the Jimeno Rancho, and also a patent from the United States following the decree. The surveys conflict, and the land in controversy is included within the boundaries of both surveys.

The date of the original grant of the Colus Rancho does not appear; nor does the date of the Jimeno grant appear, otherwise than from a recital of the patent which names November 4th, 1844, as the date of the Mexican grant to Manuel Jimeno. We have no information of the proceedings at the adjudication of the Colus survey, or of the parties thereto, except that derived from the fact that the survey was approved and confirmed to the plaintiff on a certain day. During the pendency of proceedings in the District Court upon the survey of the Jimeno Rancho, the plaintiff, to whom the Colus Rancho had then been finally confirmed,

intervened and filed exceptions to the survey, alleging, among other facts, that the survey of the Jimeno Rancho presented for confirmation was not properly located; that it covered two leagues of the Colus grant, which had been finally confirmed to him; that he believed that the title to the Colus grant was superior to that of the Jimeno grant to the same land, etc., and praying that the survey be ordered to be returned into Court for its adjudication and decision. On the day of the rendition of the final decree the plaintiff (then intervenor) appeared personally, and in open Court consented to the decree and the official survey.

The decision of the case depends upon the relative values of the several decrees of confirmation. There can be no doubt that the proceedings of a District Court under the Act of Congress of June 14th, 1860, are of a judicial nature. We may admit for the purposes of this case that the decree rendered in the matter of the Colus survey was conclusive as a judgment upon all parties in interest who either did intervene, or who might have intervened, in that proceeding, in accordance with the provisions of the Act; and that the plaintiff could have availed himself of this decree by way of a plea in bar, or as conclusive evidence of title, in the subsequent proceedings for the confirmation of the Jimeno survey. But a party may waive the benefit of an estoppel in his favor; and the failure of the plaintiff to present this plea in his intervention, and his consent in open Court to the decree as entered, was a waiver of this right. (*Semple v. Wright*, 32 Cal. 668.)

The result is not changed, if we consider the decree of confirmation of the Colus survey as being for all purposes equivalent to a patent from the United States. The holder of the best title is bound to exhibit and prove it in proceedings adverse to that title, and to which he is a party. By withholding his title, and formally consenting to a decree in favor of the claimants under the Jimeno grant, which would

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be equivalent to a patent in their hands, the plaintiff lost the power to assert his claim, as against them, to the land in controversy.

Judgment affirmed, as of the 1st day of February, 1872.

Mr. Justice CROCKETT dissented.

[No. 3,101.]

THE PEOPLE OF THE STATE OF CALIFORNIA v.
FREDERICK W. CLARKE.

CRIMINAL LAW — ORDER RESUBMITTING CASE TO GRAND JURY NOT APPEALABLE.—An order of a County Court directing that a criminal charge ignored by one Grand Jury be submitted to another, is not an appealable order.

CRIMINAL "INTERMEDIATE ORDERS" NOT APPEALABLE.—By the provisions of section four hundred and eighty-four of the Criminal Practice Act, to the effect that intermediate orders or proceedings forming part of the record of a criminal case may be reviewed on appeal from the final judgment, it was clearly intended to prohibit a separate appeal from such intermediate orders or proceedings.

CRIMINAL ORDERS, AFTER FINAL JUDGMENT, APPEALABLE.—That portion of section four hundred and eighty-one of the Criminal Practice Act which authorizes an appeal from an order "which affects a substantial right in a criminal case amounting to felony," applies only to orders made after final judgment.

APPEAL from the County Court of Alameda County.

The defendant was arrested in February, 1871, for the murder, in Alameda County, of Zelotes Reed, and held to answer. At the next term of the County Court of that county the Grand Jury investigated the charge, and ignored the bill. The District Attorney afterwards moved to resubmit the charge to another Grand Jury; and the County Court, upon the ground that the defendant had been admitted to testify as a witness on his own behalf, and that the

Argument for Appellant.

admission of such testimony by the Grand Jury was error, granted the motion. The defendant appealed from the order.

Alexander Campbell and H. S. Brown, for Appellant.

It was suggested in the Court below that the order was not appealable. But no motion has been made to dismiss the appeal on that ground, and we, therefore, infer that the objection is abandoned by the Attorney General. It may, however, be proper to state, briefly, the provisions of law upon the subject, and the construction which, in our opinion, should be given to them. Section four hundred and eighty-one of the Criminal Practice Act provides that "the party aggrieved may appeal to the Supreme Court from a final judgment of the District Court or County Court granting or refusing a new trial, or which affects a substantial right in a criminal case amounting to felony, on questions of law alone." Section two hundred and thirty-one provides that "the dismissal of the charge shall not, however, prevent the charge from being again submitted to a Grand Jury, or as often as the Court shall so direct. But without such direction it shall not be again submitted." The purpose of the law is obvious. It affords the defendant protection against repeated prosecutions after the charge against him has been once fairly investigated by the Grand Jury and dismissed; subject, however, to the power of the Court in the exercise of a legal discretion to resubmit the case whenever circumstances may arise rendering it proper to do so. The dismissal operates as a final judgment in his favor, which can only be reopened for a sufficient reason, and in the exercise of a legal, not an arbitrary, discretion. This view of the case was very properly concurred in by the Court below. (*Belt v. Davies*, 1 Cal. 134; *Dowling v. Polack*, 18 Cal. 625; *People v. Young*, 81 Cal. 563.)

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Jo Hamilton, Attorney General, for Respondent.

The order in this case was not a final judgment, nor order made after final judgment, and was, therefore, not an appealable order. (Hitt. Dig. 2068; *DeBarry v. Lambert*, 10 Cal. 503; *Moulton v. Ellmaker*, 30 Cal. 529; *People v. Thurston*, 5 Cal. 517; *People v. Ah Fough*, 12 Cal. 424.)

The County Court had the authority, in its discretion, to order a resubmission of the case to another Grand Jury, and such an order, being one within the discretion of the County Court, is not a subject of review on appeal. And if such an order was made within the discretion of the Court, the reason for the order—being no part of the order—could not be a subject of review on this appeal. (Hitt. Dig. 1818, 1870, 1871, and 1872; *Smith v. Billett*, 15 Cal. 23.)

By the Court, CROCKETT, J.:

The only question on this appeal which it is necessary to consider is, whether an order of the County Court, directing that a charge which has been ignored by a former Grand Jury be submitted to another Grand Jury, is, in any case, an appealable order. Section four hundred and eighty-one of the Criminal Practice Act provides that an appeal may be taken "to the Supreme Court from a final judgment of the District Court of County Court, in all criminal cases amounting to a felony on questions of law alone; also, from an order of the District Court or County Court granting or refusing a new trial, or which affects a substantial right in a criminal case amounting to a felony, on questions of law alone." Section four hundred and eighty-four provides that upon the appeal from the judgment any decision of the Court in an intermediate order or proceeding forming a part of the record may be revised.

In providing that intermediate orders or proceedings forming a part of the record may be reviewed on an appeal from the final judgment, it was clearly intended to prohibit a separate appeal from such intermediate orders or proceedings. Whether the intermediate orders and proceedings referred to are only those which occur between the finding of the indictment and the final judgment, or include also those which are preliminary to the indictment, such as the order appealed from in this case, or an order denying a challenge to a Grand Juror, or of the whole panel, need not be decided on this appeal. It will suffice to say on this point that if such preliminary orders and proceedings can be reviewed by this Court on appeal, it can only be on an appeal from the final judgment. Any other rule would lead to the greatest embarrassment and delay in the administration of justice in criminal cases. That portion of section four hundred and eighty-one which authorizes an appeal from an order "which affects a substantial right in a criminal case amounting to a felony," applies only to orders made after final judgment, which, of course, could not be reviewed on an appeal from the judgment. In several cases we have been called upon to review, on appeal, orders of this character, relating to the time, mode, and manner of executing the judgment. Upon this construction of the statute, its provisions are reasonable and consistent. All orders and proceedings occurring prior to the judgment, which it was intended should be subject to review by this Court, can be corrected on an appeal from the judgment, or from an order granting or refusing a new trial; whilst an order affecting a substantial right of a party, made after final judgment, can be reviewed on a direct appeal from the order. These views are decisive of this appeal, inasmuch as the order appealed from is not appealable.

Appeal dismissed.

Mr. Chief Justice SPRAGUE did not participate in the foregoing decision.

Statement of Facts.

[No. 2,580.]

HUGH HARVEY v. WILLIAM D. RYAN, JAMES LYNCH, JOHN TANEY, AND MICHAEL BRESNAN.

"MINING CUSTOMS" AS AGAINST WRITTEN "DISTRICT MINING LAWS."

— In an action for possession of a mining claim, where plaintiff relied upon a location under certain written rules adopted by the miners of the district some five years before, which did not require the posting of notices upon the claim at the time of location; and defendant offered to prove that there was a custom in the district requiring the posting of such notices; and the Court excluded the evidence on the ground that the written rules superseded any custom; *held*, that the exclusion of such evidence was error.

OBSERVED "MINING CUSTOMS" PREVAIL OVER DISREGARDED "DISTRICT MINING LAWS."

— Section six hundred and twenty-one of the Practice Act makes no distinction between the effect of a "custom" or "usage," the proof of which must rest in parol, and a "regulation" which may be adopted at a miners' meeting and embodied in a written local law; and a custom reasonable in itself, and generally observed, will prevail as against a written mining law fallen into disuse.

"DISTRICT MINING LAWS"—WHAT GIVES THEM VALIDITY.

— The rules adopted by the miners of a district acquire validity not from their mere enactment, but from the customary obedience and acquiescence of the miners following the enactment.

EXISTENCE OF "DISTRICT MINING LAW" A QUESTION OF FACT.

— As the "mining law" of a district must not only be established but in force, it is void whenever it falls into disuse or is generally disregarded; and the question whether it is in force at a given time is one of fact for the jury.

APPEAL from the District Court of the Second Judicial District, Butte County.

This was an action to recover possession of certain mining ground in Sawmill Ravine, Cherokee Flat District, Butte County, and five hundred dollars damages for alleged illegal detention. The defendants answered, fully denying the allegations of the complaint, and setting up title in themselves. The cause was tried before a jury, and a verdict was rendered in favor of plaintiff for possession of the ground and one cent damages. Judgment having been entered in ac-

cordance with the verdict, and a new trial denied, the defendants appealed from the order.

Belcher & Belcher, for Appellants.

On the trial, defendants placed a witness on the stand and offered to prove by him, and several others, that, at the time plaintiff claimed to have located the ground, there was a custom in the mining district which required a party locating to post a notice of his claim upon the ground. The Court refused to permit the testimony to be given, on the ground that there were written rules in the district in force at that time. The evidence was clearly competent for the purpose of showing that a custom existed upon a subject not covered by the written rules, or that one had grown up subsequent to and in conflict with them.

Hammond & Stratton, for Respondent.

By the Court, NILES, J.:

This was an action of trespass involving the right to the possession of certain placer mining claims. The defendants claimed under a location purporting to have been made in May, 1858. The plaintiffs claimed a portion of the same ground under a location purporting to have been made in May, 1866.

It was proven at the trial that at a meeting of the miners of the mining district, held in November, 1861, certain written rules were adopted, regulating the manner of location and size of claims. These rules contained no requirement that notices should be posted upon the claims at the time of location. The defendants offered to prove by several witnesses that, at the time plaintiffs claimed to have located the ground, there was a custom in the mining district that required a party locating to post a notice of his claim upon the ground. The testimony was rejected upon

the ground that there were written rules in force in that locality, and that those rules superseded any custom in regard to locating claims.

In this class of cases the statute authorizes proof "of the customs, usages, or regulations established and in force at the bar or diggings embracing such claims," and declares that "such customs, usages, and regulations * * * shall govern the decision of the action." (Practice Act, Sec. 3, p. 621.) No distinction is made by this statute between the effect of a "custom" or "usage," the proof of which must rest in parol, and a "regulation" which may be adopted at a miners' meeting and embodied in a written local law. This law does not, like a statute, acquire validity by the mere enactment, but from the customary obedience and acquiescence of the miners following its enactment. It is void whenever it falls into disuse or is generally disregarded. It must not only be *established*, but in *force*. A custom, reasonable in itself, and generally observed, will prevail as against a written mining law which has fallen into disuse. It is a question of fact for the jury whether the law is in force at any given time.

The custom sought to be proven in this case was not even in conflict with the mining laws. It merely prescribed another and not unreasonable act in the series of acts required for a location. The exclusion of the evidence was error.

It is unnecessary to pass upon the validity of the instructions refused by the Court. The testimony comes up to this Court in such confused and unintelligible shape that it is impossible to learn from the record whether the instructions did or did not apply to the proofs presented.

Judgment and order reversed, and cause remanded for a new trial.

Mr. Justice SPRAGUE did not participate in this decision.

Opinion of the Court — Rhodes, J.

[No. 3,315.]

SUSAN BENNETT v. SANFORD BENNETT.

CLERK'S CERTIFICATE, ON MOTION TO DISMISS APPEAL.—It is contemplated by Rule Four of the Supreme Court that the matters therein mentioned should be stated in the certificate of the Clerk, and not that they should be presented by means of documents on file in the Court below.

DEFECTIVE CERTIFICATE.—A certificate is defective which does not state whether a statement on appeal was filed, or does not show the amount or character of the judgment. Recitals in the undertaking will not be accepted as a substitute for statements which are required to be contained in the certificate.

APPEAL from the District Court of the Seventh Judicial District, Sonoma County.

The facts will be understood from the opinion. The defendant appealed from an order denying a motion to settle his statement on motion for new trial.

Firebaugh & Watson, for Appellant.

J. B. Southard, for Respondent.

By the Court, RHODES, J.:

Motion to dismiss the appeal, under Rule Four, upon a certificate of the Clerk.

The certificate is defective because it does not state whether a *statement on appeal* was filed.

It is also defective because it does not state the amount or character of the judgment. The copy of the undertaking on appeal specifies the amount, and in some respects the character of the judgment; but the recitals in the undertaking — which may or may not be true — will not be accepted as a substitute for statements which are required to be contained in the certificate.

If the copies of the notice of appeal and the undertaking on appeal could be taken in lieu of the Clerk's certificate,

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they are still defective, as the undertaking does not recite the same judgment which is mentioned in the notice of appeal. The undertaking is, therefore, *not in due form*.

It is contemplated by Rule Four that the matters therein mentioned should be stated in the certificate of the Clerk; and not that they should be presented by means of documents on file in the Court below.

Motion denied.

[No. 2,913.]

WILLIAM BARBER v. THE BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO.

SAN FRANCISCO STREET LAW—PETITION ON APPEAL TO SUPERVISORS.—

Where a petition on appeal to the Supervisors of San Francisco, from a street assessment, based upon the ground that the petitioners did the work in front of their premises in time, and were not allowed therefor, omitted to show that petitioners had obtained the certificate from the Surveyor required by law (Stats. 1867-8, p. 361, Sec. 8, Subd. 11); *held*, that such petition was not bad on account of such omission, or insufficient to give the Board jurisdiction.

STATEMENT OF OBJECTIONS TO STREET ASSESSMENT ON APPEAL TO SUPERVISORS.—

The San Francisco street law of 1863, in providing for an appeal to the Board of Supervisors (Stats. 1863, p. 530, Sec. 12), does not exact from persons objecting to an assessment the same strictness and precision, in stating their objections, which would be required in a pleading at common law.

RIGHT TO HEAR APPEAL INCLUDES POWER TO DETERMINE IT.—

In case of an appeal to Supervisors, provided for by law, where the proceedings are sufficient to give them a right to hear it, such right necessarily includes the power to determine it.

ON CERTIORARI, ONLY JURISDICTIONAL MATTERS IN QUESTION.—

Where a Board of Supervisors has jurisdiction of a proceeding, and acts upon it, any error it may commit in its conclusions as to facts, not affecting its jurisdiction, cannot be reviewed on certiorari.

THIS was a proceeding on a writ of certiorari issued out of the Supreme Court to the Board of Supervisors of the City and County of San Francisco, for the purpose of reviewing

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its action on a street assessment appeal. It appears that on January 6th, 1871, the Superintendent of Streets of that city and county made and issued an assessment for the grading of Townsend street, between Second and Third streets. Peter Donahue and J. G. Eastland appealed therefrom to the Board of Supervisors, and, in their petition of appeal, set forth, among other things, that they were the owners of the one hundred vara lot on the southerly corner of Townsend and Second streets; that before the passage of the resolution of intention to grade said Townsend street, they and the Citizens' Gas Company, through whom they deraigned title, graded said street to the official grade in front of said lot; that they were entitled to a credit in said assessment therefor, amounting to more than their proportion of the whole of said work; and that they duly claimed such credit, but said Superintendent refused to allow it.

The plaintiff, and others interested, appeared in the Board of Supervisors and filed objections to the hearing of the appeal, on the ground, chiefly, that the petition did not allege that the certificate of work done by petitioners was filed with the City and County Surveyor in office when the work was done, or was so filed at any time prior to the completion of the grading under the contract. The Supervisors seem to have considered the objections insufficient, and proceeded to hear the appeal; and some evidence was adduced tending to show that there had been a certificate, but that it had not been filed with the Superintendent previous to the completion of the grading. The result of the appeal was a resolution of the Supervisors setting aside the assessment and directing the Superintendent to make out and issue a new one, allowing credits to all parties for the net quantity of material in cubic yards removed by them respectively, or by those under whom they legally claimed title, in front of their property.

This writ of certiorari being afterwards sued out on behalf

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of Mr. Barber and others, the Clerk of the Board of Supervisors certified up all the proceedings, including the testimony taken on the appeal.

E. J. Pringle, William Barber, and H. B. Jones, for Plaintiffs, claimed that the Supervisors had exceeded their jurisdiction in taking cognizance of the appeal on an insufficient petition; in setting aside the assessment without any evidence that it was erroneous; and in directing a new assessment to be made out in a manner contrary to law. They also claimed that giving credit to a particular property holder for work previously done was equivalent to assessing the cost of such prior work upon all the property holders as if it were a part of the present contract. That certiorari was the proper remedy, they cited *Miller v. Supervisors*, 25 Cal. 97.

R. P. & Jabish Clement, for Respondents.

The petition for certiorari does not show, neither does the return, that the amount assessed against the premises of petitioners, in the new assessment, is greater than the amount assessed against them in the original; nor that said premises are excessively assessed; nor that they were assessed at all in either assessment.

Petitioners have a plain, speedy, and adequate remedy at law. If the Supervisors had no jurisdiction, no power to act on the appeal, the resolution setting aside the original assessment and ordering a new one is void. Therefore, the assessment made under it is void; and its invalidity may be interposed as a defense to any action upon it. (Practice Act, Sec. 456; *Dougherty v. Hitchcock*, 35 Cal. 512.)

The Supervisors had power to direct the allowance of credits for work done. (Stats. 1862, p. 391, Sec. 12; 1867-8, p. 358, Sec. 8, Subd. 2; 1856, p. 145, Sec. 70.) And the

record does not show the allowance of credits not authorized by law.

The Supervisors had jurisdiction of the appeal. (Stats. 1862, p. 391, Sec. 12.) The rulings complained of were not jurisdictional, nor were they erroneous. If they were erroneous, the errors were concerning the merits of the case and the manner of proceeding, not in excess of jurisdiction. (*Whitney v. Board of Delegates*, 14 Cal. 479.)

By the Court, CROCKETT, J.:

The petitioners claim that the Board of Supervisors exceeded its jurisdiction in entertaining the appeal of Eastland and Donahue from the assessment made by the Superintendent of Streets, and also in setting aside the assessment and ordering a new one to be made. Section twelve of the Consolidation Act as amended in 1863 (Stats. 1863, p. 530) authorizes any person interested in the work, who objects to the correctness or legality of the assessment, to appeal to the Board of Supervisors, stating briefly in writing the objections to the assessment; and it is made the duty of the Board to hear and determine the objections. It is further provided that the Board may correct, alter, or modify the assessment in such manner "as to them shall seem just, and may instruct and direct the Superintendent to correct said warrant, assessment, or diagram in any particular, and to make and issue a new warrant, assessment, and diagram, to conform to the decisions of said Board in relation thereto, at their option." The decisions of the Board, after hearing and notice, are made final and conclusive on all persons entitled to appeal, "as to all errors and irregularities which said Board could have remedied and avoided." The only reason urged by the petitioners why the Board did not acquire jurisdiction to hear and determine the appeal is that the petition of East-

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land and Donahue, stating their objections to the assessment, omitted to show that they had obtained the certificate of the City and County Surveyor, as required by subdivision eleven, of section eight, of the Act as amended in 1868. (Stats. 1867-8, p. 361.) But I think the petition was sufficient to entitle the Board to entertain the appeal. The statute does not exact from persons objecting to an assessment the same strictness and precision in stating the objection which would be required in a pleading at common law. On the contrary, the proceeding is intended to be summary, and all that the statute requires is that the objection be "briefly" stated in writing. In other words, the nature of the objection may be stated in general terms, without specifying minutely all the particulars. In this case the petition stated that a portion of the work of grading the street in front of the premises of the petitioners had been done by them or their predecessors in interest, before the publication of the notice of intention to grade the street, and that they were entitled to a credit on the assessment for the work so done; but that no credit was allowed them in the assessment, which was therefore incorrect and illegal. This objection was sufficiently explicit within the purview of the statute to enable the Board to take jurisdiction of the appeal; and the right to hear it necessarily included the power to determine it. The Board, therefore, had jurisdiction to entertain, hear, and determine the appeal upon the proofs introduced; and, if it committed an error in its conclusions as to the facts, the error would not affect their jurisdiction, and could not be reviewed on certiorari. The return of the Board to the writ purports to contain the evidence given on the hearing of the appeal, but there is nothing in the record to show what facts the Board considered proved, and if there was, and if we should be of opinion that the Board found the facts contrary to the evidence, we could not correct the error in this form of proceeding. We cannot ascertain, from anything that appears

in this record, that the Board did not decide and determine that Eastland and Donahue had obtained the proper certificate from the City and County Surveyor, and had done all that the law required to entitle them to the credit which they claim. These were facts which the Board had authority to ascertain and decide, and we cannot inquire, in this proceeding, as to the sufficiency of the evidence on which it acted. It is sufficient that it did act, and decided, on the facts proved, that Eastland and Donahue were entitled to the relief claimed, and that the assessment was therefore incorrect. Whether its decision was right or wrong it did not exceed its jurisdiction in making it. It is said, however, that if the Board had the authority to correct the assessment it had no jurisdiction to direct a new assessment to be made, of the character specified in its resolution, setting aside the first assessment. The objection urged against the new assessment which was ordered, is that Eastland and Donahue are to be credited with the cost of all the excavation made by them, without charging them with the cost of removing any embankments which they may have made above the official grade, or filling up excavations made by them below the official grade. The answer to this objection is that it was for the Board to determine whether there were any such embankments to be removed or excavations filled up, and we cannot review, in this form of proceeding, the action of the Board on that subject. There is nothing in the record to show that the Board has exceeded its jurisdiction in any of the matters complained of, and the writ is therefore dismissed.

So ordered.

Mr. Chief Justice SPRAGUE did not participate in the foregoing decision.

Statement of Facts.

[No. 2,228.]

PETER DECKER AND J. H. JEWETT v. M. D. HOWELL, BENJAMIN HAYNES, AND R. M. TURNER.

STRICT PARTNERSHIP IN MINES AS DISTINGUISHED FROM "MINING PARTNERSHIP," SO CALLED.—Where two persons entered into an agreement to engage together in a mining adventure, under a firm name, and to share the profits and losses equally, and as a firm they purchased a mine, and paid a note given in the firm name for a portion of the price; *held*, that the contract was one of partnership, in the ordinary sense, as distinguished from what is known as a "mining partnership," and that either partner had the same authority to bind the firm as if it were an ordinary trading partnership.

EXCEPTIONAL RULE AS TO "MINING PARTNERSHIPS" CHANGES WHEN REASON THEREFOR CHANGES.—The rule that in "mining partnerships" one partner has no authority to bind the firm by a promissory note is based upon the reason that in such partnerships there is no *delectus personarum*, and that, consequently, the membership is continually subject to changes beyond the control of the partners; but there is nothing in the nature of mining which forbids a contract of strict partnership; and when it appears that the confidential relations of an ordinary partnership are established, and the firm not subject to the intrusion of other partners at will, the reason of the rule falls, and with the reason the rule itself.

PROMISSORY NOTE OF STRICT MINING PARTNERSHIP.—Where Howell and Haynes entered into a strict partnership for the purpose of purchasing, holding, and working a mine, and while such partners Howell gave a firm note for money borrowed in the name and for the use of the firm, and afterwards conveyed all his interest to Haynes; *held*, that the note was valid as a firm note, and could be collected of Haynes.

APPEAL from the District Court of the Tenth Judicial District, Yuba County.

This was an action upon a promissory note for three thousand dollars, made in the name of "Howell & Haynes" to R. M. Turner, and by Turner indorsed to plaintiffs. Howell and Turner made default. Haynes answered separately, setting up, among other things, that "Howell & Haynes" was a partnership formed for the sole and exclusive purpose of mining, and that Howell had given the

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note without Haynes' knowledge or authority, and in fraud of his rights. On the trial the Court below found the facts substantially as stated in the opinion; but in addition thereto found that after the making of the note Howell conveyed all his interest in the partnership to Haynes, in consideration that he would pay certain claims, including the note in question. As conclusions of law the Court found:

First—That the defendants Howell & Haynes were co-partners in the working and management of their mines and mill.

Second—That a copartner in a mining partnership has not in any case implied authority to borrow money on the credit of the partnership, nor to execute or deliver a promissory note in the partnership name for any purpose, and, consequently, that the defendant Howell had no implied authority to execute or deliver a note in the partnership name to the plaintiffs for the money borrowed from them, and that the fact that the money borrowed was used to pay the wages of the laborers on the mine, and for supplies therefor, can make no difference.

Third—That the defendant Haynes, by his ratification of the acts of the defendant Howell in the making and delivery of the note in suit became, and now is, liable to pay to plaintiffs the amount due on said note.

As a further conclusion of law, the Court found that the plaintiffs were entitled to judgment in the sum of four thousand nine hundred and sixty-four dollars and twenty-five cents, for principal and interest on the note, and rendered judgment accordingly. Defendant Haynes moved for a new trial, which being denied, he took this appeal from the judgment and order.

James C. Cary and Charles E. Filkins, for Appellants.

The issue raised by the pleadings was as to the power of Howell, by the execution of the note in suit, to bind the

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firm of Howell & Haynes. The Court below found that he could not. On this finding the defendant Haynes was entitled to judgment; but the Court proceeded to work out a judgment against him by raising another issue, not made by the pleadings or the parties. The finding upon which the judgment was based was excepted to; and we contend that there was no issue or evidence to sustain it.

It is, however, contended that the partnership between Howell and Haynes was a trading or commercial partnership, as distinguished from a mining company, and that Howell, therefore, had implied authority to borrow money and give notes. But it is submitted that this is not an open question, for the reason that the Court below found upon the whole case that the business of Howell & Haynes was mining, and that Howell had no authority as a copartner in the company to borrow money and execute notes. No exception was taken to this finding, and it cannot now be questioned.

The plaintiffs well knew the nature of the business of Howell & Haynes; and when Howell proposed to give this note for borrowed money, and pledged the credit of the firm for its payment, they were put upon inquiry as to his power. Had they made inquiry, they would have found that the mode in which the business of Howell & Haynes had been conducted was against the right of Howell to borrow money in the name of the firm; that he never had exercised or assumed that right in any one instance; that he had never made but one note in the firm name, and that was for the purchase money of the mine, and under instructions to arrange for the payment as best he could; that when money was required for the mine he drew on Haynes' agent for it, and in his own name; that the mine was to be worked on a cash basis; that Haynes was able to supply all the money needed, without borrowing; that the mines had failed at the

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time Howell made his application for a loan, and that he was insolvent.

The finding that Howell had no power or authority to give a note in the name of the firm, was fully sustained by the decisions in *Skillman v. Lachman*, 23 Cal. 206; *Bradley v. Harkness*, 26 Cal. 76; *Duryea v. Burt*, 28 Cal. 577; and *Settembre v. Putnam*, 30 Cal. 490.

W. C. Belcher and G. N. Swezy, for Respondent.

It makes no difference whether the conclusions of law of the Court below are correct or not, if the facts of the case and the conclusions which the law itself makes, and which the Court ought to have made as applicable thereto, warrant and sustain the judgment.

That the first conclusion is correct, so far as it goes, is beyond controversy. When two or more parties are engaged together in working mines for their joint account, it is no longer an open question whether or not the associates are copartners, and constitute a copartnership. They may own the mine as tenants in common, and in unequal interests, and divide the profits and share the losses of working in proportion to their several interests, but the moment they begin the working for their joint account they become copartners. This copartnership may be general or special, and whether general or special, will depend upon the circumstances of each case. (See Story on Part. Sec. 82; Bainbridge on Mines, 332; Arundel on Mines, 27; Rockwell on Mines, 576; Collier on Mines, 88; Collyer on Part. Sec. 8.)

The above authorities would seem to leave no doubt that two or more persons may form a partnership for the business of mining, in which they might have all the benefits, enjoy all the rights and privileges, and subject themselves to all the liabilities of commercial partnerships—in which there should be found all the characteristics, and to which should be attached all the incidents of commercial partnerships.

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Such a partnership may be created by deed, by parol agreement, or "by just presumption from the acts of the parties." And if it be possible that a partnership possessing all the characteristics, and subject to all the liabilities of commercial partnerships, can be created for a mining adventure, then we think that the partnership between the defendants, Howell and Haynes, was one of that class. If there is any one element wanting, we do not know what it is.

The *delectus personæ*, so frequently mentioned as an essential element in commercial partnerships, and as distinguishing them from certain kinds of joint stock and mining associations, is not wanting here. Indeed, it was the chiefest inducement with Haynes, to engage in this business with which he was personally unacquainted, that he could be associated in the business with Howell, and have the benefit of his skill and experience.

The cases of *Skillman v. Lackman*, 23 Cal. 198; *Duryea v. Burt*, 28 Cal. 569; *Dougherty v. Crary*, 30 Cal. 290; *Settembre v. Putnam*, 30 Cal. 491, and *McConnell v. Denver*, 35 Cal. 385, do not determine that a mining partnership cannot be a commercial partnership, or that mining partners do not and cannot have implied authority to borrow money or give notes in the name of the partnership. All these cases carefully preserve the distinction that the partnership of which they treat are the ordinary mining partnerships in which the controlling element — the *delectus personæ* — is wanting, in which the shareholders are generally numerous, and may, at their pleasure, transfer their interests and introduce new members. Not one of them holds or intimates that a mining partnership may not be formed which would in all respects be governed by the rules of commercial partnerships, and in which the members should possess all the rights, and be subject to all the liabilities of such partnerships.

The Court below was wrong in its second conclusion of law, and should have found that Howell had implied author-

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ity to borrow the money and make the note in the name of the partnership. The finding was, doubtless, based upon the authority of *Skillman v. Lachman*, and kindred cases; but, as we have shown, the doctrines there laid down are applicable to a different class of partnerships, and not to what the facts here presented and found by the Court show this of Howell & Haynes to have been.

By the Court, NILES, J.:

The defendants, Howell and Haynes, entered into an agreement to engage together in a mining adventure, under the firm name of "Howell & Haynes," for the purpose of purchasing, holding, and working certain mines. The profits and losses were to be shared equally. Howell, a practical miner, was to contribute his skill and personal services in the conduct of the business; Haynes was to contribute money. The mine was purchased by and conveyed to the partners. A note of the firm was given for a portion of the purchase money, and afterwards paid without objection by either. The mine was worked for a year under the management of Howell, who then conveyed his interest to Haynes. Prior to this conveyance, Howell borrowed of the plaintiff, in the name of the firm and for its use, the money for which the note in suit was given.

The main question in this case is whether Howell had authority, either express or implied, to make the note in suit.

It is well settled that in the case of an ordinary trading partnership either party may bind the firm by note.

It is equally well settled by the decisions of this Court that no such authority exists in the case of an ordinary mining partnership. The decision in *Skillman v. Lachman*, 23

Cal. 206, and the subsequent cases, place this exception to the recognized rule as applicable to trading partnerships, upon the ground that in mining partnerships the *delectus personarum* does not exist, and the membership is continually subject to changes beyond the control of the partners. But it is no disparagement to the salutary doctrine of these cases to hold that a strict partnership may exist in the working of a mine which shall be subject to the incidents of a trading partnership. There is nothing in the nature of the business of mining which forbids such a contract. If by the terms of a contract of mining partnership it appears that the confidential relations of an ordinary partnership are established, and that the firm is not subject to the intrusion of other partners at will, the reason of the rule that restricts the powers of a single partner fails. The parties are strictly partners, not by reason of their common ownership of the mine, but as the result of their own agreement. The cases of *Bradley v. Harkness*, 26 Cal. 76, and *Duryea v. Burt*, 28 Cal. 587, recognize this principle.

In Bainbridge on Mines, 439, the author says: "But there are mining concerns which are carried on by partners, few in number, subject to mutual selection, and therefore more closely connected by mutual confidence. * * * There may be no difference between firms of this kind and those engaged in any other distinct business as general partners, and those who are not working partners may not be the less liable to the general consequences of such a partnership."

I am of opinion that the agreement between Howell & Haynes was a contract of partnership in the ordinary sense. Each exercised his choice in the selection of the other as his copartner. If either had conveyed his interest in the mine to a stranger, the purchaser would not, by virtue of the sale, be subrogated to his rights under the agreement. The purchaser and remaining partner would then become tenants in

Argument for Appellants.

common of the mine and in its working, subject to the rules applicable to an ordinary mining partnership.

Judgment affirmed.

Mr. Justice SPRAGUE did not participate in this decision.

[No. 2,409.]

JOSEPH M. WOOD v. REUBEN E. RAMOND ET ALs.

NONSUIT MAY BE WAIVED AND JUDGMENT TAKEN ON MERITS.—A defendant, conceiving that the plaintiff has failed to prove his case, may waive a motion for a nonsuit, and proceed to prove his own case, and have judgment on the merits.

JUDGMENT ON MERITS NOT TO BE TAKEN AFTER NONSUIT.—If a defendant move for a nonsuit, and it be granted, he cannot have judgment on the merits.

NONSUIT ON MOTION OF DEFENDANT.—A nonsuit granted on motion of the defendant is equivalent in its operation on the action to a dismissal with the consent of the defendant, even if the defendant has set up new matter and asked for affirmative relief in his answer.

APPEAL from the District Court of the Twelfth Judicial District, City and County of San Francisco.

The appeal was taken from the judgment, from "the order allowing the plaintiff to take a nonsuit, and also from the order refusing to allow the defendants to make proof of the facts set up in defendants' cross-complaint, and from all the orders and errors specified," etc.

The facts are stated in the opinion.

G. F. & William H. Sharp, for Appellants.

The defendants should have been allowed to prove the allegations of their cross-complaint. No distinction in pleading exists under the code, whether the relief sought be legal or equitable. The old rules are superseded. (*Smith v. Baie*, 4 Cal. 6; *Cordies v. Schloss*, 12 Cal. 147; *Higgins v.*

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McDonald, 18 Cal. 302; *Reddler v. Baker*, 13 Cal. 302.) The affirmative matter stated in the answer was properly the subject of a cross-complaint, and under the code it was admissible. (Secs. 37-46, 49, and 64 of Practice Act.) Under our code, legal and equitable relief may be obtained in the same action — the pleader may join in the same complaint legal and equitable causes of action. For instances of such joinder, and as illustrative of the general doctrine, see *Morenhout v. Higuera*, 32 Cal. 294. The averment of ouster was properly the subject of cross-complaint, whether this action be treated as legal or equitable. (See *Moore v. Massina*, 32 Cal. 595; *Gates v. Keiff*, 7 Cal. 125.) Equitable title may be interposed as a defense in ejectment, and if this be true, the rule must be true *e converso*. (*Cadiz v. Meyers*, 33 Cal. 288; *Carpentier v. City of Oakland*, 30 Cal. 438; *Lorain v. Long*, 6 Cal. 452; *Getty v. Hudson River R. R. Co.*, 6 Howard's Pr. 269.) The matter set up in the answer related to the general subject matter of the action, and was responsive to the complaint. (Practice Act, Sec. 47; Van Sandvord's Pleadings, 50, 51; *Pralus v. Jeff. S. Mfg. Co.*, 34 Cal. 558.)

Wood & Harding, for Respondent.

The appellants appeal from a judgment of nonsuit, granted on their own motion. They were not the parties aggrieved, and have no right to appeal. (Pr. Act, Sec. 335; *Insly v. Beard*, 6 Cal. 666; *Sleeper v. Kelly*, 22 Cal. 456; *Ely v. Frisbie*, 260.)

By the Court, RHODES, J.:

The plaintiff commenced this action under the two hundred and fifty-fourth section of the Practice Act, to quiet his title to certain premises. The defendants after denying most of the material allegations of the complaint, set up

Points decided.

what is claimed as new matter, and upon it demanded affirmative relief. Upon the hearing, the Court, on the defendants' motion, ordered a judgment of nonsuit. The defendants, thereupon, offered to prove their allegations of new matter. The Court refused them permission to introduce evidence. This is alleged as error, and is the sole ground of the appeal.

A defendant, conceiving that the plaintiff has failed to prove his case, may waive a motion for a non-suit, and proceed to prove his own case, and have judgment on the merits. But if he move for a nonsuit, and the nonsuit be granted he cannot proceed and have judgment on the merits; because, by reason of the nonsuit, the plaintiff is virtually out of Court. A nonsuit, granted on the motion of the defendant, is equivalent, in its operation on the action, to a dismissal with the consent of the defendant.

Judgment affirmed.

[No. 2,953.]

PLEASANT D. LOGAN v. JOHN S. HALE, M. LEVENSOHN, AND J. B. GALLAND.

SUBROGATION OF JUDGMENT DEBTOR TO INTEREST OF JUDGMENT DEBTOR IN LAND.—If A. makes a verbal contract with B. to sell him a tract of land, and puts B. in possession thereof, judgment creditors of B. do not thereby, by virtue of the lien of their judgment or the levy of an execution, acquire such an interest in the land as to entitle them to be subrogated to B.'s rights, and to compel A. to make a conveyance to them upon paying him the purchase price which B. was to pay.

LIEN OF JUDGMENT CREDITOR.—If A. makes a verbal contract with B. to sell him a tract of land, and B. goes into possession, B.'s judgment creditors acquire no interest in the land except a lien on his interest to be enforced by sale on execution.

PARTIES TO SUIT IN EQUITY.—If A. makes a verbal contract with B. to sell him a tract of land, and puts him in possession, B. is a necessary party to an action commenced by the judgment creditors against A. to be subrogated to B.'s rights in the land.

Statement of Facts.

THE COURT MUST SUPPLY OMISSIONS IN FINDINGS.—If the findings of a Court omit material facts in the cause, it is the duty of the Court to supply the omissions when its attention is called to the subject by proper exceptions to the findings.

LEVY UPON LAND, WHEN IRREGULAR.—When the judgment debtor has, or claims, an interest in only a small, well defined parcel of a much larger tract of land, it is extremely irregular, to say the least, to levy the execution upon his interest in the general tract instead of the particular parcel he claims.

ENJOINING SALE ON EXECUTION.—If the owner of a large tract of land contracts to sell a part of it, and the judgment creditors of the party with whom he contracts attempt to sell the whole tract on execution, the Court intimates that the owner may enjoin the sale, except as to the part contracted to be sold.

APPEAL from the District Court of the Second Judicial District, County of Tehama.

Action to enjoin the sale of land under an execution. In 1867 the plaintiff, being the owner in fee of a large tract of land, consisting of two thousand five hundred and forty-two acres, made a verbal agreement with one Robinson to sell him a parcel of about one hundred and twenty-five acres, out of the northeast corner of the tract, at two dollars per acre. Robinson built a dwelling house upon the tract, and occupied it with his family; inclosed the land with a fence, at a cost of over two hundred dollars; and cultivated it for two years, but did not pay any portion of the purchase money. In November, 1869, Robinson became embarrassed in his finances, and fearing that his interest in the land might be interfered with by his creditors, by attachment or otherwise, on the fifteenth of the month he made a verbal arrangement with the plaintiff, surrendering his right to purchase the land. The plaintiff hired a man to do three days' plowing upon the land, but Robinson's family still remained upon the premises. On the 22d of November, 1869, Levensohn and Galland, who are defendants in this action, brought suit against Robinson, and levied an attachment on the interest of Robinson in the entire tract of two thousand

Argument for Appellant.

five hundred and forty-two acres. Judgment for one thousand two hundred and sixty-five dollars and costs was rendered against Robinson, and, under the execution, the creditors levied upon Robinson's interest in the whole tract. The plaintiff brought this suit to enjoin the defendant Hale, as Sheriff, from making the sale. In their answer, the defendants plead that, by virtue of their judgment against Robinson, they became subrogated to his rights under the contract of purchase with the plaintiff, and offer to pay the amount of purchase money which they allege to be due, whenever the plaintiff shall convey the title to them. They ask judgment that the Robinson tract be sold, that the purchase money coming to the plaintiff be paid to him out of the proceeds, and the balance be applied on the execution under the judgment in the former action. The case was tried by the Court without a jury. The Court held that the defendants were entitled to be subrogated to the equities of Robinson under the agreement of purchase, and decreed that, on the payment to the plaintiffs of two dollars per acre for the one hundred and twenty-five acres, the plaintiff convey the legal title to the defendants. From this judgment the plaintiff appealed.

Beatty & Denson, for Appellant.

Either Robinson had or had not an interest in the land capable of being levied on and sold. If he did not have such interest, of course there could not be such a decree as was rendered in this case. If he did have such interest, the decree is equally erroneous. How could the Court tell what that interest was worth? It might be worth ten thousand dollars — it might not be worth ten dollars. After the land was conveyed to the creditors of Robinson, what would become of the judgment and execution? Would it be satisfied in whole or in part? Or would the creditors have Robinson's land, and Robinson still owe the entire debt? A

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levy does not divest a man of his property; it only creates a lien. The final divestiture of the property only arises when a sale shall have taken place. How, then, came the creditors of Robinson to be entitled to the conveyance from Logan? Neither Logan, Robinson, nor the Sheriff had sold them any land. But, perhaps, it may be said Robinson is not appealing, and the decree can do the appellant no harm, because it makes no difference to him whether he deeds the land to Robinson or his creditors. If Robinson was before the Court in this proceeding, so as to bind him by the decree, and it was, on proper investigation, determined that the plaintiff, on his receiving two hundred and fifty dollars, was bound to convey one hundred and twenty-five acres of land, it would make but little difference to him to whom he made the conveyance. But that is a mooted point, and it is one which cannot be determined without bringing Robinson into Court. He is not a party to this action. Suppose the plaintiff were, in accordance with the terms of the decree in this case, to deed one hundred and twenty-five acres of land of Robinson's creditors. If Robinson were afterwards to sue for a specific performance, or damages in lieu thereof, if performance could not be had, it would be no answer to the complaint for Logan to say: "I have already deeded the land to your creditors." Robinson could well say: "I was no party to that proceeding; I am not bound by it; my interest in this particular land has never been sold; I either want the land or full compensation for it."

G. P. Braynard, for Respondents.

By the Court, CROCKETT, J.:

Waiving the question whether the levy of the defendants' attachment and execution, and the threatened sale under the execution, created a cloud upon the plaintiff's title, and whether the plaintiff had such a possession of the land sold

to Robinson as would enable him to maintain an action to quiet his title under section two hundred and fifty-four of the code, I proceed to inquire whether the defendants are entitled to the relief awarded to them by the Court below. Allowing to the pretensions of the defendants Levensohn and Galland the widest latitude, the utmost that they can rightfully claim on the facts disclosed by the record is that, by reason of their judgment, attachment, and execution, they have acquired a lien, for the security of their debt, upon whatever interest Robinson had in the land purchased from the plaintiff. But I am unable to discover on what possible theory of the facts contained in the record the Court arrived at the conclusion that the execution creditors were entitled to a conveyance of the land from the plaintiff. The levy of their execution did not entitle them to be subrogated to all of Robinson's rights, but only to a lien on his interest in the land, to be enforced by a sale under the execution. Robinson was not a party to the action, and is not bound by the judgment. If the plaintiff should submit to the judgment, and convey the land, as he is ordered to do, to the execution creditors, the judgment would be no bar to a subsequent action by Robinson, against the plaintiff, to compel a conveyance. Moreover, the land may be worth four times the amount of the judgment, and it may be that, under the parol agreement for a rescission of the contract between Robinson and the plaintiff the latter would be entitled to the surplus proceeds of the sale, even though it be conceded that Robinson had an interest in the land which is subject to the execution. In any view of the case, that portion of the judgment is erroneous which directs the plaintiff to convey the land to the judgment creditors.

The Court also erred in refusing to amend its findings on the request of the plaintiff. The findings, as filed, omitted

Points decided.

to find upon several of the material issues in the cause, and the Court should have supplied the omission when its attention was called to the subject by the plaintiff's exceptions to the findings.

It was admitted at the trial that the plaintiff was the owner, in possession, of the whole of a tract containing over twenty-five hundred acres, except a small parcel in one corner thereof, containing about one hundred and twenty-five acres, which it was claimed he had sold to Robinson by a verbal contract. It was not pretended that Robinson had any interest, whatever, except in the small parcel above referred to, and yet the Sheriff levied upon and advertised for sale Robinson's interest in the whole tract. When the judgment debtor has, or claims, an interest in only a small, well defined parcel of a much larger tract, it is extremely irregular, to say the least, to levy the execution upon his interest in the general tract, instead of the particular parcel which he claims. I am strongly inclined to think, but do not express a positive opinion on the point, that upon an irregular levy of this character, and a threatened sale under it, the plaintiff, in possession of the larger tract, would be entitled to enjoin the sale, except of the smaller parcel claimed by the judgment debtor.

Judgment reversed and cause remanded for a new trial.

[No. 2,854.]**SEWELL v. PLACER COUNTY.**

SALARY OF COUNTY CLERK OF PLACER COUNTY.—The Act of February 25th, 1858, concerning the office of County Clerk of Placer County (Stats. 1858, p. 29), does not limit the salary of the Clerk to the amount of fees received by him; and if the fees collected for any one month do not amount to the salary to which he is entitled, he can recover the difference from the county.

Argument for Appellant.

STATUTE REQUIRING OFFICERS TO PAY OVER FEES, LESS SALARY.—

Where a statute concerning the office and fixing the salary of a County Clerk provided that he should collect all official fees, and at the first of every month pay the same over to the County Treasurer, "less his salary for the next preceding month;" and the fees for several months being less than the salary, it was claimed that the salary was only payable out of the collected fees; *held*, that he was entitled to his full annual salary, and that there was no legislative intention to limit the salary to the amount of fees received.

APPEAL from the District Court of the Fourteenth Judicial District, Placer County.

This action was brought to recover one thousand five hundred and forty-four dollars and forty-one cents, being the amount due the plaintiff during his term of two years. The complaint averred that the plaintiff paid into the County Treasury during his term of two years two thousand five hundred and sixty-eight dollars and fifty-six cents, and that during the same time there was drawn out of said sum for Deputy Clerk, the sum of one thousand four hundred and thirty-seven dollars. The defendant demurred to the complaint; the demurrer was overruled, and judgment by default rendered in favor of the plaintiff.

The other facts are stated in the opinion.

H. H. Fellows, District Attorney of Placer County, for Appellant.

Payment of the salary is to be made out of such fees as shall have been received by him as County Clerk, and not otherwise. (Vide Stats. 1868, pp. 29, 30.)

The first and subsequent sections of the Act referred to provide that the money for the payment of the same shall be collected from the fees of the office. No other source for the payment of the salary being provided, the Clerk must bear the consequences. He entered upon his duties as Clerk with full knowledge of the law, and if the fees have not

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amounted to a sum^e equal to his salary he ought not to complain.

Hale & Craig, for Respondent.

The maxim *expressio unis est exclusio alterius* directly applies, and as a consequence the statutory expression of a limitation of the county's liability to the Deputy Clerk for salary to moneys coming to the Treasury from the fee fund, is in effect an exclusion of the like or any other limitation of the county's liability to the County Clerk for the full sum of his salary as fixed by law.

By the Court, NILES, J.:

The plaintiff's right to recover depends upon the construction of the Act of February 25th, 1858, "concerning the office of County Clerk of Placer County." (Stats. 1858, p. 29.)

Section one of the Act provides that the County Clerk shall "receive, for all services required of him by law in his said office, * * * a salary at the rate of three thousand five hundred dollars per annum, which salary shall be in full for all services required of him. * * * And the money for the payment of the same shall be collected and retained by said Clerk in the manner hereinafter provided."

Section three provides that the Clerk shall collect all official fees, "and upon the first Monday in each and every month shall pay the same over to the County Treasurer of said county, less his salary for the next preceding month."

The plaintiff was County Clerk, and during several months of his term the receipts for official fees did not equal the amount of his salary proportioned to those months; but the receipts for the entire year exceeded the amount of his salary. The Board of Supervisors refused to allow the plaintiff's claim for the difference between the receipts for fees

and the salary for these months, and the plaintiff sues to recover it.

The defendant claims that the salary of the Clerk is only payable from the fund arising from collected fees. This is a forced construction of the statute. The provision of section one, that "the money for the payment of the same (the salary) shall be collected and retained by the Clerk," and that of section three, requiring him to pay over the surplus of collected fees to the Treasurer, were evidently intended to secure to the county the revenue derivable from the excess of fees over salary upon the one hand, and to provide a convenient method for the payment of the salary upon the other. But they were not intended to lessen the amount of the annual salary as fixed by the Act.

This construction of these sections is aided by a consideration of the second section of the Act. This section authorizes the employment by the Clerk of a deputy, at a certain salary, but provides that the salary of the deputy shall not be allowed by the Board, "unless there shall have been paid over to the County Treasurer, by the County Clerk, a sum or sums equal to, or greater, than the sum claimed to be due for services rendered by the said Deputy Clerk." This restriction upon the allowance of the deputy's salary, and the absence of any restriction in the case of the Clerk, shows satisfactorily that it was not the intention of the Legislature to limit the salary of the Clerk to the amount of fees received by him.

Judgment affirmed.

Opinion of the Court — Niles, J.

[No. 2,367.]

**HENRY CROWELL v. WATTEO LANFRANCO AND
VICTOR REGALADO.****POSSESSORY ACT—FORCIBLE DRIVING OFF OF INTENDED SETTLER.—**

Where a person, with intention to take up a tract of public land under the Possessory Act (Stats. 1852, p. 158), filed his affidavit of location, and within ninety days thereafter hauled lumber upon the ground for a house; and such lumber was removed during the night; and on his attempting to replace it next day he was driven off with threats of violence by a band of armed men: *Held*, that he had acquired no rights under the Possessory Act which would enable him to maintain ejectment against those who drove him off.

REQUIREMENTS OF POSSESSORY ACT CONDITIONS PRECEDENT.—The possessory statute (Stats. 1852, p. 158), confers no right, such as will maintain ejectment, upon a settler, until all the acts required by it shall have been performed; and it does not affect the question that he has been prevented by force or otherwise from making his intended improvements.

APPEAL from the District Court of the Seventeenth Judicial District, County of Los Angeles.

The facts are stated in the opinion. There having been a judgment for plaintiff and motion for new trial overruled, defendants appealed from the judgment and order.

A. Brunson and C. H. Larrabee, for Appellants.

V. E. Howard and Y. Sepulveda, for Respondent.

By the Court, NILES, J.:

Ejectment to recover one hundred and fifty acres of land in the County of Los Angeles. The answer was a general denial. The plaintiff claimed under the Act entitled "An Act prescribing the mode of maintaining and defending possessory actions on public lands in this State," commonly known as the Possessory Act.

He offered in evidence his affidavit of location filed with the County Recorder May 1st. 1869.

He offered further testimony showing that about the 10th or 15th day of July, 1869, he hauled some lumber upon the premises with which he intended to build a house. On the next day he visited the premises and found that the lumber had been removed and placed in the road. He endeavored to replace it upon the land, but was stopped by a number of armed men, among whom was one of the defendants, who forbade his entry and drove him away by threats of violence.

The defendants moved for a nonsuit "for the reason that plaintiff has not shown such a possession of the lands in question, nor such improvements on said lands, nor such a compliance with sections three and four of the Possessory Act as entitled him to recover."

The Court refused the motion, and this ruling is assigned as error.

The second section of the Act declares that "no person shall be entitled to maintain any such action for possession of or injury to any claim unless he or she occupy the same and shall have complied with the provisions of the third and fourth sections of this Act."

Section three provides for the filing and record of the affidavit of the claimant.

Section four provides, that "within ninety days after the date of said record the party recording is hereby required to improve the land thus recorded to the value of two hundred dollars, by putting such improvements thereon as shall partake of the realty, unless such improvements shall have been made prior to the application to record," etc.

The provisions of the statute are plain and positive. It does not undertake to confer any title to the land. It gives to the claimant at most a constructive possession, and a corresponding right to protect it against a naked trespasser. *Dehors* the statute claimant would have no rights in the premises. It prescribes a series of acts, upon a complete

performance of which his possession and right of action accrues. The performance of a single required act gives him no right. The filing of the affidavit is valueless until the other equally essential act — the placing of the required improvements — shall have been performed. When this is done, the right of the claimant will take effect, by relation, from the date of the first act of the series.

The necessity of a strict compliance with the provisions of this statute has been frequently declared by this Court. (*Sweetland v. Froe*, 6 Cal. 145; *Wright v. Whitesides*, 15 Cal. 47; *Hicks v. Whitesides*, 23 Cal. 408.)

It does not affect the question that the plaintiff in this case was prevented from making the improvements by force, whether exercised by the defendants or by others. The Legislature has given to citizens a right unknown to the common law, which it declares shall be available only when the citizen shall have performed certain acts. These acts are conditions precedent to the acquisition of the right. The statute does not provide for the contingency of an unavoidable failure to perform. The Courts cannot provide for it by construction.

The nonsuit should have been granted, because the plaintiff failed to prove that he placed the required improvements upon the land within the time prescribed by the statute.

This view of the case renders the consideration of other points unnecessary.

Judgment reversed and cause remanded for new trial.

By RHODES, J.:

I concur in the opinion and judgment, but do not wish to be understood as thereby asserting or even by implication admitting that the State has competent power in view of the Act of Congress admitting California into the Union as a State to confer any right by means of an Act of the charac-

Statement of Facts.

ter of that mentioned in the opinion of Mr. Justice NILES, in the public lands of the United States, or even to declare that a certain act or series of acts performed by any person shall constitute possession, or be evidence of possession when the same acts would not amount to possession under the laws of the United States.

Mr. Chief Justice SPRAGUE did not participate in the foregoing decision.

[No. 2,493.]

**NATHAN BARBOUR v. LEWIS PIERCE, AND LEWIS
PIERCE v. NATHAN BARBOUR.**

RIGHT OF WAY BY LICENSE.—Where a party uses a way over land belonging to another, by agreement with the owner of the land, and the land is sold to a third party without notice of the arrangement as to the right of way, the third party is not bound by the arrangement.

IDEM.—In order to maintain a right of way, acquired by parol license, as against a purchaser from the one who gave the license, the one claiming such right of way must show a right based on prescription.

SAME, NOW RIPENED INTO PERFECT TITLE.—The use of a way which began under a parol license, may, by prescription, ripen into a perfect title; but in such case the user must have been exercised under a claim of right for the period prescribed for the Statute of Limitations.

APPEAL from the District Court of the Seventh Judicial District, Solano County.

In January, 1870, Nathan Barbour commenced an action to enjoin Lewis Pierce from obstructing a private road and right of way, which he claimed to have acquired by prescription over the land owned by Pierce. In March of the same year Pierce commenced an action to restrain Barbour from using the way. The two cases were tried together by the Court without a jury. In the first case the Court filed the following findings of fact and conclusions of law.

Statement of Facts.

"1. That in 1861 Alfred Alford was the owner and in possession of a tract of land in Solano County, including the strip of roadway in suit.

"2. That in said year plaintiff attempted to secure a private road over the premises of Alford, on the east side of the creek, to his (plaintiff's) premises, in pursuance of the law of this State and took such steps as secured the appointment of viewers by the Supervisors.

"3. That while the viewers were upon the ground, the project of opening a road where plaintiff wanted it—to wit: on the east side of the creek—was abandoned, for the reason that neighbors interfered, and a compromise (the terms of which do not clearly appear) was effected, and a road was agreed to be opened at the point in dispute.

"4. That on the advice and at the suggestion of one of the viewers, Alford (who was the plaintiff's father-in-law) proffered to give him a roadway on the *west* bank of the creek—to wit: the strip in suit; that plaintiff accepted the offer, and, with the consent and permission of Alford, entered into the enjoyment of said right and roadway, and built a bridge at the point where said roadway terminates at the main public road, and also some fencing along the line of the roadway, the bridge and fencing amounting in value to six hundred dollars. The said improvements were necessary to the enjoyment by plaintiff of his way, and do not appear to have been of any value to Alford, or any advantage to his property.

"5. That plaintiff continued to use and pass over said roadway, with the knowledge of Alford, and without objection, until 1869, when Alford sold and conveyed the premises, over which said roadway ran to defendant, Pierce, who had no notice of the verbal arrangement between Alford and the plaintiff.

"6. That plaintiff, at various times while using said roadway, asked Alford to convey the same, and the strip of land

Statement of Facts.

covered thereby, to him by deed, and that Alford always declined and refused to do so.

"7. That defendant, Pierce, after his purchase, closed said roadway at the point where it intersected the main public road."

And as conclusions of law:

"1. That plaintiff took his interest in said roadway, and used the same by the permission and with the consent of Alford; that his rights therein were acquired and held by license merely, and that plaintiff did not and could not acquire any rights by reason of such use, by prescription or otherwise, which he could enforce against Pierce.

"2. That whatever rights plaintiff had in said roadway were held at the will of Alford, and terminated with his conveyance to Pierce."

In the second case the Court found similar facts, and made the following additional findings:

"4. That after Pierce purchased the premises, he caused the said roadway to be closed up, by fencing it at the point where it terminated in the main public road; that defendant removed said fence, which was replaced by plaintiff, and removed by defendant, repeatedly and continuously up to the time of the commencement of this suit.

"5. That there was no other agreement between Alford and Barbour than as above set forth, and that Pierce had no notice of any right claimed by Barbour in the premises, aside from the fact that said road was used by Barbour in the manner found above."

As conclusions of law, the Court finds:

"That the right of defendant to the use of said road rested in license from Landy Alford, and that said license terminated with the conveyance to plaintiff.

Argument for Appellant.

"That no adverse claim or right was held by Barbour in or to said roadway as against Alford, and that he acquired no rights under said license by use, prescription, or otherwise."

Judgment was rendered against Barbour in each case and he appealed therefrom.

M. A. Wheaton and John Currey, for Appellant.

By the agreement entered into between Alfred Alford and Nathan Barbour, and the acceptance by Barbour of the gift or grant from Alford of the right of way on the west bank of the creek, and his entry therein, and his continued and uninterrupted use and enjoyment of the way given and granted, with the knowledge and acquiescence of Alford, for over eight years, Barbour acquired an absolute right of way, in and over the land particularly described, in the complaint of Barbour. (Statute of Limitations, 2 Hit. Dig. 4348, 4349; *American Company v. Bradford*, 27 Cal. 366, 367; Washburne on Ease. 84, 85; *Eldredge v. Knott*, 1 Cowper, 214; *Campbell v. Smith*, 3 Halsted. 141; *Morse v. Copeland*, 2 Gray, 302; *Sherwood v. Burr*, 4 Day, 244; 1 Greenleaf's Ev. Sec. 17; Wash. on Ease. 19.)

The abandonment by Barbour of the proceeding to open a road on the east bank of the creek, and the expenses paid out by him in building a bridge, etc., was a sufficient consideration, together with his subsequent possession and use of the roadway, to support his right of way over said land, as a purchaser thereof. (*Miller v. Drake*, 1 Cain's R. 45; *Converse v. Kellogg*, 7 Barb. 590.)

As a gift, with its acceptance, and use and enjoyment of the roadway, as already mentioned, for over five years, Barbour acquired an absolute right to such way. (*Peck v. Brummagim*, 31 Cal. 440; *Dow v. Gould & Curry S. M. Co.*, 81 Cal. 652, 653.)

Argument for Respondent.

A parol grant or gift of the right of way or easement, followed by possession, use, and enjoyment of it, with the knowledge and consent of the grantor or donor, for over five years, invests the grantee or donee with an absolute title to the right of way or easement. (Wash. on Ease. 160, 88; *Ashley v. Ashley*, 4 Gray, 197; *Sumner v. Stevens*, 6 Metc. 337, and the cases therein cited; *Arbuckle v. Ward*, 29 Vt. 43, 52.)

The possession, use, and enjoyment of the easement by Barbour were adverse to Alford for over eight years. (Wash. on Ease. 88; 6 Metc. 337; 29 Vt. 43, 52; *Cannon v. Stockman*, 36 Cal. 538, and the cases therein cited; *Averill v. Wilson*, 4 Barb. 185.)

W. H. Patterson, for Respondent.

The Court found that Alford gave a parol license to Barbour to use the land as a roadway—during the will of Alford—for which no consideration passed.

The acceptance by Barbour of the parol license, and acting under it, prevented the Statute of Limitations from commencing to run. (38 New York, 111; *Parker v. Foot*, 29 Wend. 313; 14 New York, 249.) B.'s repeated application to A. for a deed precludes the idea of a grant, or holding adversely.

The license was revocable at the pleasure of his successor. (*Miller v. The Auburn and Syracuse R. R. Co.*, 6 Hill, 61; *Mumford v. Whitney*, 15 Wend. 380; *Bridges v. Purcell*, 1 Dev. & Batt. 492; *Noyes v. Chapin*, 6 Wend. 461, 464; *Thompson v. Gregory*, 4 Johnson, 81; *Jamison v. Millemun*, 3 Duer, 355; *Dexter v. Hazen*, 10 John. 246; 5 Barbour, 379; *Wood v. Leadbetter*, 13 M. & W. 838; 10 Barbour, 333.) And was revoked by the conveyance to Pierce. (6 Hill, 64; *Jackson v. Babcock*, 4 Johnson, 418; *Hittell's Digest*, 3150, Sec. 6, Stat. of Frauds.)

Wm. S. Wells and *W. W. Pendegast*, also for Respondent.

By the Court, RHODES, J.:

It is found that Pierce purchased the land over which the road in controversy ran, from Alfred Alford, without notice of the arrangement between Alford and Barbour respecting the road. Pierce, therefore, is not bound by the arrangement, as such; and Barbour, in order to succeed in maintaining his claim to the right of way, must show a right based upon adverse possession — or, as it is usually denominated, when applied to a way, prescription. That the right may become perfect by prescription, where the use began under a parol gift, is abundantly shown by the authorities cited by the appellant's counsel. The authorities also sustain the position that the user, which had its origin in license or permission, may by prescription ripen into a perfect title; but in such case the user must have been exercised for the period prescribed by the Statute of Limitations, *under a claim of right*. This qualification is of course applicable also where the right has its origin in a parol gift or sale.

It was found by the Court in the first case that Barbour, "with the consent and permission of Alford, entered into the enjoyment of said right and roadway;" and it is also stated, among the conclusions of law, that Barbour "took his interest in said roadway, and used the same by the permission and with the consent of Alford; that his rights therein were acquired and held by license merely; and that plaintiff did not and could not acquire any rights, by reason of such use, by prescription or otherwise, which he could enforce against defendant, Pierce." This latter, though found among the conclusions of law, is a fact, or perhaps more than one fact. Whether Barbour took or held his interest by grant, gift, or license, are questions of fact; and whether he acquired a right by prescription is also a question of fact. That the question of adverse possession or of prescription is a question of fact there can be no doubt. It

would not assist the appellant, Barbour, to leave that finding where the Judge of the Court below improperly placed it, for the Court neither found the prescription claimed by Barbour nor the elements going to compose it. The user is found; but it is not found that it was exercised under claim of right, or adversely to Alford.

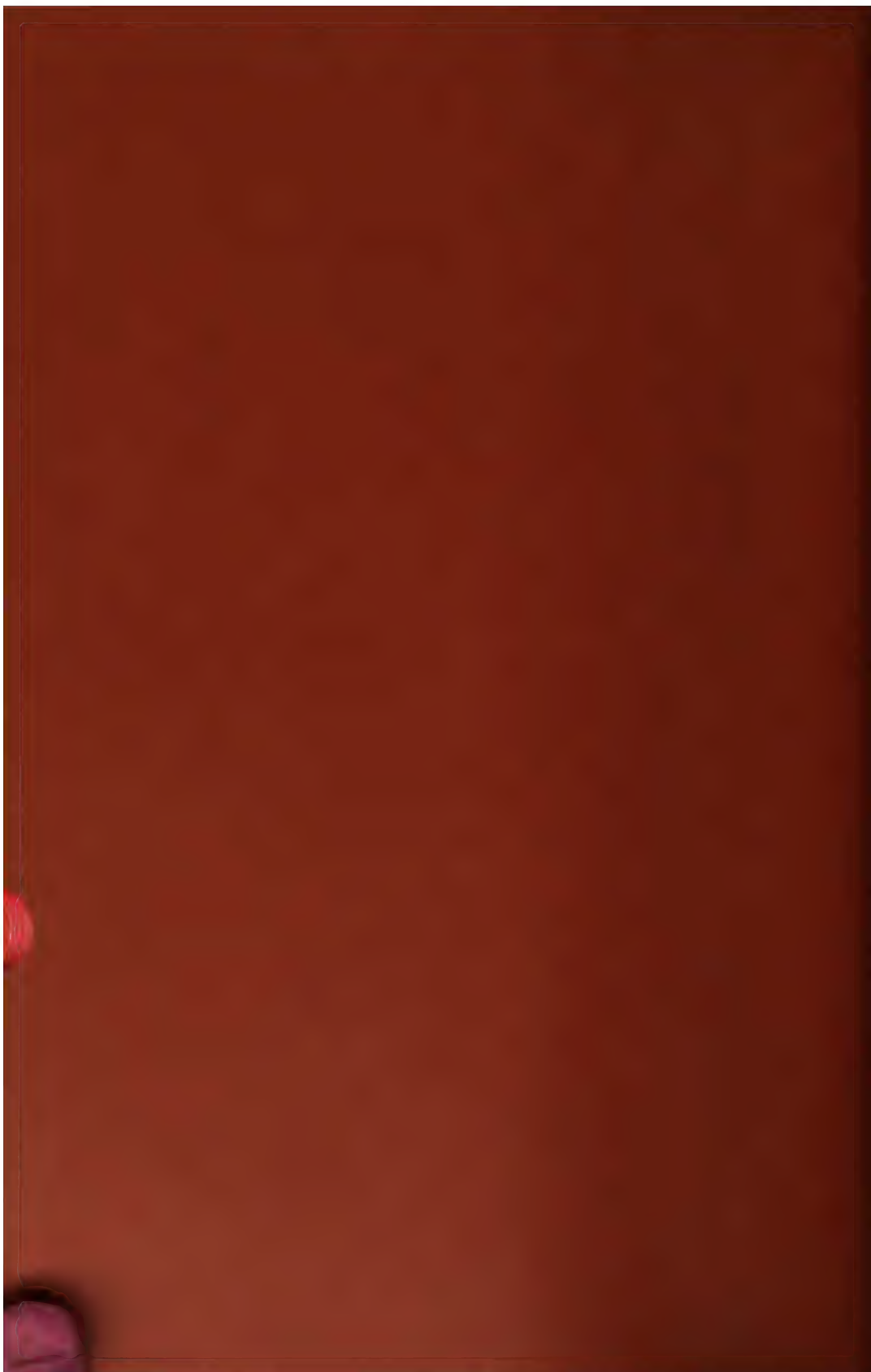
In the second case the findings are substantially the same as in the first, in the respects we have mentioned. Not only has the Court not found for Barbour on the issue of prescription, but has found against him in this as in the first case, though here again the finding is improperly called a conclusion of law. In the first case, the finding that he took and held by license merely negatives the possibility of an adverse holding; and in the second case the finding is directly against the adverse claim, and right by prescription, on the part of Barbour. We are, therefore, of the opinion that the appellant, Barbour, is not entitled to judgment, in either case, on the findings.

Judgment in each case affirmed.

Mr. Chief Justice WALLACE did not express an opinion.



EXTRA ANNOTATION
TO
PRECEDING VOLUME



VOLUME XLII.

By ALBERT RAYMOND.

Revised to include citations to Volume 147, by CHARLES L. THOMPSON.

42 Cal. 11-18. GOODYEAR v. WILLISTON.

Mortgage on Growing Crop remains a lien until crop severed and placed in condition capable of manual delivery and transportation, p. 17.

Cited to same effect in *Waterman v. Green*, 59 Cal. 142, construing Civil Code, section 2972; *Horgan v. Zanetta*, 107 Cal. 32, holding, further, attaching creditor not estopped by facts from asserting termination of lien; *Ford v. Sutherland*, 2 Mont. 442; *Gillilan v. Kendall*, 18 Am. St. Rep. 771, defining "now growing and standing" grain as used in mortgage. *White v. Brown*, 1 Ind. Ter. 106.

42 Cal. 18-21. PEOPLE v. AH YING.

Insanity at Trial.—Question must be determined before main issues decided on doubt arising on court's own motion, and without necessity of plea, p. 20.

Cited to same effect in dissenting opinion, *People v. Lee Fook*, 85 Cal. 304, main opinion, distinguishing principal case, pp. 302, 303, sustaining refusal to submit question of insanity to jury, under pleadings; *People v. McElvaine*, 125 N. Y. 609, holding discretionary submission of question to commission under local statutes.

42 Cal. 27-34. BORNHEIMER v. BALDWIN.

Time for Appeal.—Statutory limitation is peremptory, p. 31.

Cited to same effect in *Henry v. Merguire*, 111 Cal. 2, holding time not extended by facts stated; *Weinrich v. Porteus*, 12 Nev. 104, ruling similarly as to appeals from successive orders; *Solomon v. Fuller*, 13 Nev. 278, dismissing appeal from judgment because not taken in time; *Cedar Canyon etc. Min. Co. v. Yarwood*, 27 Wash. 282, fact that no discovery of mineral had been made upon mining claim at time of its location cannot be questioned by cotenant in contest between cotenants; and dissenting opinion, *Blythe etc. Co. v. Swenson*, 15 Utah, 365, on same point.

Tenant in Common cannot while in possession assail common title or call its validity in question, p. 34.

Cited to same effect in *Olney v. Sawyer*, 54 Cal. 382, denying right to assert purchase of outstanding title as against suit of cotenant to be let into possession. Cited, also in note on general subject to *Gilliam v. Bird*, 49 Am. Dec. 389; *Rice v. St. Louis etc. Co.*, 47 Am. St. Rep. 78.

42 Cal. 35-75. APPEAL OF HOUGHTON.

Appeal Does not Lie from judgment of county court on report of commissioners for modifying street grades, when declared by statute to be "final and conclusive," p. 51.

Cited to same effect in *San Francisco v. Certain Real Estate*, 42 Cal. 520, on point that such judgment under similar act cannot be collaterally attacked; *Spencer v. Vallejo*, 48 Cal. 72, as to which see *Bixler's Appeal*, *infra*, affirming jurisdiction of county court in proceedings to condemn water for use of cities; *Bixler's Appeal*, 59 Cal. 554, 555, 557, as to judgment of superior court on appeal from order of supervisors in swamp land proceeding; *Tyler v. Connolly*, 65 Cal. 30, as to judgment imposing fine for contempt though amount within statutory requirement; dissenting opinion in *Sharon v. Sharon*, 67 Cal. 214, main opinion sustaining appeal in action for divorce and to determine validity of disputed marriage; *In re Curtis*, 108 Cal. 663, as to proceeding against supervisor for misdemeanor in office (Penal Code, sec. 772); *State v. Oshkoosh*, 84 Wis. 566, as to condemnation proceedings where no appeal allowed by statute; and holding statute constitutional although only remedy by certiorari provided. Cited, also, in note on general subject to *Conant v. Conant*, 70 Am. Dec. 724.

Statutes Concerning Appeals should be so construed as to allow right when possible, p. 52.

Cited to same effect in *Payne v. Davis*, 2 Mont. 382, granting right under local statutes; *Portland v. Gaston*, 38 Or. 537, denying supreme court's jurisdiction over appeal from circuit court in street condemnation proceedings under Laws of 1898, 101, 146, sections 112, 114, 117.

Streets—Appeal.—Finality of judgment of county court discussed, p. 53.

Cited in *Lambert v. Bates*, 137 Cal. 679, discussing nature of appeal to board.

Procedure on Appeal may be regulated by appellate court when jurisdiction conferred but no procedure established by statute, p. 58.

Cited to same effect in *People v. Jordan*, 65 Cal. 649, as to cases of misdemeanor prosecuted by indictment; *Sharon v. Sharon*, 67 Cal. 219, discussing right of appeal in action to determine validity of disputed marriage and for divorce; *State v. District Court*, 24 Mont. 563, and *Western etc. Co. v. St. Ann Co.*, 22 Wash. 163, discussing powers of supreme court under local statutes.

Jurisdiction of Supreme Court.—Power of legislature over, discussed, p. 62.

Cited in *Ex parte Towels*, 48 Tex. 446, discussing legislative power over appeals in election contests.

"Special Cases" are within appellate jurisdiction of supreme court, p. 66 (dissenting opinion).

Cited to same effect in *Stockton etc. Co. v. Galgiani*, 49 Cal. 140, as to proceeding to condemn land for railroad; *Lord v. Dunster*, 79 Cal. 483, 484, 486, as to election contest, and see *People v. Perry*, 79 Cal. 108, as to proceedings in nature of quo warranto to try title to office, both distinguishing and commenting on main opinion in principal case; dissenting opinion in *State v. Thayer*, 158 Mo. 55, on point that right cannot be created by intendment beyond clear expression of legislative intent.

42 Cal. 75-86. PAGE v. VILHAC.

Mortgage.—Deed with agreement for resale held to constitute, p. 78.

Cited in *Garwood v. Wheaton*, 128 Cal. 404, ruling similarly under facts stated; *Spalding v. Brown*, 36 Or. 167, noted under *Henley v. Hotaling*, 41 Cal. 22.

42 Cal. 86-107. ATKINS v. GAMBLE. 10 Am. Rep. 232.

Action for Conversion lies against bailee who has sold property in violation of authority, p. 98.

Cited to same effect in *Payne v. Elliott*, 54 Cal. 341, 35 Am. Rep. 82, sustaining right of action for conversion of "shares" of stock, independently of certificate therefor; and *Kuhn v. McAllister*, 1 Utah, 273, sustaining conversion for stock and holding complaint sufficient on default.

Certificates of Stock are not negotiable instruments, p. 99.

Cited to same effect in *Sherwood v. Meadow etc. Co.*, 50 Cal. 414, discussing rights of bona fide purchaser of lost endorsed certificate.

Pledgee of Stock is liable in nominal damages only for conversion when ready and willing to transfer to owner equivalent number of shares in same company, p. 101.

Cited to same effect in *Thompson v. Toland*, 48 Cal. 116, as to liability on redemption; concurring opinion in *Hayward v. Rogers*, 62 Cal. 372, following main case, however, on principle of stare decisis; *Krouse v. Woodward*, 110 Cal. 643, sustaining judgment for specific performance by pledgee of contract for return of stock by compelling him to transfer his own certificate for equal amount; *Craig v. Hesperia etc. Co.*, 113 Cal. 12, 54 Am. St. Rep. 318, on point that identity of shares is not affected by transfer of certificate, and transfer is subject to lien for unpaid assessments; *Marshall v. Marshall*, 11 Colo. App. 512, holding trustee liable to return such equivalent of shares intrusted to him; *Allen v. Dubois*, 117

Notes Cal. Rep.—134.

Mich. 117, 72 Am. St. Rep. 559, but holding pledgor entitled to identical shares when capable of identification; *Morris v. East Side Ry. Co.*, 104 Fed. 417, applying rule of identity to bonds sold on pledgee's sale; note to *Wilson v. Little*, 51 Am. Dec. 314, on measure of damages for conversion by pledgee; *Horton v. Morgan*, 75 Am. Dec. 319, on general subject; *Griggs v. Day*, 32 Am. St. Rep. 724, on liabilities for unlawful use of collateral.

General Citations.—*Koontz v. Oregon Ry. etc. Co.* 20 Or. 18; *Southern Pac. R. Co. v. Dufour*, 95 Cal. 620, 623, ownership of percolating waters.

42 Cal. 110-121. **CALDERWOOD v. PEYSER.**

Appeal.—“Order After Judgment” includes order made subsequent to judgment, striking from files statement on motion for new trial, p. 112.

Cited to same effect, as to such subsequent orders, in *McDonald v. McConkey*, 57 Cal. 326, order dismissing motion for new trial; and *Marshall v. Golden Fleece etc. Co.*, 16 Nev. 169, order refusing to dismiss, and amending records; *Clark v. Crane*, 57 Cal. 633, order refusing to settle statement; *Stonesifer v. Hilburn*, 94 Cal. 42, order refusing to settle bill of exceptions; but see *State v. Murphy*, 19 Nev. 94, sustaining mandamus to compel such settlement; *Odd Fellows' etc. Bank v. Deuprey*, 68 Cal. 170, order denying motion to vacate former order refusing new trial; *Empire Co. v. Bonanza Co.*, 67 Cal. 410, 411, and *Comstock etc. Co. v. Allen*, 21 Nev. 329, order taxing costs; and *Mining Co. v. Weinstein*, 7 Mont. 348, order adjudging costs; *Sutton v. Symons*, 97 Cal. 476, order striking out statement, and see S. C. 100 Cal. 577; and *Symons v. Bunnell*, 101 Cal. 223; *White v. Superior Court*, 110 Cal. 57, order directing sale by receiver of husband's property to satisfy judgment for alimony; *Beach v. Spokane etc. Co.*, 21 Mont. 8, 25 Mont. 368, as to such orders extending time to file bill of exceptions, and striking bill from files; *Clarke v. Gonn*, 2 Mont. 439, order refusing to stay execution.

Statement on Motion for New Trial should not be stricken from files because not served, p. 121.

Cited to same effect in *Vole v. Hollis*, 60 Cal. 572, holding erroneous order denying such motion for want of prosecution, statement having been filed in due time; *Beach v. Spokane etc. Co.*, 25 Mont. 374, noted under *Quivey v. Gambert*, 32 Cal. 304.

42 Cal. 125-129. **FAIRCHILD v. DOTEN.**

Judgment Upon Arbitration is void if statute not complied with, p. 129.

Cited to same effect in *Kreiss v. Hotaling*, 96 Cal. 622, sustaining perpetual stay of judgment entered by clerk, because of such noncompliance, and discussing validity as common-law award.

42 Cal. 129-134. BANK v. HOWLAND.

Nonpresentation of Claim against decedent cannot be first urged in appellate court, p. 134.

Cited to same effect in *Drake v. Foster*, 52 Cal. 227, where defendant died during trial and administrator substituted, but no claim presented; on same point, *Preston v. Knapp*, 85 Cal. 561, where presentation admitted on trial; and see *Falkner v. Hendy*, 107 Cal. 53, discussing procedure on such substitution; *Chase v. Envoy*, 58 Cal. 353, and *Wise v. Hogan*, 77 Cal. 188 (and see 187), sustaining allegations of complaint as to presentation of claim; *Bemmerly v. Woodward*, 124 Cal. 574, noted under *Hentach v. Porter*, 10 Cal. 555; *Rose v. Pierce Co.*, 25 Wash. 121, applying rule to presentation of claim against county; *Neis v. Farquharson*, 9 Wash. 517.

Presentation of Claim against decedent must be alleged and proved, p. 132.

Cited to same effect in *Wise v. Hogan*, 77 Cal. 187, sustaining allegations of complaint as to presentation; *Derby v. Jackman*, 89 Cal. 5, holding erroneous judgment on pleadings in suit on claim, where verification and presentation denied.

Joint Judgment against makers of note and administrator of deceased comaker is erroneous if not made as to latter payable de bonis testatoris, p. 131.

Cited to same effect in *Briggs v. Breen*, 123 Cal. 662, but permitting joinder of administrator of deceased promisor with latter's copromisors who were jointly liable; *Bostwick v. McEvoy*, 62 Cal. 502, sustaining, however, joinder of such parties as codefendants; *Braithwaite v. Power*, 1 N. Dak. 470, 471, sustaining judgment against all when administrator had been substituted for defendant dying pending suit, and judgment against him made payable in due course. Cited, also, in note on general subject to *Hawkins v. Ball's Admr.*, 68 Am. Dec. 762.

42 Cal. 139-148. BREWSTER v. SIME.

Owner of Mining Stock in name of another as "trustee" is bound by latter's acts as to all persons without actual knowledge of true ownership, p. 143.

Cited to same effect in *Thompson v. Toland*, 48 Cal. 113, as to sale and pledge by broker holding certificates so issued; and *Gass v. Hampton*, 16 Nev. 191, as to pledge by pledgee under like facts; *Newhall v. Central Pacific etc. Co.*, 51 Cal. 350, 21 Am. Rep. 717, applying principle to negotiation by vendee of bill of lading, as against vendor's lien; *Winter v. Belmont etc. Co.*, 53 Cal. 432, as to purchase in good faith of stolen stock certificate of W., issued in name of M., and by him indorsed in blank; *Woodsum v. Cole*, 69 Cal. 145, as to promissory note, holding, however, plaintiff not to be innocent purchaser under facts; *Moore*

v. Boyd, 74 Cal. 70 (from argument of counsel), considering such registry as to bar of stockholder's liability by statute of limitations; *Graves v. Mining Co.*, 81 Cal. 325, on a point that certificates indorsed in blank pass by mere delivery (but see same page, where main case criticised in holding that court will take judicial notice of course of stock transactions); *Savings Bank v. Central etc. Co.*, 122 Cal. 33, holding stockholders personally liable on their note, though signing as "trustees"; *Rua v. Watson*, 13 S. Dak. 456, holding bona fide purchaser protected in purchase from grantee described as "trustee" under facts stated. Denied in *Geyser, etc. Co. v. Stark*, 106 Fed. 563, holding corporation negligent in making transfer on request of such trustee, without obtaining consent of beneficiary; *Winter v. Montgomery, etc. Co.*, 89 Ala. 549, discussing rights of transferee of stock of wife registered in name of husband as trustee. Distinguished in *Gerard v. McCormick*, 130 N. Y. 268, as "not in accordance with the current of authority," holding addition of "agent" by drawer sufficient to put payee on inquiry as to ownership of fund drawn on. Cited, also, in note on general subject to *Johnson v. Lafia*, 5 Dill. 88; *Maples v. Medlin*, 3 Am. Dec. 690, where criticised; *Crocker v. Crocker*, 88 Am. Dec. 297, on rights of bona fide purchaser.

Delivery of Possession of Personalty does not per se constitute such indicia of ownership as to bind owner by transferee's acts p. 147.

Cited to same effect in *Shaeffer v. Lacy*, 121 Cal. 579, noted under *Robinson v. Haas*, 40 Cal. 474; *Creighton v. Black*, 2 Mont. 357, as to Montana militia vouchers where statute expressly prohibits assignments unless made in particular form.

42 Cal. 148-149. SPANGEL v. DELLINGER. S. C. 34 Cal. 476; 38 Cal. 278, sub nom. SPANAGEL v. DELLINGER.

Appearance of Counsel for defendants generally will be limited by prior express appearance as to some only, p. 149.

Cited to same effect in *Hobbs v. Duff*, 43 Cal. 492, as to appearance on motion for new trial; *Kennedy v. Parks*, 120 Cal. 23, as to general appearance on appeal, modified by stipulation in transcript.

42 Cal. 152-158. GRAY v. COLLINS.

"Forcible Entry" is one made with violence and strong hand on premises then held in peaceable possession, p. 157.

Cited to same effect in *Ely v. Yore*, 71 Cal. 133, 134, holding such entry shown by facts, although owner then absent. Cited, also, in note on general subject to *Evill v. Conwell*, 18 Am. Dec. 146.

"Actual Possession" defined and held shown under facts, p. 156.

Cited to same effect in *Schnepel v. Mellen*, 3 Mont. 135, construing "actual possession and occupancy" under Townsite Act; *Brooks v. Warren*, 5 Utah, 121, 122, holding possession insufficient to sustain action

for forcible entry. Cited also in *Townsend v. Edwards*, 25 Fla. 583, as defining "adverse" possession.

42 Cal. 159-165. *HILL v. HASKIN*. S. C. 51 Cal. 175, 177..

42 Cal. 165-169. *PEOPLE v. HARRINGTON*. 10 Am. Rep. 296.

Criminal Trial.—Prisoner cannot be chained or shackled during trial unless necessary to prevent escape, p. 167.

Cited to same effect in *Faire v. State*, 58 Ala. 80, holding, however, action of court discretionary and not reviewable on appeal; and see *Poe v. State*, 10 Lea (Tenn.) 678, holding no abuse shown; *Lee v. State*, 51 Miss. 570, 572, justifying shackling when necessary to prevent escape; *State v. Kring*, 64 Mo. 592, holding assault by prisoner in courtroom three months previously not sufficient justification; *Territory v. Kelly*, 2 New Mex. 302, holding convenience of court officers no justification but no sufficient cause shown for reversal under facts; *State v. Smith*, 11 Oreg. 208, reversing conviction, on this ground; *State v. Craft*, 164 Mo. 651, but held inapplicable to handcuffing after adjournment of court to facilitate removal from courtroom; *State v. Williams*, 18 Wash. 51, 63 Am. St. Rep. 872 (and note), reversing decision for such manacling; *State v. Allen*, 45 W. Va. 68, but holding matter within discretion of court, which is presumed not abused, when record is silent as to necessity therefor. Cited also in note on general subject to *State v. Lewis*, 27 Am. Rep. 117.

Prisoner is Entitled to be personally present during every stage of prosecution for felony, p. 168.

Cited in note on general subject to *Fight v. State*, 23 Am. Dec. 629.

Prisoner on Trial is in custody of law and subject to orders and control of court, p. 168.

Distinguished in *Lee v. State*, 51 Miss. 667, holding sureties not released by appearance of prisoner at trial if he afterwards escapes during trial.

42 Cal. 169-174. *FARMER v. GROSE*.

Deed with Defeasance Back is mortgage if debt still subsists and continues, p. 172.

Cited to same effect in *Page v. Vilhac*, 42 Cal. 83, and *Winters v. Swift*, 2 Idaho, 66, *McNamara v. Culver*, 22 Kan. 669, holding transaction not a mortgage under facts; *Husheon v. Husheon*, 71 Cal. 411, ruling similarly and holding no express promise of mortgagor to pay debt necessary, whether debt is antecedent, concurrent or to be subsequently created; *Gassert v. Bogk*, 7 Mont. 598, 599, ruling aliter on facts and stating general rules on subject; and see *Lawrence v. DuBois*, 16 W. Va. 462, holding transaction to be a mortgage; *Garwood v.*

Wheaton, 128 Cal. 403, 404, noted under Page v. Vilhac, 42 Cal. 75. Cited, also, in Klein v. McNamara, 54 Miss. 100, on point that equity leans in favor of mortgage rather than sale.

Parol Evidence is admissible to show deed absolute on face to be mortgage.

Cited to same effect in Gassert v. Bogk, 7 Mont. 599.

Deed with Defeasance is not Mortgage simply because of agreement to reconvey on payment of consideration stated, with interest, p. 173.

Cited to same effect in Montgomery v. Spect, 55 Cal. 356, holding transaction mortgage, however, under all facts; Booth v. Hoskins, 76 Cal. 275, ruling similarly on facts where debt created contemporaneously.

General Citation.—Baldaff v. Griswold, 9 Okla. 448.

42 Cal. 174-179. CHRISTY v. DANA.

Probate Claim on Mortgage need not be presented where no relief demanded against estate and mortgagor had no interest in land at time of death, p. 178.

Cited to same effect in Siebel v. Carrillo, 42 Cal. 505, holding presentation unnecessary where mortgage made by wife of deceased debtor.

Title Subsequently Acquired by patent inures in favor of holder of mortgage executed after certificate of purchase, p. 179.

Cited to same effect in Camp v. Grider, 62 Cal. 25, under similar facts; Orr v. Stewart, 67 Cal. 277, as to homestead patent; Stewart v. Powers, 98 Cal. 520, as to pre-emption patent; Weber v. Leadler, 26 Wash. 147, fact that entryman of public land under homestead act mortgages homestead claim before actual entry thereon does not invalidate mortgage. Cited in note on general subject to Clark v. Baker, 76 Am. Dec. 458; Kirkaldie v. Larrabee, 89 Am. Dec. 207; Wilcox v. John, 52 Am. St. Rep. 261.

42 Cal. 180-196. JONES v. CLARK.

Interlocutory Judgment awarded in action for dissolution of partnership, with reference for accounting, p. 181.

Cited in Thompson v. White, 63 Cal. 509, as an instance of such judgment, sustaining procedure in action for specific performance of contract for conveyance of patent right and for accounting; Arnold v. Sinclair, 11 Mont. 567, 568, 28 Am. St. Rep. 494, holding decree of dissolution under facts to be a final judgment.

Superintendent of Mining Partnership cannot bind it except upon contracts usual and necessary in ordinary prosecution of the work, p. 191.

Cited to same effect in Stuart v. Adams, 89 Cal. 372, holding it liable for his purchase of necessary supplies and materials; Heald v. Hendy,

39 Cal. 635, as to provisions furnished to miners' boarding house by superintendent's order. Cited, also, in note on general subject to Skillman v. Lachman, 83 Am. Dec. 108.

Mining Partnership.—Note executed by superintendent held executed for it and on its behalf, p. 191.

Cited in McCormick v. Stockton, etc. Co., 130 Cal. 105, holding note signed by president to be a corporate note.

Finding of Fact when ultimate and otherwise sufficient, is valid as such although stated as conclusion of law, p. 193.

Cited to same effect in Walker v. Buffandeau, 63 Cal. 316, and Savings, etc. Society v. Burnett, 106 Cal. 538, holding matter, however, to be such conclusion and not finding; Bath v. Valdez, 70 Cal. 355, as to finding on statute of limitations; McCarthy v. Brown, 113 Cal. 19, as to finding on ouster; Blish v. McCormick, 15 Utah, 197, holding matter to be conclusion of law, though stated among findings of fact; Snyder v. Emerson, 19 Utah, 322, holding question immaterial under the pleadings whether portion of finding was a conclusion of law.

Mining Partners are governed by laws of ordinary partnerships, except as to rules of *delectus personae*, pp. 193, 195.

Cited to same effect in Stuart v. Adams, 89 Cal. 369, 370, holding each liable for full amount of firm debts; Dellapiazza v. Foley, 112 Cal. 384, ruling similarly as to liability for labor performed on mine; Congdon v. Olds, 18 Mont. 491, holding instruction incorrect that partnership in suit was general partnership; Thomas v. Hurst, 73 Fed. Rep. 374, on point that such partnership is not dissolved by death of member; and see Hoard v. Clum, 31 Minn. 188, stating distinctions in this regard; Childers v. Neely, 47 W. Va. 74, noted under Skillman v. Lachman, 23 Cal. 199; Mining Co. v. First Nat. Bank, 95 Fed. 39, noted under Duryea v. Burt, 28 Cal. 569. Cited, also, in note on general subject to Skillman v. Lachman, 83 Am. Dec. 104, 106; p. 107, as to dissolution; p. 109, as to liability of incoming partners; p. 110, as to necessary parties in actions for dissolution.

Estoppel will Operate against mining partnership by ratification and acquiescence in acts of their superintendent, p. 193.

Cited to same effect in Gribble v. Columbus, etc. Co., 100 Cal. 72, holding corporation estopped as to acts of its president in making mortgage.

Mining Partnership is not dissolved by death of one of its members, p. 195.

Cited in notes to Breau v. La Blanc, 69 Am. St. Rep. 416, and Brew v. Hastings, 79 Am. St. Rep. 716, on dissolution.

Findings will be Refused when immaterial, or of probative facts only, p. 195.

Cited to same effect in *Perry v. Quackenbush*, 105 Cal. 306, on point that findings of probative facts will not in general control, limit, or modify those of ultimate facts.

42 Cal. 196-201. EX PARTE BULL.

Defective Commitment by justice will not justify discharge on habeas corpus, p. 199.

Cited to same effect in *Ex parte Kell*, 85 Cal. 310, as to failure to show name of person assaulted.

"Good Cause" for detention of prisoner when indictment not found is within discretion of court, p. 199.

Cited to same effect in *Ex parte Isbell*, 11 Nev. 297, holding no abuse of discretion in detention shown.

42 Cal. 201-209. PEOPLE v. CHAMBERS.

Payment "in Cash" for formation of railroad corporation held under facts not to include payment by bank check, p. 206.

Cited in *Albright v. Texas, etc. Co.*, 8 N. Mex. 118, but holding subscribers not relieved from their liability as such or as stockholders by reason of such insufficiency of payment.

Distinguished in *People v. Stockton etc. Co.*, 45 Cal. 314, 315, 13 Am. Rep. 179, 180, holding payment by check sufficient under facts.

42 Cal. 210-215. ESTATE OF SILVEY.

Community Property.—Half vests in surviving wife on husband's death, p. 212.

Cited to same effect in concurring opinion *Smith v. Olmstead*, 88 Cal. 589, 22 Am. St. Rep. 340, applying rule to pretermitted children.

Devise by Husband must be read as applying only to moiety with his testamentary power, p. 213.

Cited to same effect in *Estate of Wickersham*, 138 Cal. 363, noted under *Beard v. Knox*, 5 Cal. 256; *King v. Lagrange*, 50 Cal. 333, construing devise of community property and discussing election by wife; In re *Gilmore*, 81 Cal. 242, under similar devise; In re *Smith*, 108 Cal. 119, holding, however, wife put to election by form of devise of community property.

Will—Election.—Wife is not estopped by claim under will, from asserting rights as survivor of community, p. 213.

Cited to same effect in *In re Gwin*, 77 Cal. 315, and *Pratt v. Douglass*, 38 N. J. Eq. 537, holding no election required and no estoppel under facts; and *In re Gilmore*, 81 Cal. 243, under similar facts.

42 Cal. 215-218. MYERS v. SAN FRANCISCO.

Exemplary Damages are allowable, under statute, for negligent killing of child, p. 217.

Distinguished in *Little Rock etc. Co. v. Barker*, 33 Ark. 360, 34 Am. Rep. 47, confining damages to expenses and loss of services during minority; *Bennett v. City of Marion*, 102 Iowa, 426, 63 Am. St. Rep. 455, and held to be justified only by local statute. Cited, also, but point not decided, on general subject in *Kansas etc. Co. v. Cutter*, 19 Kan. 89; *Roach v. Imperial etc. Co.*, 7 Saw. 231; 7 Fed. Rep. 705; notes to *Carey v. Berkshire etc. Co.*, 48 Am. Dec. 638, and see 641 as to general rule of damages; *Louisville etc. Co. v. Goodykoontz*, 12 Am. St. Rep. 376, 377, 379.

Verdict will not be Disturbed unless so excessive as to justify presumption that jury was misled by passion, prejudice or ignorance, p. 218.

Cited to same effect in *Brown v. Evans*, 8 Saw. 496, 17 Fed. Rep. 918, sustaining, on motion for new trial, verdict for eight thousand one hundred and fifty dollars and eighty-seven cents in case of aggravated assault and battery. Cited, also, in notes on general subject under first syllabus.

42 Cal. 218-227. *HALL v. POLACK*.

Order Improvidently Made may be set aside by court of its own motion, p. 224.

Cited to same effect in *Odd Fellows etc. Bank v. Deuprey*, 66 Cal. 170, as to order on motion for new trial; *Wiggin v. Superior Court*, 68 Cal. 402, as to decree discharging administrator; *Baker v. Fireman's etc. Co.* 73 Cal. 185, as to order changing place of trial; *Carpenter v. Superior Court*, 75 Cal. 598, as to verdict and judgment on will contest, holding, however, practice erroneous under facts; *People v. Curtis*, 113 Cal. 71, as to order of dismissal in criminal case.

42 Cal. 227-230. *BOHANNAN v. HAMMOND*.

Carriers.—"Act of God" does not include ordinary results of falling of tide, p. 230.

Cited in note to *Gilson v. Delaware etc. Co.*, 36 Am. St. Rep. 822, on effect of normal physical laws on liability.

42 Cal. 230-233. *CUMMINGS v. STEWART*.

Judgment in Replevin is erroneous which gives defendant option of keeping property in payment of same less than value as found, p. 232.

Cited to same effect in *McCue v. Tunstead*, 66 Cal. 487, holding judgment in claim and delivery erroneous because not in alternative: *Guille v. Wong Fook*, 13 Oreg. 585, ruling similarly where judgment held indefinite.

42 Cal. 233-235. HIGGINS v. BARKER.

Diversion of Water.—Judgment for injunction without damages held proper under facts, p. 235.

Cited in *Fabian v. Collins*, 3 Mont. 225, holding complaint for injunction sufficient.

Appropriator of Water may divert it by new ditch to amount of original appropriation, p. 235.

Cited to same effect in *Meagher v. Hardenbrook*, 11 Mont. 390, sustaining change by tenant in common under facts. Cited, also, in note to *Heath v. Williams*, 43 Am. Dec. 282, on rights of others to residue.

42 Cal. 236-244. MORRIS v. ANGLE.

Appeal.—Bill of exceptions or statement is necessary to bring up matters not appearing on face of judgment-roll, p. 240.

Cited to same effect in *Hawley v. Kocher*, 123 Cal. 79, holding order striking out part pleading not reviewable on appeal on judgment-roll alone; *Graham v. Linehan*, 1 Idaho, 781, as to order striking out part of supplemental complaint; and *Whitney v. Teichfuss*, 11 Colo. 556, as to order refusing to strike out amended answer.

42 Cal. 245-252. REEDY v. SMITH.

Contract is Executed although signed by one party only, if acted upon by the other, p. 250 (247.)

Cited to same effect in *Bloom v. Hazard*, 104 Cal. 312, holding offer accepted under facts.

42 Cal. 252-257. KEYS v. MARIN COUNTY.

District Court or judge thereof may issue writ of certiorari, p. 254.

Cited to same effect in *Reynolds v. County Court*, 47 Cal. 605, under code.

Supervisors Exercise Judicial Functions in proceedings to establish road, p. 254.

Cited to same effect in *Belser v. Hoffschneider*, 104 Cal. 460, as to their action on appeal in street assessment proceedings.

Certiorari against Supervisors in highway proceedings is within discretion of court, p. 255.

Cited to same effect in *Hagar v. Supervisors*, 47 Cal. 228, denying writ, under facts, as to formation of reclamation district; *Spring Valley etc. v. Bryant*, 52 Cal. 140. (Cited in note to *Mayor v. Morgan*, 18 Am. Dec. 238), ruling similarly as to ordinance held to be legislative in character. Cited, also, in note on general subject to *Duggen v. McGruder*, 12 Am. Dec. 530, 536. (Cited in *Johnson v. Supervisors*, 61

Iowa, 92, and *Welch v. County Court*, 29 W. Va. 73; *Wulzen v. Board*, 40 Am. St. Rep. 39.

Certiorari is Barred by lapse of time equal to that granted for appeal, unless for good cause shown, p. 256.

Cited to same effect in *Reynolds v. Superior Court*, 64 Cal. 373 (cited in *Smith v. Superior Court*, 97 Cal. 352), holding application barred by lapse of more than one year, under facts: *Kimple v. Superior Court*, 66 Cal. 137, ruling similarly as to delay for more than sixty days; *Lyons v. Green*, 68 Ark. 209, but holding petitioner not barred under facts stated; *State v. Milwaukee County*, 58 Wis. 12, denying writ after lapse of two years. Cited, also, in note on general subject to *Wulzen v. Board*, 40 Am. St. Rep. 31.

42 Cal. 275-279. *ARAM v. SHALLENBERGER*.

Appeal will be Dismissed when statutory requirements not followed, p. 278.

Cited to same effect in *Pardee v. Murray*, 4 Mont. 37, as to time of filing undertaking, remitting appeal, however, on motion for diminution to correct error in record as to such filing: *Territory v. Hanna*, 5 Mont. 247, as to failure to serve notice on proper person. Distinguished in *Townsley v. Hornbuckle*, 2 Mont. 581, where appeal held merely insufficiently taken, but holding right to dismissal waived under facts.

Appeal—Contempt.—Appeal does not lie from order adjudging one guilty of, p. 279.

Cited to same effect in *Tyler v. Connolly*, 65 Cal. 31, even when amount of fine within statutory requirement.

42 Cal. 279-285. *WHITE v. LYONS*.

Code Pleading.—Plaintiff is entitled to such relief as facts alleged in complaint warrant, irrespective of prayer, or form of complaint, p. 282.

Cited to same effect in *Whitehead v. Sweet*, 126 Cal. 73, holding complaint sufficient to authorize review of corporate election, irrespective of its form or prayer; *McPherson v. Weston*, 64 Cal. 279, holding complaint sufficiently to state cause of action; and *Marriott v. Clise*, 12 Colo. 566, ruling similarly as to cross-complaint; and see *Schiffer v. Adams*, 13 Colo. 581; *Watson v. Sutro*, 86 Cal. 528, holding action for partition maintainable under facts; *Hulsman v. Todd*, 96 Cal. 231, ruling similarly, as to action to quiet title to water rights; *Bayles v. Kansas etc. Co.*, 13 Colo. 197, as to action to reform contract for transportation of goods by railway; *De Lacy v. Hurst*, 83 Ga. 232, as to action in nature of creditor's bill; *Canty v. Lattimer*, 31 Minn. 241, as to action to reform contract and recover thereunder; *Mullen v. McKim*, 22 Colo. 475, allowing in action for specific performance, amendment praying for damages

merely; *Morse v. Swan*, 2 Mont. 309, as to action for trespass, discussing right to statutory treble damages.

Interest.—Statute changing rate as to judgments affects contracts made before passage but is prospective in operation only, p. 284.

Cited to same effect in *Randolph v. Bayue*, 44 Cal. 369, as to judgment for street assessment; *Dunne v. Mastick*, 50 Cal. 247, as to act allowing interest on legacies; *Estate of Olvera*, 70 Cal. 186, on point that judgment on probate claims bears interest from its date although original demands did not bear interest; *Seton v. Hoyt*, 34 Or. 274, 75 Am. St. Rep. 644, applying rule to interest on county warrants; *Graham v. Merchant*, 43 Or. 312, in action for money had and received where statutory rate of interest changed after money received and before judgment, old rate governs to date of change and thereafter at new rate; *State v. Guenther*, 87 Wis. 676, on point that state treasurer who has failed to pay over moneys to successor is chargeable with interest "at rate in force during period of default as varied by legislation." Cited, also, in note on general subject to *Aguirre v. Packard*, 73 Am. Dec. 646.

42 Cal. 285-287. SOULE v. BILLINGS.

Dismissal of Action cannot be granted on motion of stranger to record, p. 287.

Distinguished in *Kreiss v. Hotaling*, 99 Cal. 386, and rule held changed by section 581 of the Code of Civil Procedure as amended in 1889.

42 Cal. 288-290. ESTATE OF GASQ.

Probate.—Allowance of Fees to attorney will be affirmed in absence of plain abuse of discretion, p. 290.

Cited in *Briggs v. Breen*, 123 Cal. 661, discussing personal liability of administrator for such fees, irrespective of allowance by probate court.

42 Cal. 290-293. DE LA MONTAGNIE v. UNION INSURANCE COMPANY.

Guardian's Sale without order of court is void and does not bind ward, p. 293.

Cited in *Morse v. Hinckley*, 124 Cal. 158, holding invalid a guardian's contract for legal services to be rendered to ward. Distinguished in *Scarf v. Aldrich*, 97 Cal. 366, 33 Am. St. Rep. 194, holding ward bound on collateral attack by sale made on publication of irregular order to show cause.

42 Cal. 298-303. PHELPS v. MCGLOAN.

Findings will not be disturbed on appeal where evidence conflicting, p. 302.

Cited to same effect in *Caulfield v. Bogle*, 2 Dak. Ter. 467.

Declarations of Grantor, while in possession, are admissible to prove character of such possession, p. 302.

Distinguished in *Frink v. Roe*, 70 Cal. 318, holding declarations inadmissible to show that power of attorney to sell was coupled with interest, or that agent retained such interest after conveyance made under the power.

42 Cal. 303-313. **HANSON v. McCUE**. S. C. 10 Am. Rep. 299.

Water Rights.—Underground currents in defined channels are subject to same rules as similar surface streams, p. 308.

Cited to same effect and explained in *Lux v. Haggin*, 69 Cal. 394, discussing rights of riparian proprietors; *Tampa etc. Co. v. Cline*, 37 Fla. 602, 53 Am. St. Rep. 268, discussing rights to surface and underground waters generally; *Willis v. Perry*, 92 Iowa, 301, as to diversion from flowing wells and holding further as to measure of damages. Cited, also, in note on general subject to *Wheatley v. Baugh*, 64 Am. Dec. 727, 730; *Gould v. Eaton*, 52 Am. St. Rep. 205.

Water Rights.—Spring will be presumed fed from ordinary percolations unless presence of underground stream shown, p. 308.

Cited to same effect in *Metcalf v. Nelson*, 8 S. Dak. 89, holding further as to right of owner of such spring.

Water Percolating or Filtrating belongs absolutely to owner of soil, and free from usufructuary rights of others, p. 309.

Cited to same effect in *Vineland Irr. Dist. v. Azuba Irr. Co.*, 126 Cal. 494, distinguishing between such waters and the subsurface flow of a stream; *Katz v. Walkinshaw*, 141 Cal. 128, 130, 131, 140, on point that underground water not flowing in defined stream is not a watercourse nor governed by law as to riparian rights; *Boyce v. Cuppir*, 37 Or. 260, and *Case v. Hoffman*, 100 Wis. 327, applying rule to percolations from springs and marshes having no definite courses nor perceptible outlets; *Crescent etc. Co. v. Silver King etc. Co.*, 17 Utah, 456, 70 Am. St. Rep. 817, and note (quoted in *Willow Creek etc. Co. v. Michaelson*, 21 Utah, 257), holding no prescriptive right to such percolating water established under facts stated; *Copper King v. Wabash Mg. Co.*, 114 Fed. 992, but held inapplicable as to diversion of water from a natural watercourse; note to *Wheelock v. Jacobs*, 67 Am. St. Rep. 666, et passim, on general subject; *Cardelli v. Comstock T. Co.*, 26 Nev. 297, where all waters flowing through tunnel are derived from drainage of mine and country between mine and mouth of tunnel and from pumpings from lower levels, waters are not subject to appropriation; *Deadwood Cent. R. R. v. Barker*, 14 S. Dak. 566, 574, where tunnel excavated on plaintiff's land extended into land of defendant, who permitted percolating water, to flow through same, which water was appropriated by plaintiff at mouth of

tunnel, disuse did not prevent defendant from diverting water on his own land; *Herriman Irr. Co. v. Keal*, 25 Utah, 114, drying up springs caused by escape of percolating waters into and out through a tunnel driven by one on his own land is *damnum absque injuria*; *Painter v. Pasadena etc. Co.*, 91 Cal. 82, sustaining reservation of such right as profits *aprendre* in deed of soil; *Southern Pacific etc. Co. v. Dufour*, 95 Cal. 617, 619, 620 (but see dissenting opinion 623, 624), sustaining diversion by such owner, and holding question of priority of appropriation immaterial; *Gould v. Eaton*, 111 Cal. 644, 52 Am. St. Rep. 204 (and see note, 205), holding rule not affected by character of material of soil, and sustaining such owner's right to divert; *Cross v. Kitts*, 69 Cal. 222, 58 Am. Rep. 562, holding right to such water acquirable by grant or prescription; *People's Gas Co. v. Tyner*, 131 Ind. 280, 31 Am. St. Rep. 435 (and see note, 438) applying rule to natural gas deposits and discussing generally surface owner's rights therein; *Sullivan v. Northern Spy etc. Co.*, 11 Utah, 441, discussing conflicting rights of discoverer of such waters and subsequent locator on such land. Cited, also, in notes on general subject to *Wheatley v. Baugh*, 64 Am. Dec. 727, 730.

Prescription.—Presumption of grant of easement from user without interference need not be indulged in when no right shown to complain of user, p. 310.

Cited to same effect in *Sullivan v. Zeiner*, 98 Cal. 350, holding prescriptive right to support of building by coterminus property not established; *Clarke v. Clarke*, 123 Cal. 669, ruling similarly as to the right of way; *Lakeside etc. Co. v. Crane*, 80 Cal. 184 (cited in *Sullivan v. Zeiner*, 98 Cal. 351), discussing sufficiency of finding upon adverse possession of water right; and see on same point *Hargrave v. Cook*, 108 Cal. 79; *Last Chance etc. Co. v. Heilbron*, 86 Cal. 18, holding appropriator to have had no right of complaint against acts of riparian owner; *Humphreys v. Blasingame*, 104 Cal. 44, on point that in order to acquire right of way by prescription user need not amount to ouster or exclusion of former owner from the right.

42 Cal. 316-326. STOPPELKAMP v. MANGEOT.

Notice of Change of Terms of Lease cannot be given when tenancy is for fixed period, p. 322.

Cited to same effect in *Canning v. Fibush*, 77 Cal. 197, where lease for three months, and holding further that no notice to quit was necessary at expiration of such term; *Hurd v. Whitsett*, 4 Colo. 87, on point that landlord cannot by notice change term of tenancy; and *Reithman v. Brandenburg*, 7 Colo. 481, where tenancy was for one month. Cited, also, in note on change of tenancy to *Blumenberg v. Myres*, 91 Am. Dec. 564, 565.

Notice to Quit is not necessary where lease terminates by expiration of term, p. 322.

Cited to same effect in *Lee Chuck v. Quan etc. Co.*, 91 Cal. 597, where tenant held over.

Jurisdiction of County Court.—Statute is constitutional extending jurisdiction to actions for unlawful detainer, p. 324.

Cited to same effect in *Rosenberg v. Frank*, 58 Cal. 403, affirming jurisdiction of district court in suit in equity to construe will.

42 Cal. 326-335. IRWIN v. TOWNE. S. C. 43 Cal. 23.

Deed—Description.—"Northerly," et cetera, means "due north" only when necessary to prevent failure of deed for want of certainty in location of line, p. 334.

Cited to same effect in *Martin v. Lloyd*, 94 Cal. 202, holding "north" not to mean "due north" under circumstances; *Currier v. Nelson*, 96 Cal. 505, 31 Am. St. Rep. 241, ruling aliter, and holding "north" to mean "due north" unless controlled or qualified by other words; *Segar v. Babcock*, 18 R. I. 204, holding that line so described must yield to any other description which locates it with reasonable certainty.

42 Cal. 335-339. TORMEY v. PIERCE.

Ejectment.—Judgment for all coplaintiffs is erroneous, where no interest or right to possession shown as to one, p. 338.

Cited to same effect in *Waterman v. Andrews*, 14 R. I. 599, holding rule modified, however, by local statutes.

42 Cal. 339-345. CORREA v. FREITAS.

Miners' Possessory Rights include right to extend flume so as to prevent appropriation by another, p. 344.

Cited to same effect in *Last Chance etc. Co. v. Bunker Hill etc. Co.*, 49 Fed. Rep. 433, discussing right of change of use of water. Cited, also, in note on general subject to *McClintock v. Bryden*, 63 Am. Dec. 105; and in *Goldhill etc. Co. v. Ish*, 5 Oreg. 106, on point that right to mine on public lands is a franchise.

42 Cal. 346-353. BRUCK v. TUCKER.

Ejectment.—Answer need not set up title in defendant after plea of general denial, p. 348.

Cited to same effect in *Henry v. Vineland Irr. Dist.*, 140 Cal. 378, discussing right of plaintiff to dismiss complaint under pleadings construed; *Hyde v. Mangan*, 88 Cal. 325, on point that under general denial defendant may show that deed under which plaintiff claims is merely mortgage; *Wixon v. Devine*, 91 Cal. 481, as to evidence under general denial of prior appropriation of water in action for diversion; *Northern Pacific etc. Co. v. McCormick*, 55 Fed. Rep. 602, holding answer sufficient

which sets up both specific denials and new matter showing title, even if latter insufficiently pleaded.

Equitable Defense should be pleaded according to rules of equity pleading as applied to complaints praying similar relief, p. 352.

Cited to same effect in *Miller v. Fulton*, 47 Cal. 147, holding such defense in ejectment insufficiently pleaded; *Kentfield v. Hayes*, 57 Cal. 411, and *Arguello v. Bours*, 67 Cal. 450, 451, and *Kahn v. Old Telegraph etc. Co.*, 2 Utah, 195, ruling similarly in similar action; *Swasey v. Adair*, 88 Cal. 182, ruling similarly as to such defense in action for recovery of personalty; *Davis v. Holbrook*, 25 Colo. 495, as to defense equivalent to specific performance on action of ejectment; *Hatcher v. Briggs*, 6 Oreg. 41, as to equitable defense in ejectment, and holding cross-bill sufficient; but see *Dale v. Hunneman*, 12 Neb. 224, holding equitable defense inadmissible under general denial only when affirmative relief is sought.

Equitable Defense is Allowable in ejectment although no affirmative relief prayed for, p. 352.

Cited to same effect in *Davis v. Davis*, 9 Mont. 275, allowing such defense in action to annul conveyance by agent, and holding further as to bar of such defense by failure to plead it; and on last point *Brady v. Husby*, 21 Nev. 455.

Specific Performance will be Denied when set up as equitable defense where terms of contract are unfair, p. 353.

Cited to same effect in *Ward v. Yorba*, 123 Cal. 452; *Windsor v. Miner*, 124 Cal. 494; *Prince v. Lamb*, 128 Cal. 129; *Newman v. Freitas*, 129 Cal. 288, denying relief for insufficiency of consideration; *Stiles v. Cain*, 134 Cal. 172 (quoted in *Fleishman v. Woods*, 135 Cal. 262), holding complaint insufficient as against general demurrer; *Nicholson v. Tarpey*, 70 Cal. 609, holding, however, objection of inadequacy waived by vendor under facts; *Kertchem v. George*, 78 Cal. 599, refusing specific performance of contract of sale of land of estate of decedent when absolutely void. Distinguished in *Burroughs v. De Couts*, 70 Cal. 366, holding equitable defense in ejectment sufficient under facts.

Construction of Will is matter of law, p. 355.

Cited in *Estate of Lynch*, 142 Cal. 375, but holding devise ineffective where description of subject matter is indefinite.

42 Cal. 358-362. WOODS v. WHITNEY.

Community Property.—Purchase by husband with community funds and title taken in wife's name constitutes it her separate property as being gift to her, p. 361.

Cited to same effect in *Higgins v. Higgins*, 46 Cal. 263, holding parol evidence admissible to show such intent in deed to her; *Kane v. Desmond*, 67 Cal. 465, sustaining gift of personalty from husband to wife,

not otherwise void as to creditors; *Jackson v. Torrence*, 83 Cal. 532, holding, further, wife not estopped, under facts, from claiming property as her own; *Flournoy v. Flournoy*, 86 Cal. 294, 21 Am. St. Rep. 43, holding intention of parties to control, and husband to have no interest in land conveyed to wife as her separate property because of loan to her from his own funds to make part payment; *Rico v. Brandenstein*, 98 Cal. 469, 35 Am. St. Rep. 196, denying, however, right of wife to make gift to husband under act of 1857; *Henry v. Pesoli*, 109 Cal. 60, discussing effect of amendment to section 184 of the Civil Code on presumption from transfer to wife during coverture; *Sackman v. Thomas*, 24 Wash. 688, noted under *Peck v. Brummagin*, 31 Cal. 440. Cited, also, in note to *Partridge v. Stocker*, 84 Am. Dec. 674, on gifts from husband to wife.

Evidence of Intentions is not admissible where undisclosed and secret, p. 362.

Cited to same effect in *Crane v. McCormick*, 92 Cal. 182, as to conversations regarding intentions, had in absence of other parties.

Intention is to be Deduced from acts and conduct of party at time, p. 362.

Cited to same effect in *Allen v. Southern etc. Co.*, 70 Fed. Rep. 375, holding positive testimony of party as to intention regarding residence overcome by such acts and conduct.

42 Cal. 362-367. DE GAZE v. LYNCH.

Order Granting New Trial will be vacated if made before statement filed, or formal submission of motion, p. 366.

Cited to same effect in *Estate of McKenna*, 138 Cal. 440, sustaining denial of motion prematurely made; *Carpenter v. Superior Court*, 75 Cal. 598, discussing methods of reviewing decision of court, and holding motion inappropriate under facts.

42 Cal. 367-372. TAYLOR v. CASTLE.

Mining Partnership has no delectus personae and is not dissolved by death of member or transfer of his interest, p. 270.

Cited to same effect in *Kahn v. Central etc. Co.*, 102 U. S. 646 (cited in *Bissell v. Foss*, 114 U. S. 261), holding such partnership not dissolved by assignment of interests of some of members; *Thomas v. Hurst*, 73 Fed. Rep. 374, discussing commencement of running of statute of limitations against suit for dissolution of such partnership; *Mining Co. v. First Nat. Bank*, 95 Fed. 39, quoting *Kahn v. Smelting Co.*, 102 U. S. 646; notes to *Breaux v. Le Blanc*, 69 Am. St. Rep. 415, 418, and *Brew v. Hastings*, 79 Am. St. Rep. 716, on general subject. Distinguished in *Hawkins v. Spokane etc. Min. Co.*, 3 Idaho, 656, where a mining corporation, against majority's protest, works mine in which it has minority interest, and mingles gold extracted therefrom with portion from its own

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claim, they cannot recover gold so mingled. Cited, also, in note to *Powell v. North*, 56 Am. Dec. 517, on power of equity to appoint person to continue partnership for benefit of infant heirs of deceased partner; and to *Skillman v. Lachman*, 83 Am. Dec. 106, 107, on general subject.

Mining Partners are liable on contract made in firm name through its secretary, p. 371.

Cited in *Stuart v. Adams*, 89 Cal. 369, on point that each partner is liable to full extent of indebtedness, and not pro rata, and in note on general subject to *Skillman v. Lachman*, 83 Am. Dec. 107.

Usage in Respect to Contracts of mining partnership enters into and must be taken as part of contract of partnership, p. 371.

Cited to same effect in *Union etc. Co. v. American etc. Co.*, 107 Cal. 333, 48 Am. St. Rep. 144, as to trade usages upon reinsurances by insurance companies. Cited, also, in note on general subject to *Skillman v. Lachman*, 83 Am. Dec. 108.

Former Judgment is Bar to second suit when cause of action is same, p. 372.

Cited to same effect in *Mauldin v. Clark*, 79 Cal. 53, holding, however, such judgment no bar where issues essentially and entirely different; *Woolverton v. Baker*, 98 Cal. 632, holding judgment conclusive as res judicata upon all matters which might have been litigated in first action.

Former Judgment as Bar.—Cause of action is same when evidence necessary for judgment in second action would have supported judgment in first, p. 372.

Cited to same effect in *Phelan v. Quinn*, 130 Cal. 378, holding former judgment a bar under the rule; *Hammer v. Downing*, 39 Or. 523, denial of motion to vacate judgment of supreme court for costs, as being prematurely entered, is not res adjudicata as to items in cost bill; *Montgomery v. Harrington*, 58 Cal. 274, applying principle to plea of another action pending; *Baker v. State*, 109 Ind. 60, holding judgment in supplemental proceedings a bar to proceedings for execution against debtor's body; *Brooke v. Logan*, 112 Ind. 186, 2 Am. St. Rep. 180, ruling aliter as to effect of judgment denying removal of statutory guardian on subsequent habeas corpus proceedings by father to obtain child's possession; and *McKinney v. Curtiss*, 60 Mich. 621, holding adjudication on probate claim to bar where party had no opportunity to have merits passed upon; *Gayer v. Parker*, 24 Neb. 644, 8 Am. St. Rep. 228, holding former judgment no bar because of difference in proof; and on same point *Buddress v. Schafter*, 12 Wash. 312; *Stone v. United States*, 64 Fed. Rep. 671, holding acquittal of one for feloniously removing timber from public lands, no bar to civil action against him for value of timber so cut. Criticized in *Oregon etc. Co. v. Oregon etc. Co.*, 12 Saw. 118, 28 Fed. Rep. 511, holding test not to have been found satisfactory.

Account Stated.—Action on is no bar to subsequent action on original contract, p. 372.

Cited to same effect (sub nom. *Littlefield v. Nichols*) in *Partridge v. Butler*, 113 Cal. 323, holding, however, action based on original contract and not account stated.

42 Cal. 372-375. **LITTLEFIELD v. NICHOLS.** S. C. see *Sherman v. McCarthy*, 57 Cal. 512, as to further litigation based on same title.

Ejectment.—Title under elder lien must prevail against title from common source under junior lien, p. 374.

Cited to same effect in *Brady v. Burke*, 90 Cal. 6, as to successive street assessment liens, although judgment on latter rendered before that on former; *Halyburton v. Greenlee*, 72 N. C. 320, as to successive judgment liens where sale made under junior lien.

42 Cal. 375-387. **POLHEMUS v. CARPENTER.**

Time of Filing Findings is not defined or limited, under Practice Act, p. 383.

Cited to same effect in *Broad v. Murray*, 44 Cal. 229, sustaining filing after entry of judgment.

Trial Does not Terminate until filing of written findings when requested, p. 384.

Cited to same effect in *Connolly v. Ashworth*, 28 Cal. 206, holding judgment erroneous if entered on findings filed after expiration of term of office of trial judge.

New Trial.—Notice of motion must be filed within ten days after notice of filing decision, p. 385.

Cited in *First Nat. Bank v. McCarthy*, 13 S. Dak. 362, noted under *Carpenter v. Thurston*, 30 Cal. 123. Distinguished in *Elder v. Frevert*, 18 Nev. 282, under local statute holding time to run from announcement of judgment.

Defective Findings should be amended if objected to, p. 386.

Cited in *Victor et al. Co. v. National Bank*, 18 Utah, 93, 72 Am. St. Rep. 760, sustaining filing of additional finding under local practice.

Findings of Court must embrace all specific facts put in issue, p. 386.

Cited to same effect in *Franklin v. Franklin*, 140 Cal. 609, reversing divorce judgment for insufficiency of findings; *Pratalongo v. Larco*, 47 Cal. 382, sustaining, however, findings by referee on general facts alleged, when controversy involved many items of long standing account; *Ladd v. Tully*, 51 Cal. 279, holding insufficient a finding that all material allegations of complaint were true, and *Smith v. Smith*, 62 Cal. 468, ruling similarly as to finding in divorce suit held to be a conclusion of law;

and *Potwin v. Blasher*, 9 Wash. 466, ruling similarly were findings covered issues sufficient to support judgment, but not all.

42 Cal. 387-390. McCOURTNEY v. FORTUNE.

Appeal from Final Judgment does not allow review of prior order, itself appealable, p. 390.

Cited to same effect in *Deyoe v. Superior Court*, 140 Cal. 496, discussing effect of interlocutory divorce decree. Distinguished in *State v. Reed*, 3 Idaho, 559, order denying change of venue in criminal cases is reviewable only on appeal from final judgment; *Regan v. McMahon*, 43 Cal. 627, declining to review interlocutory decree in partition; *Barham v. Hostetter*, 67 Cal. 278, ruling similarly as to order dissolving preliminary injunction.

Time to Appeal from Judgment runs from its rendition, p. 390.

Distinguished under amendment of statute in *Thomas v. Anderson*, 55 Cal. 45, holding time to run from its entry.

Judgment is "Rendered" when findings are filed, p. 389.

Cited to same effect in *In re Rose*, 80 Cal. 169, discussing time of appeal from order settling administrator's account; *Horn v. Miller*, 20 Neb. 101, as to time for appeal from judgment.

42 Cal. 390-397. TALBERT v. SINGLETON.

Actual Possession of Land, with usual acts of ownership, is constructive notice of claim of title, p. 359.

Cited to same effect in *Pacific etc. Co. v. Stroup*, 63 Cal. 153, holding adverse possession established under facts; *Hicks v. Lovell*, 64 Cal. 20, 49 Am. Rep. 682, on point that vendee in such possession can set up contract to purchase as equitable defense to ejectment by grantee of vendor, affected with such notice; *Peasley v. McFadden*, 68 Cal. 615, holding such notice established by erection of building by claimant and its occupation by his tenants; *Toltec Ranch Co. v. Babcock*, 24 Utah, 193, where defendant's vendor entered on public lands after certificate of location filed by railroad, and defendant inclosed and cultivated same and held them in open and notorious manner for over twenty years after such certificate filed, he had title as against railroad's grantee, though his possession was not of seven years' duration since railroad's patent; *School District v. Taylor*, 19 Kan. 292, where building occupied as schoolhouse under unrecorded deed; but see *Emeric v. Alvarado*, 90 Cal. 473, holding such possession merely evidence of notice and criticising main case as dictum and opposed to current of authorities.

Notice of Claim of Title reattaches on revesting of title although conveyed to innocent purchaser, p. 396.

Cited to same effect in *Huling v. Abbott*, 86 Cal. 427, as to notice of unrecorded mortgage.

42 Cal. 397-402. TALBERT v. HOPPER.

Term of Court at which trial had held regular, p. 399.

Cited to same effect in *Talbert v. Singleton*, 42 Cal. 397, sustaining judgment at same term.

Judicial Notice extends to time of holding regular terms of court and power to adjourn, p. 400.

Cited in note on general subject to *Lanfear v. Mestier*, 89 Am. Dec. 668.

Ejectment—Variance.—When title is made basis of plaintiff's claim, he cannot recover without proving title, p. 402.

Cited to same effect in *Helena v. Albertose*, 8 Mont. 504, holding title (by dedication) not shown; *Tarpey v. Desert etc. Co.*, 5 Utah, 213, holding proof of equitable title insufficient where legal title pleaded and made basis of claim.

42 Cal. 402-408. SWEENEY v. REILLY.

Injury will be Presumed from admission of improper testimony, p. 407.

Cited to same effect in *Estate of Toomes*, 54 Cal. 516, as to exclusion of proper testimony; *Storeh v. McCain*, 85 Cal. 308, where record did not show appellant not injured thereby; *People v. Ah Own*, 85 Cal. 584, as to admission of improper opinion evidence.

42 Cal. 408-412. KAPP v. GRIFFITH.

Married Woman may be divested of separate property by adverse possession, p. 411.

Cited to same effect in *Mauldin v. Cox*, 67 Cal. 390, holding further adverse possession of homestead property not shown by facts.

42 Cal. 412-415. BATCHELDER v. MOORE.

Contempt.—Court has power to punish, but such power is arbitrary, p. 414.

Cited to same effect in *State v. Markuson*, 5 N. Dak. 160, holding, further, no right to jury trial in such matters.

Contempt Proceedings are invalid unless case is within provisions of law authorizing such proceedings, p. 414.

Cited to same effect in *Lezinsky v. Superior Court*, 72 Cal. 511, annulling order imposing fine for refusal to obey notary's subpoena; *Overend v. Superior Court*, 131 Cal. 285, noted under *People v. Turner*, 1 Cal. 155;

State v. Clancy, 24 Mont. 363, annulling orders on certiorari, for absence of affidavit and proper notice; *State v. Conn*, 37 Or. 598, ruling similarly as to affidavit on information and belief; dissenting opinion in *Ex parte Henshaw*, 73 Cal. 508, main opinion sustaining order for continuing to exercise functions of public office after having been adjudged usurper thereof; dissenting opinion in *In re Jessup*, 81 Cal. 482, discussing powers of legislature over courts, in relation to granting of rehearings on appeal; *Schwarz v. Superior Court*, 111 Cal. 112, on point that finding and judgment must be construed strictly in favor of accused, and annulling order based on alleged violation of injunction; and see *Ex parte O'Brien*, 127 Mo. 488, on point that no presumptions will be indulged in support of commitment; and *Hawes v. State*, 46 Neb. 151, on same point; *State v. Frew*, 24 W. Va. 437, 444, 49 Am. Rep. 258, 261, holding punishable, however, publication of newspaper articles reflecting on court.

Order Punishing for Contempt committed outside of presence of court is void if based on insufficient affidavit, p. 415.

Cited to same effect in *Phillips v. Welch*, 12 Nev. 164-178, holding affidavit sufficient and denying certiorari to quash order; *State v. Root*, 5 N. Dak. 496, 57 Am. St. Rep. 574, *Hawthorne v. State*, 45 Neb. 874, and *State v. Sweetland*, 3 S. Dak. 506, holding affidavit insufficient; *Thomas v. People*, 14 Colo. 258, *State v. Henthorn*, 46 Kan. 618; *State v. Horner*, 16 Mo. App. 194, discussing rights of accused and denying mandamus to compel adjudication of contempt; and *State v. Kaiser*, 20 Ore. 60, reversing order when no affidavit filed. Distinguished in *Ex parte Robinson*, 71 Cal. 610, holding affidavit unnecessary when contempt committed in presence of court. Cited, also, in note to *Clark v. People*, 12 Am. Dec. 186, on review of judgments of contempt.

Contempt.—Certiorari granted when order beyond jurisdiction of court, p. 415.

Cited to same effect in *People v. O'Neil*, 47 Cal. 110, holding judgment appealable imposing three hundred dollars' fine (but see *Huerstal v. Muir*, 62 Cal. 481, denying right of appeal, and on same point, *Phillips v. Welch*, 11 Nev. 193, S. C. 12 Nev. 169); *Ex parte Hollis*, 59 Cal. 408, holding, also, habeas corpus to lie, and holding order improper under facts; *State v. Knight*, 3 S. Dak. 512, 44 Am. St. Rep. 811, holding writ of error appropriate to review order, and sustaining same under facts; *People v. District Court*, 6 Colo. 537; restraining such proceedings by prohibition, for want of jurisdiction; *State v. Judges*, 32 La. Ann. 1262, granting certiorari when respondent given no opportunity to make defense.

42 Cal. 416-418. THOMASSON v. WOOD.

Omission of Revenue Stamp cannot be set up in state court as defense to action on a contract, p. 417.

Cited in note on general subject to *Satterthwaite v. Doughty*, 59 Am. Dec. 558.

Appellate Court may remand cause when defense based on former decision now overruled, p. 418.

Cited to same effect in *Porter v. Sherman etc. Co.*, 40 Neb. 280, discussing powers of such court on reversal and holding matter to be in its discretion.

42 Cal. 418-434. PALACHE v. PACIFIC INSURANCE COMPANY.

Statutes are to be construed according to legislative intent as shown by general tenor and scope of entire legislative scheme embodied, p. 430.

Cited to same effect in *People v. Eichelroth*, 78 Cal. 143, construing "graduate in medicine" under act for appointment of county physician.

"Insolvency" of Insurance Company authorizing revocation of commissioner's certificate is that defined by statute itself, and not ordinary commercial insolvency, p. 432.

Cited to same effect in *State etc. Co. v. San Francisco*, 101 Cal. 144, construing sections 601 and 602 of the Political Code and holding, further, as to powers of court in case of insolvent insurance corporations.

42 Cal. 435-438. SHAW v. CROCKER.

Street Contractor is not Liable for damages resulting to contiguous property from performance of work for city, if done with proper care and skill, p. 438.

Cited to same effect in *Reardon v. San Francisco*, 66 Cal. 498, 500, holding city liable, however, for such special consequential damages under constitutional provisions as to eminent domain; but see *Henderson v. Minneapolis*, 32 Minn. 322, holding city not liable under charter for damage caused by surface water on change of grade. Cited, also, in note on general subject to *Radcliff v. Mayor*, 53 Am. Dec. 367; *Perry v. Worcester*, 66 Am. Dec. 438; *Goddard v. Inhabitants*, 30 Am. St. Rep. 389.

42 Cal. 439-444. FOOTE v. RICHMOND.

Reopening of Case for introduction of further testimony is within discretion of court, p. 442.

Cited to same effect in *Clavey v. Lord*, 87 Cal. 419, holding no abuse shown in permitting such evidence after setting aside verdict in equity case.

Appearance of Defendants is shown by filing of written consent of his attorney to judgment as prayed for, and he is bound by such judgment, p. 443.

Cited to same effect in *Childs v. Lanterman*, 103 Cal. 392, 42 Am. St.

Rep. 124, holding infant bound by judgment rendered after attorney's appearance when after majority he moves for new trial and appeals, although never served with summons; dissenting opinion in *Blyth v. Swenson*, 15 Utah, 363, as to showing required to vacate judgment when rendered on attorney's appearance, main opinion vacating such judgment.

42 Cal. 444-446. RYCRAFT v. RYCRAFT.

Appeal from Judgment will not authorize examination of sufficiency of evidence, p. 446.

Cited to same effect in *Allport v. Kelley*, 2 Mont. 345; where no appeal from order denying new trial; and on same point in *Brown v. Wiloughby*, 5 Colo. 8.

42 Cal. 446-452. CREIGHTON v. SAN FRANCISCO.

Municipal Corporation may be compelled by legislature to pay claims equitably due although not enforceable by action, p. 450.

Cited to same effect in *Erskine v. Steele Co.*, 87 Fed. 634 (quoted in S. C., 98 Fed. 219), as to statute validating municipal contracts formerly held invalid; In re *Market Street*, 49 Cal. 549, denying, however, legislative power to levy tax on property for payment for work previously done by contractor under abortive contract with city; *People v. Lynch*, 51 Cal. 36, 21 Am. Rep. 693, also denying legislative power to directly levy assessment within incorporated city whose charter has granted it such powers; *Perry Co. v. Conway Co.*, 52 Ark. 432, sustaining power to impose debt of one county on another, on new county division; *Pearson v. State*, 56 Ark. 154, 35 Am. St. Rep. 94, ruling similarly as to right of legislature to release county treasurer from liability for moneys stolen from him; *Board v. Snyder*, 45 Kan. 638, 23 Am. St. Rep. 744, as to act authorizing township bonds for repayment of moneys advanced towards construction of courthouse; and *Fuller v. Morrison*, 36 Minn. 311, as to act authorizing payment for publication of financial county statement theretofore gratuitously made. Distinguished in *Conlin v. Supervisors*, 99 Cal. 23, 37 Am. St. Rep. 21 (and see S. C. 114 Cal. 409), denying such legislative powers under new constitution, as being gift of public moneys; and *State v. Tappan*, 29 Wis. 674, 9 Am. Rep. 625, denying power to tax town to pay volunteer's bounty and costs of unsuccessful suits to recover same, not being for municipal purpose. Cited, also in note on general subject to *Hasbrouck v. Milwaukee*, 80 Am. Dec. 733, 734; *Mount Hope Cemetery v. Boston*, 35 Am. St. Rep. 534.

42 Cal. 452-457. GUEDICI v. BOOTS.

Mistake.—Judgment in partition may be set aside for, on equitable cross-complaint in ejectment suit, p. 456.

Cited to same effect in *Western v. Skiles*, 35 Fed. Rep. 675, as to set-

ting aside such judgment for fraud and mistake. Cited, also, in note to Nicely v. Boyles, 40 Am. Dec. 641, on effect of partition judgments.

42 Cal. 457-462. McCREERY v. BROWN.

Preliminary Injunction may be continued in force until hearing, in discretion of court, although equities of bill denied by answer, p. 461.

Cited to same effect in Coolot v. Central Pacific etc. Co., 52 Cal. 67, sustaining granting of preliminary injunction notwithstanding denials in answer and counter-affidavits; Efford v. Southern etc. Co., 52 Cal. 279, as to modification of such injunction; Parrott v. Floyd, 54 Cal. 535, as to its dissolution; White v. Nunan, 60 Cal. 407, as to its continuance; and on same point in Hiller v. Collins, 63 Cal. 238, where averments of answer made on information and belief; and Huron etc. Co. v. Huron, 3 S. Dak. 617, where rights of defendant were protected by bond, and holding, further, that such discretion should be exercised in favor of party most liable to be injured.

42 Cal. 462-464. CHAPMAN v. HOLLISTER.

Heir Cannot Maintain Ejectment while administration remains unclosed, p. 463.

Cited to same effect in Plass v. Plass, 121 Cal. 133, noted under Meeks v. Hahn, 20 Cal. 620; Meeks v. Kirby, 47 Cal. 170, as to action by grantee of heir, and holding further distribution ineffectual when made after suit commenced but before trial; Jones v. Throckmorton, 57 Cal. 387, denying, however, power of administrator to sue to establish trust and compel conveyance thereunder; Cromby v. Dowd, 61 Cal. 696, holding heir not barred by limitation when vacancy in administration, under facts (and see Meeks v. Vassault, 3 Saw. 212; 16 Fed. Cas. 1317); but see Traweck v. Kelly, 60 Miss. 656, holding heirs barred under facts, although all but one were under no legal disability; Dunn v. Peterson, 4 Wash. 173, applying rule to devisee under foreign will, and holding further as to presumption of administration had thereunder. Distinguished in Lamme v. Dodson, 4 Mont. 588, denying right of executor to possession as against stranger to probate proceedings and claiming property adversely to estate; Gossage v. Crown Point etc. Co., 14 Nev. 156-158, sustaining heir's right to sue where no creditors to be affected and no equity existing in administrator's favor.

Title to Decedent's Realty passes to heirs on his death subject to right of possession by representative for payment of debts, p. 463.

Cited to same effect in Murphy v. Crouse, 125 Cal. 18, noted under Beckett v. Selover, 7 Cal. 215; Bates v. Howard, 106 Cal. 183, holding title not derived from decree of distribution and construing section 1384 of the Civil Code. Cited, also, in note on general subject to Beckett v. Selover, 68 Am. Dec. 257.

42 Cal. 465-469. BARSTOW v. CITY RAILROAD COMPANY.

Quantum Meruit.—Evidence is admissible of all facts relative to situation and relation of parties, as bearing on question of employment, p. 467.

Cited to same effect in *Bassett v. Fairchild*, 132 Cal. 646, quoting *McCarthy v. Mount Tecarte etc. Co.*, 111 Cal. 337, 338, holding erroneous the exclusion of certain testimony in suit by director against his corporation for compensation for services.

42 Cal. 469-474. CRAWFORD v. BARK CAROLINE REED.

Maritime Contract.—Jurisdiction of federal courts is exclusive in proceedings in rem to enforce lien against domestic vessel for materials and supplies furnished at home port, p. 472.

Cited to same effect in *Hayford v. Cunningham*, 72 Me. 134, as to repairs on domestic vessel, following federal decisions; *Steamer Petrel v. Dumont*, 28 Ohio St. 613, 614, 617, 22 Am. Rep. 401, 403, 405, holding lien for repairs given by state watercraft law unavailable in state court; *The Willapa*, 25 Oreg. 78, ruling similarly as to local law, as to supplies at home port. Distinguished in *Atlantic Works v. The Glide*, 157 Mass. 525, 34 Am. St. Rep. 306, sustaining jurisdiction of state court under local act, as to labor and materials used in repairs (but see dissenting opinion, pages 531, 532, 534, 34 Am. St. Rep. 309, 310); and see *McDonald v. The Nimbus*, 137 Mass. 303, discussing but not deciding point.

42 Cal. 475-479. RUSSELL v. MIXER.

Satisfaction of Mortgage will be set aside in equity when made by mistake of both parties, instead of assignment as agreed upon, p. 477.

Cited in note on general subject to *Poore v. Price*, 27 Am. Dec. 586; *Banta v. Vreeland*, 82 Am. Dec. 273; *Young v. Shaner*, 5 Am. St. Rep. 707.

42 Cal. 479-484. SPENCER v. WINSELMAN.

Mining Claim is freehold estate in fee and not subject to arbitration, p. 482.

Cited to same effect in *Aspen etc. Co. v. Rucker*, 28 Fed. Rep. 222, holding that partition thereof may be had although legal title still in government.

42 Cal. 484-492. SMITH v. McDONALD.

General Guardian of Infants may appear for them notwithstanding their nonservice, and submit them to jurisdiction of court, p. 486.

Cited to same effect in *Emerie v. Alvarado*, 64 Cal. 597, although no

summons issued; *Richardson v. Loupe*, 80 Cal. 499, holding further as to sufficiency of service on minors; *Western etc. Co. v. Phillips*, 94 Cal. 56, holding appointment of guardian ad litem immaterial; *Redmond v. Peterson*, 102 Cal. 599, 41 Am. St. Rep. 206, 207, applying rule to guardians of incompetents; *Beliveau v. Amoskeag Mfg. Co.* 68 N. H. 228, 73 Am. St. Rep. 580, on point that infants and adults are on same plane as to binding effect of judgment entered with consent of his attorney of record employed by next friend. Cited, also, in note to *Porter v. Robinson*, 13 Am. Dec. 159, and *Joyce v. McAvoy*, 89 Am. Dec. 186, on judgments against infants.

Stare Decisia.—Rule of property when well established, will be followed whether correct or not, p. 488.

Cited to same effect in *Mayer v. Carothers*, 14 Mont. 287, as to application of statute of limitations to mining claims; *Pack v. Hansbarger*, 17 W. Va. 339, as to rights of vendees as equitable owners. Cited, also, in note on general subject to *Gee's Admr. v. Williamson*, 27 Am. Dec. 632; note to *Traxton v. Fitt etc. Co.*, 73 Am. St. Rep. 99, on stare decisia.

42 Cal. 493-509. **SICHEL v. CARRILLO.**

Statute of Limitations does not discharge debt, but only takes away a remedy, p. 498.

Cited to same effect in *Whitmore v. San Francisco Savings Union*, 50 Cal. 150, applying rule to failure to present probate claim, and denying right of executor to compel creditor to surrender security under trust deed where claim not presented (but see as to this case *Reid v. Sullivan*, 20 Colo. 501, where main case cited); *State v. Yellow Jacket etc. Co.*, 14 Nev. 232, discussing operation of statutes on claims for taxes; dissenting opinion in *Mulvane v. Sedgley*, 63 Kan. 126, main opinion holding action on surety mortgage barred when principal debt is barred; *Raymond v. Bales*, 26 Wash. 499, partial payment by mortgagor on mortgage debt does not extend limitations as against judgment creditors of mortgagor who has purchased mortgaged premises at execution sale; *George v. Butler*, 26 Wash. 463, absence of mortgagor from state will not suspend running of limitations as to mortgage where he has parted with all interest in premises to resident grantee; *Myer v. Beal*, 5 Oreg. 130, holding mortgage enforceable though remedy in notes barred, and on same point in *Allen v. O'Donald*, 12 Saw. 32, 28 Fed. Rep. 26. Cited, also in notes on general subject to *Lord v. Shaler*, 8 Am. Dec. 163; *Ludlow v. Van Camp*, 11 Am. Dec. 534.

Death of one joint debtor does not affect bar of statute as to survivor, p. 499.

Affirmed in *Hibernia Sav. & Loan Society v. Boland*, 145 Cal. 629, where bar of statute as to other defendants than administrator of deceased defendant appeared on face of complaint, it was not demurrable.

Surety is not Discharged by failure to present claim against estate of deceased principal, p. 500.

Cited in *Neale v. Head*, 133 Cal. 49, holding sureties not discharged by nonpresentation against estate of deceased cosurety; *Eickhoff v. Eikenbary*, 52 Neb. 335 (quoted in *Bell v. Walker*, 54 Neb. 226), applying rule to action on replevin bond. Distinguished in *Smith v. Freylar*, 4 Mont. 492, holding surety of note, though joint maker in form, discharged by granting of extension to principal.

Contract of Mortgage is distinct from that creating debt secured, p. 503.

Cited in *Sather etc. Co. v. Briggs Co.*, 138 Cal. 734, on point that mortgage is not discharged by any change in the form of the indebtedness.

Probate Claim.—Nonpresentation against estate of debtor does not bar right to foreclose mortgage of lands of wife to secure the debt, p. 505.

Cited to same effect in *Cal. Bank v. Brooks*, 126 Cal. 200, noted under *Lord v. Morris*, 18 Cal. 482; *Vandall v. Teague*, 142 Cal. 476, holding presentation of mortgage claim against husband's estate not to suspend running of statute of limitations as against title of surviving wife to the homestead mortgage; *Wood v. Goodfellow*, 43 Cal. 188, on point that mortgagor cannot, as against subsequent incumbrancers or transferees, prolong time of payment or otherwise increase burdens of mortgaged property; *Schadt v. Heppe*, 45 Cal. 437, 438, on point that mortgagor's administrator is not necessary defendant in foreclosure when property set apart as probate homestead and no personal claim made against estate; *Pitte v. Shipley*, 46 Cal. 159, holding presentation of claim necessary, however, when land part of general assets of estate, even though no claim for deficiency made; and on same point in *Harp v. Calahan*, 46 Cal. 230; and *Reid v. Sullivan*, 20 Colo. 501; *Bull v. Coe*, 77 Cal. 60, 61, 11 Am. Rep. 237, when mortgaged property was wife's homestead, and holding further as to release of wife considered as a surety. Cited, also, in *Toulouse v. Burkett*, 2 Idaho, 176, discussing meaning of "claim," and holding presentation unnecessary in case of action to declare vendor's lien on property sold to deceased.

Claim on Mortgage should be presented against mortgagor's estate although securing debt of third person, p. 505.

Explained and overruled in *Hibernia etc. Soc. v. Conlin*, 67 Cal. 181, holding such presentation unnecessary and bar of statute of limitations not affected by presentation and allowance; but see *Bush v. Adams*, 22 Fla. 190, where case followed.

Conclusions of Law—Modification of.—Query whether this proper practice, p. 507.

Cited in *First National Bank v. Dusy*, 110 Cal. 76, denying power of court after entry of decree of foreclosure to amend its findings and judgment, so as to include other foreclosures.

Counsel Fees upon Foreclosure are not allowable unless stipulated in mortgage, p. 508.

Cited to same effect in *Monroe v. Fohl*, 72 Cal. 570, modifying judgment where fee allowed in excess of such stipulation; *Boab v. Hall*, 107 Cal. 162, ruling similarly on allowance where no fee stipulated in mortgage.

42 Cal. 513-522. SAN FRANCISCO v. CERTAIN REAL ESTATE.

Judgment by Consent cannot be reviewed on appeal, p. 518.

Cited to same effect in *Erlanger v. Southern Pacific etc. Co.*, 109 Cal. 306, dismissing appeal from judgment entered on stipulation, with provision that no appeal should be taken therefrom.

Street Improvements.—Validating act is constitutional that cures defects and omissions in proceedings of supervisors or street superintendent, p. 519.

Distinguished in *People v. Lynch*, 51 Cal. 35, 36, 21 Am. Rep. 693, denying power of legislature to levy tax directly in incorporated city or validate such tax when imposed by city government when void for want of uniformity and equality. Cited in *Lent v. Tillson*, 72 Cal. 419, discussing validity of publication of notice.

City is not Liable under act 1862, p. 391, for work done other than on street "accepted" thereunder, p. 521.

Cited in *Raisch v. San Francisco*, 80 Cal. 8, holding city not liable on implied contract under the Statute of 1871-72, page 808, unless no assessment made or none enforced, through fault of others than contractor.

42 Cal. 523-528. SCOLES v. UNIVERSAL LIFE INSURANCE COMPANY.

Life Insurance.—"Local disease," within application for insurance, includes tuberculosis, p. 527.

Cited in note on general subject to *Continental etc. Co. v. Yung*, 3 Am. St. Rep. 635.

42 Cal. 528-535. HOWE v. UNION INSURANCE COMPANY.

Attachment Lien is Dissolved by filing petition in bankruptcy, but not execution lien where levy theretofore made, p. 533.

Cited to same effect in *Elliott v. Warfield*, 122 Cal. 634, quoting *Vermont etc. Co. v. Superior Court*, 99 Cal. 581; as to first proposition in *Day v. Superior Court*, 61 Cal. 494, holding further as to conflict between state and federal courts; and as to second, in *Vermont, etc. Co. v. Superior Court*, 99 Cal. 581, denying power of insolvency court to restrain sheriff in sale under such execution.

General Citations.—*Hudson v. Adams*, Fed. Cas. No. 6832; *Shelly v. Elliston*, Fed. Cas. No. 12750.

42 Cal. 535-540. PEOPLE v. PADILLIA.

Affidavits on Motion for New Trial cannot be considered unless incorporated into bill of exceptions or properly certified, p. 539.

Cited to same effect in *People v. Mahoney*, 77 Cal. 532, holding clerk's certificate insufficient; *People v. Louie Foo*, 112 Cal. 21, where not certified at all.

Reasonable Doubt—Instructions.—Jury cannot convict unless entirely satisfied of defendant's guilt of offense charged, p. 540.

Cited to same effect in *People v. Kerrick*, 52 Cal. 447; *People v. Carrillo*, 70 Cal. 645; and *People v. Ferry*, 84 Cal. 34 (but see *State v. Ryan*, 12 Mont. 299, holding erroneous instruction given, but holding main case overruled by later cases; and *State v. Nelson*, 11 Nev. 342, criticising main case); holding erroneous instruction similar to that given in main case; *People v. Vereseneckcockcockhoff*, 129 Cal. 504, as having overruled *People v. Cronin*, 34 Cal. 191, and holding erroneous instruction given; *People v. Beck*, 58 Cal. 213, sustaining instruction on reasonable doubt, although "considered unsatisfactory"; and *People v. Hardisson*, 61 Cal. 380, also sustaining instruction on same subject. Distinguished in *State v. Anderson*, 10 Oreg. 461, sustaining instructions given. Cited, also, in note to *Rippey v. Miller*, 62 Am. Dec. 182, on sufficiency of circumstantial evidence.

Errors in Instructions are reviewable in the absence of the testimony if incorrect under every conceivable state of the evidence, p. 539.

Cited in *State v. Mason*, 24 Mont. 344, reviewing such instructions on judgment-roll alone.

42 Cal. 541-559. SAN FRANCISCO v. CANAVAN.

Dedication with Right of Revocation is invalid, p. 553.

Distinguished in *County v. Barney*, 79 Cal. 379, 12 Am. St. Rep. 154, holding dedication by county of land for hospital shown, although power of revocation existed, and defining "irrevocable" as used in this connection; and see *State v. Travis County*, 85 Tex. 441, as to right of public where dedication made with no right of revocation. Cited, also, in note on general subject to *State v. Trask*, 27 Am. Dec. 570.

Dedication may be Revoked before acceptance, whether made by deed or otherwise, p. 553.

Cited to same effect in *Mills v. Los Angeles*, 90 Cal. 531, holding, however, that dedication by city of land for streets is complete without formal acceptance. Cited, also, in note on general subject to *State v. Trask*, 27 Am. Dec. 569.

Intent to Dedicate must be clearly indicated by owner's acts and declarations, p. 554.

Cited to same effect in *Ramthun v. Halfman*, 58 Tex. 553, holding such intent not shown by facts.

Dedication consists of clearly indicated intention by owner to dedicate, and acceptance by public of the dedication, p. 553.

Cited to same effect in *People v. Blake*, 60 Cal. 503 (and dissenting opinion, page 504), holding dedication for street shown by facts; *People v. Williams*, 64 Cal. 502, holding no dedication for wharf purposes shown, by reason of nonacceptance by city; and *Hayward v. Manzer*, 70 Cal. 480, ruling similarly as to street; *Spaulding v. Bradley*, 79 Cal. 454, and *Steinauer v. Tell City*, 146 Ind. 497, holding dedication for street incomplete on both grounds; and, for same reasons, *People v. Reed*, 81 Cal. 77, 79, 15 Am. St. Rep. 28, 30, where lots sold by reference to unrecorded map; and *Shellhouse v. State*, 110 Ind. 513, as to dedication for alley; *Smith v. San Luis Obispo*, 95 Cal. 470, holding acceptance of street shown by user without formal action by municipal authorities; *People v. Dreher*, 101 Cal. 273, holding, further, dedication question of fact, and finding not disturbed where evidence conflicting; and see *Demartini v. San Francisco*, 107 Cal. 409, sustaining finding of no dedication or acceptance, and holding intention to dedicate not shown by proof of user alone; *Niles v. City*, 125 Cal. 577, noted under *San Francisco v. Calderwood*, 31 Cal. 585; *Swift v. Mayor*, 101 Ga. 710, holding dedication not shown under facts stated; *Lightcap v. Town of North Judson*, 154 Ind. 46, holding offer revoked by conveyance to another before acceptance; *Bank v. Oakland*, 90 Fed. 697, 61 U. S. App. 231, holding dedication established. Cited, also, in note on general subject to *State v. Trask*, 27 Am. Dec. 562, 564, 565.

Pueblo Lands were held by pueblos and their successors only, in trust for certain municipal purposes, and subject to power of legislature to control their alienation, p. 555.

Cited to same effect in *Holladay v. San Francisco*, 124 Cal. 356, and *City of Monterey v. Jacks*, 139 Cal. 549, noted under *Hart v. Burnett*, 15 Cal. 530; *Board v. Martin*, 92 Cal. 217, discussing nature of city title to school lots; *Ames v. San Diego*, 101 Cal. 392, on point that pueblo lands held for public use cannot be lost by adverse possession, but aliter as to those held as house lots. Distinguished in *People v. Lynch*, 51 Cal. 35, discussing legislative power over municipal assessments. Cited, also, in note to *Mount Hope Cemetery v. Boston*, 35 Am. St. Rep. 538, on legislative power over municipal property held in trust.

Municipal Corporations are subject to legislative will as to extent of powers and manner of exercise, p. 557.

Cited to same effect in *Ex parte Wells*, 21 Fla. 319, sustaining act dissolving municipal corporation for default in payment of interest accounts; note in *Commonwealth v. Cullen*, 53 Am. Dec. 471, on amendments to municipal charters; *Hasbrouck v. Milwaukee*, 80 Am. Dec. 732, on general subject.

42 Cal. 570-578. McKINLAY v. TUTTLE.

Defendants Sued by Fictitious Names are not bound by judgment unless complaint is amended by insertion of true names, p. 577.

Cited to same effect in *Alameda Co. v. Crocker*, 125 Cal. 104, but obviating reversal by amendment as of date prior to judgment; and to same effect, see *Hoffman v. Keeton*, 132 Cal. 196; *Baldwin v. Bornheimer*, 46 Cal. 436, directing amendment where party appeared who was not an original defendant; and see *Tyrrell v. Baldwin*, 67 Cal. 3, 4, under similar facts, holding, however, judgment not void on collateral attack; *Campbell v. Adams*, 50 Cal. 205, holding, however, judgment not attackable collaterally, although erroneous on direct attack; and on same point *Baldwin v. Morgan*, 50 Cal. 588; *Farris v. Merritt*, 63 Cal. 119, holding, however, such amendment not to change cause of action so as to fall within statute of limitations; *Bachman v. Cathry*, 113 Cal. 501, discussing right to change of venue where such fictitious names used.

Recitals in Judgment are not conclusive on direct attack, p. 577.

Cited to same effect in *Houghton v. Tibbets*, 126 Cal. 60, reversing default judgment on appeal for misnomer of defendant served; *Wiggin v. Superior Court*, 68 Cal. 401, holding aliter, however, as to collateral attack; *County of Yolo v. Knight*, 70 Cal. 436, as to recitals of proof of service and default; and *Weeks v. Gold Min. Co.* 73 Cal. 600; and *Whitney v. Daggett*, 108 Cal. 235, as to like recitals as to service by publication; *Eichhoff v. Eichhoff*, 107 Cal. 47, 48 Am. St. Rep. 112, on point that judgment will be reversed on appeal for irregularities which would not avail on collateral attack, and holding action to vacate judgment to be collateral attack. Distinguished in *Dennis v. Winter*, 63 Cal. 18, holding recitals in order confirming probate sale conclusive in collateral attack, as to facts not jurisdictional.

Law of Case.—Record on Former Appeal may be looked into to ascertain facts then before appellate court, p. 576.

Cited to same effect in concurring opinion, *Sharon v. Sharon*, 79 Cal. 691, holding, however, opinion of trial judge not within rule except as relating to questions of law; *Eversdon v. Mayhew*, 85 Cal. 7, *Headley v. Challis*, 15 Kan. 606, and *Plymouth etc. Bank v. Gilman*, 3 S. Dak. 178, 44 Am. St. Rep. 787, applying rules of law of case. Cited, also, in note on general subject to *Gee's Admr. v. Williamson*, 27 Am. Dec. 634.

42 Cal. 578-590. STATE v. STEAMSHIP "CONSTITUTION." 10 Am. Rep. 303.

States cannot Exclude sane, able-bodied persons who are neither paupers or criminals, p. 587.

Approved in dissenting opinion in *Compagnie Francaise etc. v. Board etc.*, 186 U. S. 400, majority holding Louisiana state board of health may prohibit foreign steamer from landing passengers at New Orleans or any

place contiguous thereto because of existence of infectious disease in that city.

42 Cal. 591-606. **MORENHAUT v. BARRON.** S. C. see **MORENHAUT v. BELL**, 62 Cal. 338, construing same conveyances.

Finding Outside Issues will not sustain judgment based thereon, p. 605.

Cited to same effect in *Schirmer v. Drexler*, 134 Cal. 139, reversing judgment and holding no waiver of insufficiency of findings shown; *Green v. Chandler*, 54 Cal. 628, where fact found not alleged in complaint; *Murdock v. Clarke*, 59 Cal. 693, where finding for plaintiff was opposed to allegations of complaint; and *Heinlen v. Heilbron*, 71 Cal. 563, on allowance for damages for diversion of water on property not included in complaint; *Harris v. Lloyd*, 11 Mont. 405, 28 Am. St. Rep. 485, as to variance between complaint and findings in nature of partnership involved; *Gaston v. Drake*, 14 Nev. 183, 33 Am. Rep. 553, holding, however, that court need not base findings on such issues where relief denied because of public policy; and *Harkins v. Cooley*, 5 S. Dak. 231, holding, further, such judgment not supported by rule as to presumptions in its favor.

42 Cal. 606-619. **POPPE v. ATHEARN.**

Regulations of General Land Office have force and effect of laws, when not repugnant to acts of Congress, p. 609.

Cited to same effect in *Rose v. Wood, etc. Co.*, 73 Cal. 388, sustaining regulation as to entry of lands by agents; *Cosmos etc. Co. v. Gray Eagle etc. Co.*, 112 Fed. 12, sustaining regulations as to relinquished forest reserve lands under 30 United States Statutes at Large, 36; *United States v. Barnhart*, 13 Saw. 130, 33 Fed. Rep. 462, on point that such regulations are "executive acts" and within judicial notice of court.

Failure to Find Upon Issues cannot be reviewed on appeal unless findings excepted to in that particular, p. 617.

Cited to same effect in *Warren v. Quill*, 9 Nev. 264, affirming judgment for lack of such exception or objection.

Pre-emption.—Declaratory statement under act of 1853 is ineffectual if not filed within time limited by that act, p. 618.

Cited to same effect in *Schieffery v. Tapia*, 68 Cal. 188, where held filed too late under facts.

42 Cal. 619-622. **SEMPLE v. WARE.** S. C. see **HAGAR v. SPECT**, 48 Cal. 408, discussing same titles involved.

Former Judgment as Bar.—Estoppel from may be waived by failure to plead such bar in subsequent action and consent to decree thereon, p. 621.

Cited to same effect in *Board v. People*, 189 Ill. 448, noted under *Semple v. Wright*, 32 Cal. 659; *Bateman v. Grand Rapids etc. Co.*, 96 Mich. 444, holding such estoppel waived under facts, and last judgment to control.

42 Cal. 622-625. **PEOPLE v. CLARKE.**

Criminal Appeal from order "affecting substantial rights" applies only to orders after final judgment, p. 625.

Cited to same effect in *People v. Ah Kim*, 44 Cal. 385, denying right to appeal from order arresting judgment; *People v. Tremayne*, 3 Utah, 334, ruling similarly as to orders forfeiting bail money and refusing to set aside such forfeiture; *People v. Hill*, 3 Utah, 359, as to order refusing to discharge defendant upon sustaining of demurrer to indictment.

42 Cal. 626-628. **HARVEY v. RYAN.**

Mining Regulations.—Question whether in force at given time is one of fact for jury, p. 628.

Cited to same effect in *Myers v. Spooner*, 55 Cal. 261, applying rule to question of intention to abandon mining claim; *Poujade v. Ryan*, 21 Nev. 452, as to existence of local mining rules and customs; *North Noonday etc. Co. v. Orient etc. Co.*, 6 Saw. 307, holding, further, as to presumption of continued existence.

Mining Custom may be proved by parol, and supersedes disused written regulation, p. 628.

Cited to same effect in *Doe v. Waterloo etc. Co.*, 70 Fed. Rep. 456, construing section 2324 United States Revised Statutes. Cited, also, in note on general subject to *McClintock v. Bryden*, 63 Am. Dec. 93; and in *Roberts v. Wilson*, 1 Utah, 294, on point that on proof of written mining laws it must appear that copy comes from proper repository and is properly certified.

42 Cal. 629-630. **BENNETT v. BENNETT.**

Appeal.—Recitals in undertaking cannot supply defects in clerk's certificate on motion to dismiss, p. 629.

Cited in *Railroad Co. v. Anderson*, 77 Cal. 299, on point that clerk's certificate of correctness of transcript (which improperly contained undertaking) is not sufficient as certificate of sufficiency of undertaking.

42 Cal. 630-635. **BARBER v. SAN FRANCISCO.**

Certiorari will not lie to correct error of supervisors in passing upon facts within their jurisdiction, p. 634.

Cited to same effect in *Central Pacific etc. Co. v. Placer County*, 48

Cal. 670, denying writ as to refusal of board of equalization to reduce assessment, and holding rule unchanged by section 3680 of the Political Code; and see *Farmers' etc. Bank v. Board*, 97 Cal. 327; *Spring Valley W. W. v. Bryant*, 52 Cal. 137, ruling similarly as to passage of resolution by supervisors and holding act legislative and not judicial; *Belser v. Hoffachneider*, 104 Cal. 459, on point that court cannot review action of supervisors in sustaining appeal on ground that relief granted was not based upon objections made; and see *Quinchard v. Board*, 113 Cal. 672, on point that board first exercises judicial functions on such appeal; *Phillips v. Welch*, 12 Nev. 169, denying writ as to commitment of petitioner for contempt where court had jurisdiction.

Street Improvements.—Appeal to supervisors held sufficient, p. 634.

Cited in *Girvin v. Simon*, 127 Cal. 494, ruling similarly as to appeal under act of 1885, and distinguishing "appeal" and "remonstrance."

42 Cal. 636-643. **DECKER v. HOWELL.**

Partner may Bind Firm by executory note in its name, p. 641.

Cited to same effect in *Schneider v. Sansom*, 62 Tex. 202, 50 Am. Rep. 522, sustaining power to sell entire stock in good faith to pay debts, even if on Sunday.

Partnership as to Mines may be strict, and not mining partnership, if so expressly agreed upon by parties, p. 642.

Cited to same effect in *Quinn v. Quinn*, 81 Cal. 16, holding partnership to be a strict one, and granting power to partner to transfer entire property of firm; *Congdon v. Olds*, 18 Mont. 490, discussing difference between such classes. Cited, also, in note to *Skillman v. Lachman*, 83 Am. Dec. 103, 106, 108, on general subject. Distinguished in *Hawkins v. Spokane etc. Min. Co.*, 3 Idaho, 655, where mining corporation holding minority interest works claim against protest of majority and mingles gold from partnership claim with its own gold, it cannot recover gold so mingled, quantity being unknown.

General Citation.—*Freeman v. Hemenway*, 75 Mo. App. 617.

42 Cal. 643-645. **WOOD v. RAMOND.**

Nonsuit may be Waived and judgment had on merits, p. 645.

Cited to same effect in *McKay v. Montana etc. Co.*, 13 Mont. 19, discussing review on appeal on judgment entered on verdict directed on motion.

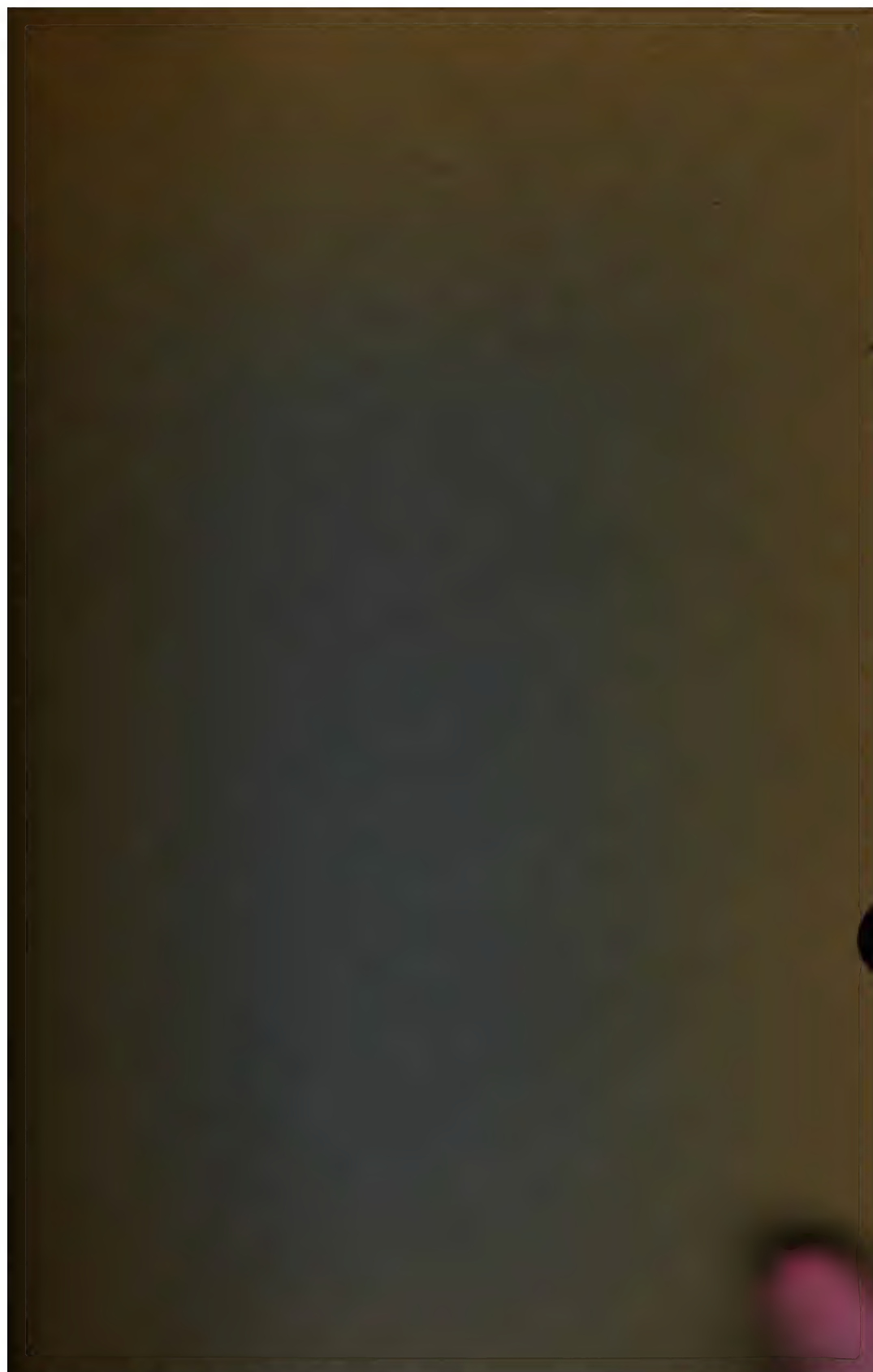
Granting of Nonsuit on defendant's motion precludes right to judgment on merits for him, p. 645.

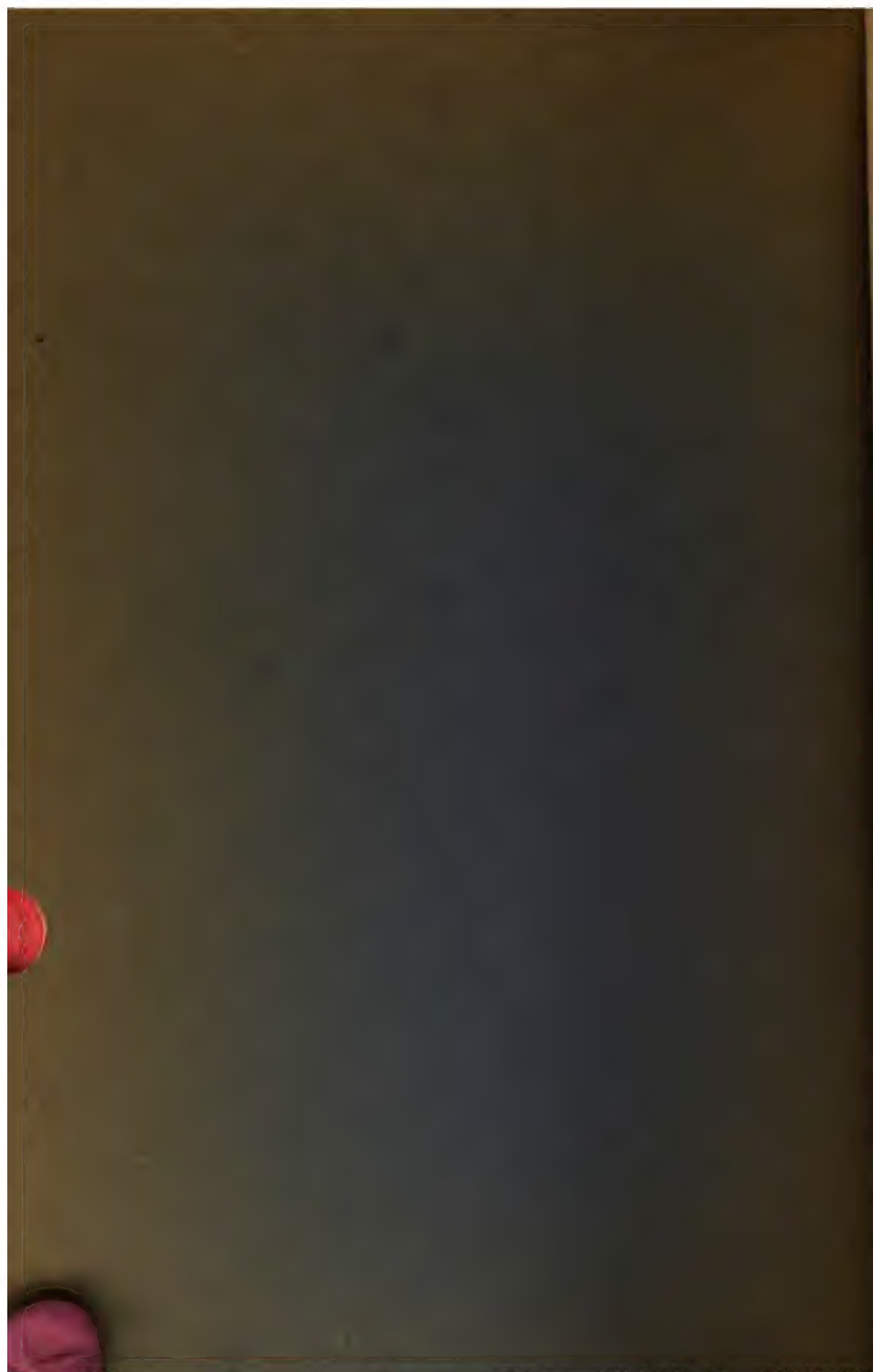
Distinguished in *Warner v. Darrow*, 91 Cal. 313, holding nonsuit not to operate as dismissal so as to deprive defendant of right to judgment on merits on his cross-complaint.

42 Cal. 645-650. LOGAN v. HALE.

Findings.—Omissions in should be supplied by court on exception taken to their sufficiency, p. 649.

Cited to same effect in *Thompson v. Connecticut etc. Co.*, 139 Ind. 353, holding special findings amendable at any time before final judgment and during period for filing bill of exceptions containing evidence; *Ordway v. Boston etc. Co.*, 69 N. H. 431, as holding that a judgment of nonsuit is not one upon the merits and is not a bar, but distinguished under local practice in this regard. Distinguished in *Davenport v. Doss*, 40 Or. 338, motion for nonsuit for insufficiency of evidence does not amount to an admission by defendant that his counterclaim is without merit.





REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF CALIFORNIA.

CHARLES A. TUTTLE,
REPORTER.

VOLUME 43
WITH
NOTES ON CAL. REPORTS

SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY,
LAW PUBLISHERS AND LAW BOOKSELLERS.
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HON. WILLIAM T. WALLACE became Chief Justice February 27th, 1872, on the decease of Chief Justice SPRAGUE.

HON. ISAAC S. BELOHER, *vices* SPRAGUE, deceased, qualified March 4, 1872.

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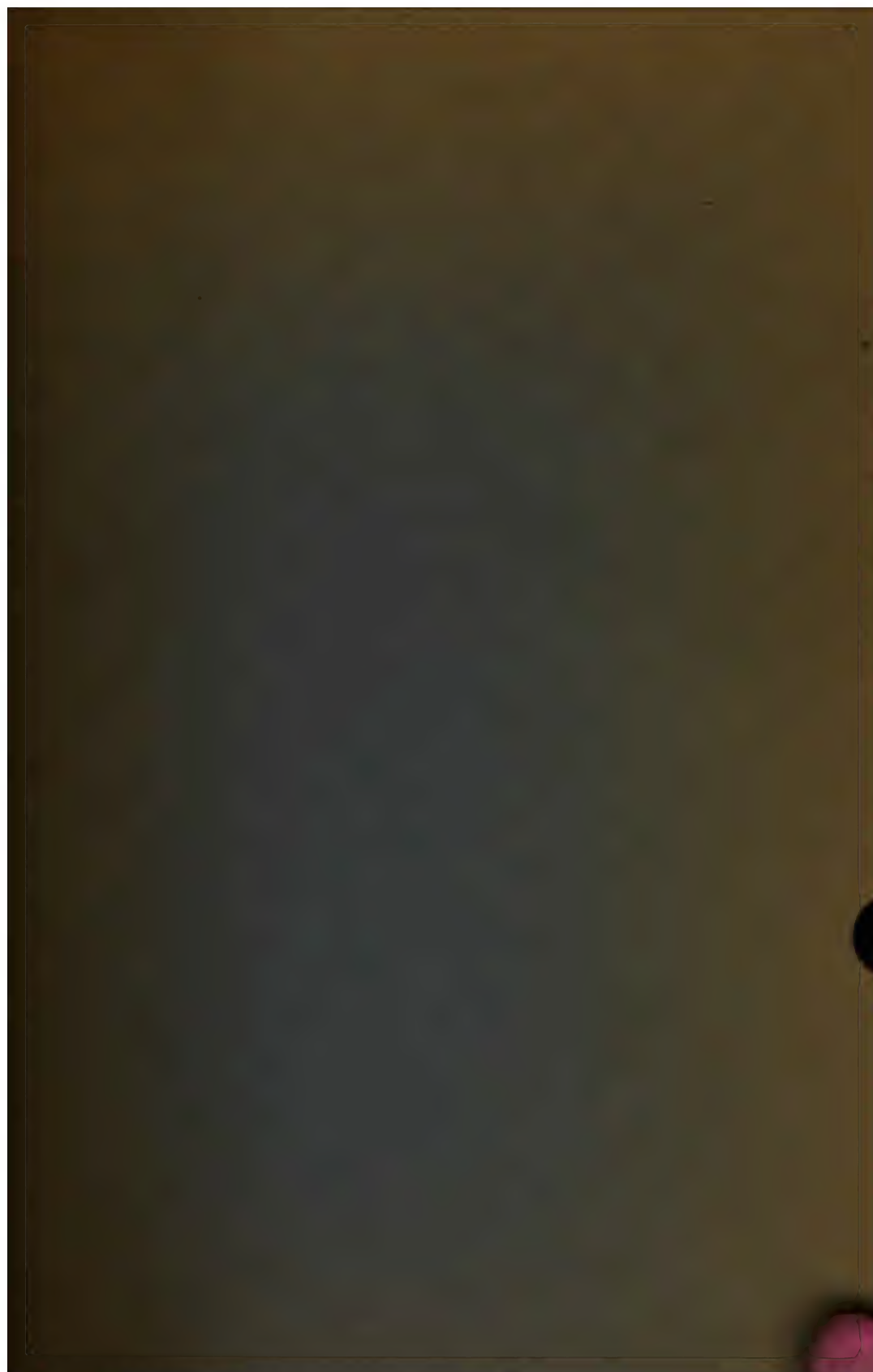
FIRST DISTRICTPABLO DE LA GUERRA
SECOND DISTRICT.....CHARLES F. LOTT
THIRD DISTRICTSAMUEL BELL McKEE
FOURTH DISTRICT.....ROBERT F. MORRISON
FIFTH DISTRICT.....SAMUEL A. BOOKER
SIXTH DISTRICT.....LEWIS RAMAGE
SEVENTH DISTRICT.....W. C. WALLACE
EIGHTH DISTRICT.....JOHN P. HAYNES
NINTH DISTRICT.....A. M. ROSBOROUGH
TENTH DISTRICT.....P. W. KEYSER
ELEVENTH DISTRICT.....A. C. ADAMS
TWELFTH DISTRICTE. W. McKINSTRY
THIRTEENTH DISTRICTA. C. BRADFORD
FOURTEENTH DISTRICT.....T. B. REARDON
FIFTEENTH DISTRICT.....S. H. DWINELLE
SIXTEENTH DISTRICT.....THERON REED
SEVENTEENTH DISTRICTR. M. WIDNEY
EIGHTEENTH DISTRICTH. C. ROLFE
NINETEENTH DISTRICTE. D. WHEELER
TWENTIETH DISTRICTDAVID BELDEN

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JANUARY TERM, 1872.

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
JANUARY TERM, 1872.

[No. 2,333.]

ABRAHAM POWELL v. JOHN MAGUIRE.

CONTRACT TO FORM A PARTNERSHIP — REMEDY FOR BREACH.—Where two persons made an agreement to form a partnership, but such partnership was never launched, and one of the parties proceeded to conduct the enterprise in his own name, at his own cost, and for his own exclusive benefit, excluding the other, and repudiating the partnership agreement: *Held*, that an action by the latter to establish his right as a partner, and for an accounting, would not lie—his only remedy in such case being an action at law for breach of contract.

SECRET AGREEMENT OF PARTNERSHIP IN FRANCHISE TO BE PROCURED, NOT ENFORCEABLE.—When Powell and Maguire verbally agreed to procure a franchise in the name of Maguire, and to run a ferry, each party to be equally interested in the franchise and business, and after the procurement of the franchise Maguire refused to transfer one half to Powell, or to recognise any interest in him: *Held*, that public policy forbade the enforcement of such secret understanding between the parties.

RIGHT OF FRANCHISEE TO SELECT ASSOCIATES.—When the Legislature grants a franchise to a particular person, his associates and assigns, it delegates to him the right to select the person thereafter to be associated with him in the enterprise.

Statement of Facts.

PUBLIC POLICY AS TO OWNERSHIP OF FRANCHISE.—If several persons, under an agreement of mutual interest, see fit to obtain a franchise from the Legislature in the name of one only, public policy requires that they should be made to rely solely upon his good faith in carrying out the agreement; and if he repudiates the contract on obtaining the franchise, equity will not grant relief.

WHAT AGREEMENTS TO SHARE FRANCHISE ARE ENFORCEABLE.—The rule adopted in *Miles v. Thorne*, 38 Cal. 335, that an agreement of partnership in a franchise might be enforced by a person who had been let into possession, and expended money under an agreement to that effect after the granting of the franchise, is not to be extended beyond the facts of that case.

APPEAL from the District Court of the Seventh Judicial District, Napa County.

This action was originally commenced in the District Court of the Seventh Judicial District for Solano County, but was afterwards transferred to Napa County. On February 1st, 1869, a judgment was rendered in favor of plaintiff, that he should be let into equal participation and enjoyment with the defendant in the franchise and ferry business between Vallejo and Mare Island, and ordering a reference to the Court Commissioner to state an account as to the expenses and receipts of said ferry. The Commissioner reported that the expenses from the time of the granting of the franchise up to May 26th, 1869, amounted to twenty-one thousand three hundred and twenty-six dollars and sixty-eight cents, and the receipts during the same time, to twenty-one thousand one hundred and forty-four dollars and forty-six cents. Upon this report final judgment was rendered on June 18th, 1869, that upon plaintiff's paying to defendant ninety-one dollars and eleven cents, he should be admitted into a full and equal participation and enjoyment with defendant in the ownership of said ferry, its franchise, business, and property. The defendant moved for a new trial, which was overruled, and he then took this appeal from the judgment and order.

Argument for Appellant.

McAllisters & Bergin, for Appellant.

There never was any partnership between the parties. The plaintiff contributed no time, labor, or money towards the enterprise. It was only after the franchise was granted that he claimed any interest; but not even then did he contribute, or offer to contribute, to the expenses of building boats and putting the ferry in running order. His whole claim was based upon the influence, or pretended influence, exerted by him upon the State Senator from that district in procuring the passage of the bill; but there is nothing to show anything like a partnership between the parties. On his own statements the most he could claim was a half interest in the franchise for "lobby service;" but not even that as a partner. (*Wheeler v. Farmer*, 38 Cal. 203, and cases cited; *Hasketh v. Blanchard*, 4 East, 184; *Harding v. Foxcraft*, 6 Greenl. 77; *Thorndike v. DeWolf*, 6 Pick. 120; *Parsons on Part.* 548.)

But even admitting, for the sake of the argument, that there was a clear and binding agreement of partnership entered into between Powell and Maguire, that Maguire afterwards repudiated it, and himself proceeded and embarked his means in the proposed business of the partnership, and that Powell never contributed time, attention, means, or labor to the business Maguire thus carried on in disregard of the partnership agreement, is there any principle of law or equity that will make the individual means of Maguire partnership funds, and the increase, partnership profits, or entitle Powell to a division? We know of no such principle or rule. Upon general principles, in the case supposed, Maguire would only be liable for a breach of contract, for which he would be bound to render compensation. What would the compensation be? Clearly not half the profits and stock of the business to which the supposed excluded partner never contributed either. In the ordinary

Argument for Appellant.

case of an employment for a definite period of time, if the employer wrongfully dismiss the employé, he is liable for damages; but these are not the full compensation for the unexpired term of service, but merely an indemnity for the damage sustained. (*Clark v. Marsiglia*, 1 Den. 318; *Martin v. Wilson*, id. 605; *Spencer v. Halsted*, id. 608; *Owen v. Frink*, 24 Cal. 178; *Shannon v. Comstock*, 21 Wend. 459; *Hecker v. McCrea*, 24 Wend. 309; *Ashburner v. Balchen*, 3 Seld. 264; *Durkee v. Mott*, 8 Barb. 428; *Holmes v. Davis*, 19 N. Y. 494; *Giles v. Morrison*, 50 Barb. 50; *Utter v. Chapman*, 38 Cal. 659.)

There were many errors of law committed on the trial. Among others it was error to admit parol evidence to establish the pretended contract, which, if there ever was any, was void under the Statute of Frauds. It was not to be performed within a year. Besides this, a franchise of this character is embraced within the term "lands, tenements, and hereditaments," as used in the statute, prohibiting any estate, or interest therein, or trust or power relating thereto, to be created, granted, assigned, surrendered, or declared, except in writing. (*Rausch v. Van Hagan*, 17 Cal. 122; *Wait v. Van Allen*, 22 N. Y. 322; *Yturbide v. U. S.*, 22 How. 290; *Ray v. Wilson*, 13 Ind. 12; 13 Wend. 279; 23 Ill. 370.)

Again, there was error in denying the defendant's motion for nonsuit, and on this among other grounds—the subject matter of the alleged contract was not a legal subject matter of contract. The rights asserted by plaintiff were founded in illegality, in that they were based upon a combination to exercise improper influence on the Legislature in the discharge of its duty; and, also, because the Legislature, in the exercise of its bounty, and in the discharge of its sovereign duty, granted the franchise to the defendant alone, and those whom he might afterwards, by instrument in writing, associate with him in the performance of the duties imposed;

Argument for Appellant.

and parol evidence was incompetent to control, qualify, or in any manner vary the terms of the Act itself—the express language of the statute being the only legal means of ascertaining who are the intended recipients of the legislative bounty. In other words, the alleged contract was void as against public policy. (*Mills v. Mills*, 36 Barb. 474; *Brown v. Brown*, 34 Barb. 388; *Rose v. Trax*, 21 Barb. 361; *Harris v. Roof*, 10 Barb. 494; *Gill v. Williams*, 12 La. An. 219; *Clippenger v. Hepbaugh*, 5 W. & Serg. 315; *Hartsfield v. Gurden*, 7 Watts, 152; *Bryan v. Reynolds*, 5 Wisc. 200; *Powers v. Skinner*, 34 Verm. 274; *Wood v. Cann*, 6 Dana, 366; *Frost v. Inhabitants of Belmont*, 6 Allen, 152; *Magill v. Burnett*, 7 J. J. Marsh. 640; *Cunningham v. Cunningham*, 18 B. Monroe, 19; *Eddy v. Caperton*, 4 R. I. 394; *Fuller v. Dame*, 18 Pick. 472; *Gulick v. Baily*, 5 Halst. 87; *Pingry v. Washburn*, 1 Aiken, 264; *Spence v. Harvey*, 22 Cal. 366; *Swan v. Chorpenning*, 20 Cal. 182; *Valentine v. Stewart*, 15 Cal. 387; *Devlin v. Brady*, 32 Barb. 518; *Devlin v. Brady*, 36 N. Y. 681; *Davidson v. Seymour*, 1 Bosw. 92; *Satterlee v. Jones*, 3 Duer, 116; *Bartlett v. Coleman*, 4 Pet. 184; *Cappock v. Bower*, 4 M. & Wels. 361; *Wilder v. Collier*, 7 Maryland, 273; *Krebbin v. Haycroft*, 26 Mo. 396; *Martin v. Wade*, 37 Cal. 168, and cases cited.)

We are not unaware of the decision of this Court in *Miles v. Thorne*, 38 Cal. 335; but in that case the agreement, upon which it was held that Miles was entitled to one half the franchise, was subsequent to the grant, and he actually did reconstruct and repair the subject matter of the franchise under the agreement. All that was said in the opinion as to the validity of the original agreement to procure the franchise was *obiter*, and at best questionable doctrine. According to the test there expressed, there is scarcely a “lobby” arrangement ever made that would not be legal. The true rule, in the language of Justice FIELD is that “all agreements for a share in the result of legislation suggest the use

Argument for Respondent.

of sinister and corrupt means for the accomplishment of the end desired, and are therefore void."

Hartson & Burnell, and Thomas P. Stoney, for Respondent.

A partnership must in all cases exist in advance of its business. Before the partnership business can be launched, there must be an association of the partners for the purpose of embarking in the enterprise. It is hard to conceive of a business which does not require preparations preliminary to its practical operation, and the coöperation of partners in making these preparations is as legitimately within the scope of the partnership as their acts after the principal business has actually been commenced. (*Smith v. Tarlton & Finley*, 2 Barb. Ch. 336.) Our position then is, that Powell and Maguire were partners, and that as such they coöperated in all that was done to procure the franchise, and that the franchise was applied for and obtained by them under the express agreement that it was to be used by them as partners in carrying on the proposed ferry business. The evidence shows that they associated themselves together as partners, and as such applied for and obtained the franchise, and we insist that neither of them can exclude the other from a share of the acquisitions of the association, merely because by the terms of the partnership it was to continue for a longer period than the law would recognize as obligatory upon either of them.

Being such partners, the grant of the franchise to "Maguire and his associates" rendered Maguire a trustee, holding for himself and Powell. (*Beaumont v. Whitney*, 20 Maine, 413; Collyer on Part. 135; 2 Black. Com. 244; Bouvier Law Dic. "Purchase.") The franchise being essential to the copartnership business, as soon as it was acquired it vested by operation of law in the partnership. (*Forster v. Hale*, 5 Ves. 308; *Leach v. Leach*, 18 Pick. 68; *Featherstonhough v. Fenwick*, 17 Ves. 298; Dart on Vendors, 434; Collyer on

Argument for Respondent.

Part. 181; Tiffany & Bullard on Trust. 189; *Marcy v. Her-
rick*, 18 Penn. St. 128; see, also, *Jenkins v. Frink*, 30 Cal.
586.)

Granting that a prospective legislative grant of a franchise such as this was a mere *jus precarium* and not susceptible of being contracted for, yet the franchise when obtained was property, and as such might be the subject of an implied trust. There is nothing in a ferry franchise, as such, which can prevent an assignment of it. If it is inequitable for a partner to exclude his copartner from a share in the franchise, and the law allows him to associate his copartner with him in its enjoyment if he desires, why would not equity compel him to do that justice which the law does not forbid his doing voluntarily? The grant here was not to John Maguire alone, but to him "and his associates" already selected, or to be selected. It was not a personal trust reposed in him, but was made expressly assignable by the use of the words "and assigns."

There is nothing illegal or contrary to public policy in a joint effort of partners to procure for themselves a franchise from the Legislature. There is and can be no illegality in seeking what the Legislature can lawfully grant. If such franchises are given to and may be enjoyed by more than one, why cannot two or more persons unite in praying for them? If all legislation must be the "spontaneous act of the legislative department," it would be equally unlawful for one man, as for several, to petition for and use his influence to obtain a legislative grant for himself. Unless the law, out of tender regard for the weakness of legislators, prohibits all application to them for franchises, there was no impropriety whatever in the combination of Maguire and Powell to obtain theirs from the Legislature. The case of *Miles v. Thorn*, 38 Cal. 335, is an authority directly in point and fully supports this position.

Opinion of the Court — CROCKETT, J.

By the Court, CROCKETT, J.:

In the year 1866 the Legislature granted to the defendant, "his associates and assigns," a franchise authorizing him or them to establish, and for twenty (20) years to maintain, a steam ferry between Vallejo and Mare Island. Shortly after obtaining the franchise the defendant constructed a steam ferry-boat at his own expense, and in the Spring of 1867 commenced, and has ever since continued, to use her as a ferry-boat between said points. The plaintiff claims that, before the franchise was obtained, he and the defendant had entered into a parol agreement, to the effect that they would jointly, at their mutual expense and for their mutual benefit, establish and operate a steam ferry between said points; and as a part of said agreement, it was further understood and agreed that they would, if practicable, obtain from the Legislature, for their joint and mutual benefit, a franchise authorizing the establishment of said ferry, with the right to operate the same; that it was agreed between them that the franchise should be obtained in the name of the defendant and his associates, and the plaintiff, through his friendly relations with the Senator from that district, was chiefly or wholly instrumental in procuring the franchise to be granted; that immediately after the franchise was obtained, he applied to the defendant to convey or assign to him one half of it, in accordance with their previous agreement; that the defendant at first promised to make the transfer, but evaded doing so from time to time, and finally expressly refused; and commenced, and has ever since continued, to operate the ferry for his own emolument, denying the plaintiff's right to participate therein. The action is brought to establish the plaintiff's right to one half the franchise and ferry, and for an accounting. The answer explicitly denies that there was any understanding or agreement to the effect that the plaintiff was to have any interest whatever in the fran-

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chise or ferry, or that he is entitled to participate in any manner therein. At the hearing the Court decided the issues in favor of the plaintiff, and after an accounting was had entered a judgment accordingly. The defendant appeals, as well from the judgment as from an order denying his motion for a new trial.

Upon the plaintiff's own showing the contract was, at most, but an agreement to form a partnership, to take effect when the franchise was obtained; but it clearly appears that the partnership was never launched. On the contrary, the defendant proceeded, shortly after obtaining the franchise, to construct a steam ferry-boat, at his own expense, and for his own exclusive use, and has ever since used her for maintaining the ferry, at his own cost and for his exclusive benefit, denying the plaintiff's right to participate therein, and excluding him from the management and control thereof. Upon these facts, it is obvious that if the plaintiff's rights rested solely on a verbal agreement, to the effect that he and the defendant would establish and maintain the ferry at their joint expense, and for their joint benefit, without reference to the franchise, the plaintiff's only remedy would be an action at law for a breach of contract. He would have no right to participate in the profits of an enterprise to which he had contributed nothing, and could claim no interest in a boat constructed by the defendant, at his own expense, and for his own use, nor in the earnings thereof. In such cases it is well settled that, when the partnership was never launched, and when one of the copartners has proceeded to conduct the enterprise in his own name, at his own cost, and for his own exclusive benefit, excluding the other party therefrom, and repudiating the partnership agreement, the only remedy of the injured party is an action at law for a breach of contract. There would be in such a case, no existing partnership, but only an agreement to form one, which was never consummated by launch-

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ing the enterprise. But it remains to be considered whether the plaintiff stands upon a better footing, because there was coupled with the contract a further agreement that, in furtherance of the enterprise, they would obtain, as they afterward did, the ferry franchise in the name of the defendant, his associates and assigns, for their joint benefit. Upon this branch of the case the first inquiry is, whether a Court of equity, upon the facts stated in the complaint, will decree the defendant to be a trustee, holding the legal title to a moiety of the franchise for the use of the plaintiff. In *Miles v. Thorne*, 38 Cal. 335, we had occasion to consider a somewhat similar question. In that case it appeared that Thorne, at his own expense, had constructed and maintained a wagon road for public travel; but the road having gotten out of repair, he desired to obtain from the Legislature a franchise authorizing him to reconstruct the road, and to collect tolls thereon; and with this view he agreed with Miles, that if the latter would prepare a proper bill for that purpose, and present it to a member of the Legislature for introduction into that body, he would convey to Miles one half the franchise, when obtained. It further appeared that after the franchise was obtained in the name of Thorne, the agreement was renewed, and Miles was placed in possession of one half the road, which he repaired at his own expense—Thorne repairing the other half, and collecting tolls on the whole road. The action was brought to compel a conveyance of one half the franchise, and for an accounting. On these facts, we held that the contract was not *contra bonos mores*, and that the plaintiff was entitled to the relief demanded. But, in the case at bar, the facts are quite different—the plaintiff has not been let into possession, nor expended any time, labor, or money under the franchise, but rests solely on his naked right under the antecedent verbal agreement, to compel the defendant to convey to him a moiety of the franchise. In my opinion, principles of

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public policy forbid that a Court of equity should enforce such a trust, resting wholly on an antecedent agreement, that some one else beside the beneficiary named in the statute was to participate in its benefits, in virtue of a secret understanding between the parties to that effect. Such a practice, if sustained by the Courts, would naturally lead to powerful combinations to procure vicious and corrupt legislation in the name of the least obnoxious of the parties, on an agreement of the confederates to divide the spoils between them. When the Legislature grants a franchise to a particular person, his associates and assigns, it delegates to him the right to select the person thereafter to be associated with him in the enterprise. After obtaining the franchise, if he shall then, by a new contract upon a proper consideration, and in due form, agree to convey a portion of it to another, or if he shall afterwards ratify an antecedent contract otherwise unobjectionable, as in *Miles v. Thorne*, and shall let the party into possession, thereby causing him to expend his time, labor, or money in furtherance of the enterprise, as was done in that case, there can be no doubt that a Court of equity would enforce such a contract. But if several persons desiring to obtain a franchise from the Legislature, in which they are all to be mutually interested, see fit to ask it in the name of only one, public policy requires that they should be made to rely solely on his good faith in carrying out the agreement; and if he repudiates the contract on obtaining the franchise a Court of equity will grant no relief. It may be that, if the Legislature had known beforehand who the real parties in interest were, they would not have made the grant; and if the Courts could be appealed to, to enforce such secret antecedent agreements, unsupported by any subsequent acts of the ostensible beneficiary, it is evident that powerful secret combinations would be formed to procure vicious legislation under false pretenses. What might appear to be a harmless or beneficial

Opinion of Rhodes, J., concurring.

enterprise under the control of one person of good character, might prove to be a very dangerous and pernicious scheme in the hands of twenty secret associates of bad character, and to whom the Legislature might have refused to make the grant, if their interest had been disclosed on the face of the bill. I think the rule adopted in *Miles v. Thorne* ought not to be extended beyond the facts of that case; and I am, therefore, of opinion that a Court of equity ought not to enforce the verbal agreement set up in the complaint, to the effect that it was agreed before the franchise was obtained that the plaintiff was to be equally interested in it with the defendant. In my opinion the judgment should be reversed, and the cause remanded, with an order to the Court below to dismiss the action.

RHODES, J., concurring:

I concur in the foregoing opinion and judgment, and I am of the opinion that the franchise in question is real estate; that in its transfer it is to be governed by the rules applicable to the transfer of title to other real estate — the provisions of the Statute of Frauds, and the rules in equity, respecting the creation of trusts — and that the evidence in this case fails to show the creation of a trust in favor of the plaintiff within those rules.

Mr. Chief Justice SPRAGUE did not participate in the foregoing decision.

Opinion of the Court — WALLACE, C. J.

[No. 2,684.]

OLIVER IRWIN v. A. P. TOWNE AND SAMUEL H. TOWNE.

ORDER OF SUPREME COURT AS TO NEW TRIAL.—Where the Supreme Court reverses an order of an inferior Court denying a motion for a new trial and remands the cause for further proceedings, in accordance with the opinion given in the case, which opinion does not indicate that the proceedings should be different from the proceedings that would have followed the granting of the motion for a new trial in the first place, the order of the Supreme Court places the case, in point of the mere procedure to be followed, in the same situation as though the Court below had directed a new trial.

THE appeal in this case was decided at the October Term, 1871, and is reported in 42 Cal. p. 381. The defendants applied to the Supreme Court for a modification of the judgment.

The other facts are stated in the opinion.

By the Court, WALLACE, C. J.:

In reversing the order denying the motion for a new trial an opinion was filed in which a construction was given to the descriptive calls in the deed under which the plaintiff claimed, but the opinion intimated nothing as to what particular proceedings were to be had on the return of the cause to the Court below. It concluded as follows: "Order denying a new trial reversed and cause remanded for further proceedings in accordance with this opinion." Had the Court below sustained the motion of the plaintiff for a new trial, no question could have arisen as to the proceedings to follow in the cause. Had no appeal been taken from such an order a new trial must have been the result, unless the plaintiff had dismissed the action. The order of this Court reversing the order denying the motion and remanding the cause for further proceedings in accordance with the opinion filed, places the case, *in point of the mere procedure to be*

Opinion of the Court — Rhodes, J.

followed, in the same situation as though the Court below had itself directed a new trial, for, as we have said, there is nothing to be found in the opinion filed which would indicate that the proceedings to be had should be different from the proceedings in any other case in which an application for a new trial had been allowed.

The application for a modification of the order entered here is denied and the remittitur will issue forthwith.

[No. 2,871.]

**JOHN THOMPSON v. ARTHUR THORNTON AND
ISAAO STANLEY.**

DEFECTIVE CERTIFICATE OF CLERK.—A Clerk's certificate, filed in support of a motion to dismiss an appeal under Rule Four of the Supreme Court, is defective, if it fail to state the fact, or the date of the service of the notice of appeal, or the character of the evidence of service.

CERTIFICATE TO SHOW STATEMENT WAS SETTLED.—Where a statement on appeal has properly been filed, the Clerk's certificate must show that the statement was settled.

Query.—Whether a statement on an appeal from an order granting or refusing a new trial would in any case be necessary or proper.

APPEAL from the District Court of the Fifth Judicial District, County of San Joaquin.

The plaintiff had judgment and the defendant appealed.

George W. Tyler, for Appellant.

Terry & Carr, for Respondents, moved to dismiss the appeal upon a Clerk's certificate.

[The certificate is not on file.—**REPORTER.**]

By the Court, RHODES, J.:

Motion to dismiss the appeal, upon a Clerk's certificate, under Rule Four.

Points decided.

The certificate is defective because it does not state either the fact or the date of the service of the notice of appeal, or the character of the evidence of service. It is certified that a statement on *appeal* was filed, that amendments were filed, but that the statement has not been settled. It is certified that the appeal is taken from an order granting a new trial. Whether a statement on an appeal from an order granting or refusing a new trial would in any case be necessary or proper, it is unnecessary at this time to decide; but it has repeatedly been announced by this Court, that in cases where a statement on appeal had properly been filed, the certificate *must show that the statement had been settled*, otherwise the certificate would *not* comply with Rule Four, and the respondent would *not* be entitled to have the appeal dismissed on his *ex parte motion*.

Motion denied.

[No. 2,061.]

SANFORD BENNETT v. WILLIAM C. WALLACE,
JUDGE OF THE DISTRICT COURT OF THE SEVENTH JUDICIAL
DISTRICT.

WHEN THE WRIT OF CERTIORARI LIES.—The writ of certiorari lies only in those cases in which, in the exercise of judicial functions, an excess of jurisdiction has occurred and in which there is no appeal, nor in the judgment of the Court any plain, speedy, and adequate remedy.

CERTIORARI WILL NOT LIE WHERE AN APPEAL MIGHT HAVE BEEN TAKEN.—In a case where an appeal from the judgment might have been taken, but the time for taking it was suffered to elapse, the case does not thereby become one in which "there is no appeal," within the meaning of the Practice Act, Sec. 456.

SUBJECT OF THE PRACTICE ACT AS TO CERTIORARI.—The Practice Act, as to the writ of certiorari, was intended to supply a remedy where none existed in the first instance, and not to supplement one lost through the laches of the party himself.

Opinion of the Court—Wallace, C. J.

CERTIORARI to the Judge of the Seventh Judicial District.

The petition represents that on the 26th day of September, 1867, the District Judge, at his chambers, signed a decree in the case of Susan Bennett against the petitioner, in which it was adjudged and decreed that the bonds of matrimony existing between the parties be dissolved; that the petitioner pay to Susan Bennett the sum of five hundred dollars for her costs, and thirty dollars per month for the support of an infant child; that the said Susan have the care and custody of the child, and that said decree be entered as of the last day of the proceeding June Term of the Court. The petitioner further states that there was no stipulation or consent of the parties that the cause should be heard at chambers, or that the decree should be entered as of the June Term, and he asks the Supreme Court to set aside the decree on the ground that the District Judge exceeded his jurisdiction. It does not appear that any attempt was made to take an appeal.

A. Thomas, for Petitioner, cited *In Re Presentments Co.*, 14 Mayo Jr. C. L. R. 392; *People v. Supervisors of Alleghany*, 15 Wend. 198; *People v. City of Rochester*, 21 Barb. 656; *Matter of Mount Morris Square*, 2 Hill, 14 (19 N. Y. 531).

J. B. Southard, for Respondent, cited *Milliken v. Huber*, 21 Cal. 166; *People v. Shepard*, 28 Cal. 115; *Clary v. Hoagland*, 13 Cal. 173.

By the Court, WALLACE, C. J.:

The writ of certiorari lies only in those cases in which, in the exercise of judicial functions, an excess of jurisdiction has occurred — and in which “there is no appeal,” etc. (Pr. Act, Sec. 456.) Unless the case be brought within both these conditions, the writ must be dismissed.

Opinion of the Court — Rhodes, J.

It is not denied on the part of the petitioner that the final judgment and the orders of the District Court in question might have been examined here upon appeal taken in time for that purpose; but it is insisted that, as the time limited by statute for the taking of the appeal has been suffered to elapse, the case has thereby become one in which there is no appeal, and is thus brought within the terms of the statute referred to. This view is answered by the case of *Milliken v. Huber*, 21 Cal. 166. The statute was intended to supply a remedy where none existed in the first instance, and not to supplement one lost through the laches of the party himself.

Writ dismissed.

[No. 3,204.]

LOUIS GROSS ET AL. v. F. AND P. J. CASSIN.

A CORRECT FORM OF CLERK'S CERTIFICATE for dismissal of appeal given and commented upon.

APPEAL from the District Court of the Twelfth Judicial District, City and County of San Francisco.

The facts are stated in the opinion.

Pringle & Pringle, for Appellant.

Wm. Hays, for Respondent.

By the Court, RHODES, J.:

The respondent moves that the appeal be dismissed, and in support of the motion files a certificate of the Clerk of the Court below, which is as follows (omitting the title, etc.): "I, William Harney, County Clerk of the City and County of San Francisco, and ex officio Clerk of the Twelfth District Court in and for said city and county, do hereby certify as

Opinion of the Court—Rhodes, J.

follows, viz: That judgment and dismissal were rendered and entered in this action in favor of defendants, together with defendants' costs and disbursements incurred in said cause, amounting to the sum of nineteen dollars and seventy-five cents, on the 28th day of July, A. D. 1870. That on the 19th day of January, A. D. 1871, plaintiffs filed a notice of appeal in said cause, wherein they appealed to the Supreme Court of the State of California, from the said judgment therein made and entered on the 28th day of July, A. D. 1870, in favor of defendants and against plaintiffs, and from the whole thereof, and that said notice of appeal was served upon the respondent on the 19th day of January, 1871, as appears from the endorsement thereon in the following words and figures: 'Service of within made on plaintiff this 19th January, 1871. Pringle & Pringle, attorneys for plaintiff.' That an undertaking on appeal, in due form of law, was filed in said cause on the 19th day of January, A. D. 1871. That no statement on appeal has been filed in said cause. That the appellants have not requested the Clerk of said Court to make, or to certify to, a correct transcript of the record in said cause. In witness whereof," etc.

The certificate fills the requirements of Rule Four, and is sufficient both in form and in substance.

Many of the certificates presented to this Court are radically defective, and the above certificate is inserted in order to give the Clerks and counsel a convenient and accurate form. It can readily be varied to suit a different state of facts.

Appeal dismissed.

Points decided.

[No. 2,916.]

**THE PEOPLE OF THE STATE OF CALIFORNIA
v. CYRUS SANFORD.**

INDICTMENT—SUFFICIENT CHARGE OF DEATH.—In an indictment for murder it was charged that the accused, "on the fourth day of September, A. D. 1870, at the county and State aforesaid, did feloniously, willfully, maliciously, and of his malice aforethought, shoot, kill, and murder one Enoch Barnes:" *Held*, to be a sufficient charge of the death of Barnes.

OBJECTION TO JUROR.—Where, in a criminal case, a juror whose name is on the poll tax list only, is sworn to try the cause, and the defendant receives the juror without objection as to his competency, he cannot be heard, after the verdict is rendered, to object that the juror was lacking in this particular.

POINT CONSIDERED AS WAIVED.—In a criminal case the defendant's counsel offered to question a witness as to her husband having, at her instance, approached the defendant's friends for the purpose of obtaining money from him. The proffer was denied by the court "for the present." No exception was reserved, the proffer was not subsequently renewed, and no effort was made to obtain an ultimate decision on the point: *Held*, that it must be considered as waived.

TESTIMONY OF WITNESS NOT AN EXPERT AS TO SANITY.—A witness, even though not an expert, who details a conversation had between himself and another, may also, in connection therewith, state his opinion, belief, or impression as to the state of the mind of such person as these seemed to the witness at the time of the conversation.

RELIGIOUS BELIEF OF WITNESS—DYING DECLARATIONS.—No person is to be held incompetent to be a witness in this State on account of his opinions on matters of religious belief. This rule applies to dying declarations. The common law rule in this respect is abrogated.

ORAL INSTRUCTION IN CRIMINAL CASE.—The giving of an oral instruction to the jury, in a criminal case, without the consent of the defendant, is error; and the consent of the defendant cannot be presumed from his presence and failure to make the objection when the oral instruction is given.

APPEAL from the District Court of the Seventeenth Judicial District, County of Los Angeles.

The facts are stated in the opinion.

Haven & Howard, for Appellant.

The indictment does not state that Barnes died within a year and a day. (*People v. Michel*, 34 Cal. 211.)

Opinion of the Court—Wallace, C. J.

The conviction was invalid because not found by a competent jury. The statute requires the juror to be assessed on the last assessment roll of his township or county, on real or personal property, or both. (Hit. Dig. 3870.) One juror was on the poll tax list only.

The Court erred in not permitting the defense to prove by the witness Dolores Orosco—the principal witness for the prosecution—that at her instigation her husband approached parties for the purpose of procuring money from the defendant to enable them to avoid her being a witness. Such testimony would have weakened, if not entirely destroyed the value of her evidence.

The Court erred in allowing the witness Burns, who was not an expert, to testify in regard to the condition of mind of the deceased at the time he made purported dying declarations. (24 N. Y. 298; 34 id. 190; 36 id. 276.) The proof does not show that the deceased was under a sense of immediate or impending dissolution, and it does show that he was not under any religious feeling when he made the purported dying declarations. Such declarations must not only be made under a sense of impending dissolution, but of his "accountability to his Maker, and the deep impression that he is soon to render to him the final account." (1 Greenl. Ev. 157.)

The Court erred in charging the jury orally. (*People v. Payne*, 8 Cal. 34; *People v. Bealer*, 6 Cal. 246; *People v. Demint*, 8 Cal. 423; *People v. Ah Tong*, 12 Cal. 345; *People v. Charles*, 26 Cal. 78.)

Attorney General Jo Hamilton, for Respondent.

By the Court, WALLACE, C. J.:

The defendant was convicted of the crime of murder in the second degree, committed in the felonious killing of one Enoch Barnes; and from the judgment rendered, and an

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order of the Court denying his motion for a new trial, he prosecuted this appeal.

First—The first point made challenges the sufficiency of the indictment, which, after the usual caption, is as follows:

“The said Cyrus Sanford is accused by the Grand Jury of the County of Los Angeles, State of California, by this indictment, found this eighth day of September, A. D. one thousand eight hundred and seventy, of the crime of murder, committed as follows: The said Cyrus Sanford, on the fourth day of September, A. D. eighteen hundred and seventy, at the county and State aforesaid, did feloniously, willfully, maliciously, and of his malice aforethought, shoot, kill, and murder one Enoch Barnes, contrary to the form, force, and effect of the statute in such cases made and provided, and against the peace and dignity of the people of the State of California.”

It is objected that “the indictment does not state that Barnes died within a year and a day,” etc. This objection rests upon the circumstance that the time of the death is not specially stated; and if there be anything in the objection, it might have been extended further, as it is not specially stated that Barnes died at all. But the averment in substance is that he died on the fourth day of September, 1870, for it is alleged that on that day the prisoner, of his malice aforethought, did kill and murder him—and this, under the provisions of the Criminal Practice Act, is sufficient. (*People v. Cronin*, 34 Cal. 191.)

Second—There is nothing in the objection to the competency of the juror. It was the duty of the defendant in the first place to have examined him as to his competency in the respect referred to at the time the jury was impaneled. He does not seem to have made any objection to his competency even afterwards, but took his trial before him with a knowledge of the fact that his name was on the

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poll tax list only, and not on the real or personal property tax list. Having deliberately taken his chance of a favorable verdict, he cannot be heard to object now that a juror of his own choosing was lacking in a qualification of this technical character. (*People v. Stonecifer*, 6 Cal. 405.)

Third—The record does not make it apparent that the Court definitively refused to permit the prisoner's counsel to interrogate the witness, Dolores Orosco, as to her husband having, at her instance, approached the prisoner's friends for the purpose of obtaining money from him. The proffer upon that point was denied by the Court "for the present," and no exception was reserved. The cross-examination of the witness was thereupon continued at considerable length upon other points; but the proffer was not subsequently renewed, nor was any effort made to obtain the ultimate decision of the Court thereon; and the point must, therefore, be considered as waived.

Fourth—The next point relied upon concerns the admissibility of the evidence given by Burns, the Sheriff, by whom the prosecution were permitted to prove certain dying declarations of the deceased. The witness was asked by the prosecution to state the condition of mind of the deceased at the time—whether it was clear or confused. This was objected to by the defense, because the witness was not a medical man, etc.; but the objection was overruled, and the witness answered in substance, that judging from the conversation of the deceased at the time, his mind was clear. It is said here, for the prisoner, that this was the expression of a mere opinion, by a non-expert witness, and should have been excluded on that ground. We do not think so. We understand the rule on this point to be that a witness, even though not an expert, who details a conversation had between himself and another, may also, in connection therewith, state his opinion, belief, or impression as to the state of the mind of such person, as these seemed or appeared to

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the witness at the time of the conversation. The impression made upon the mind of Burns, to the effect that the mental condition of the deceased was unobstructed, was an impression he had formed by personal observation. He had heard the utterances of the deceased; these he could repeat, or substantially repeat, to the jury; but he had also observed his tone, gesture, appearance, and his general demeanor at the time; these he could not be expected to reproduce to the jury as he saw and observed them; nor could he even describe them in giving his evidence, without in some degree indicating his own opinion or impression of what they were—and this, it is said, he may not be permitted to do. We think, however, that this cannot be said to be an expression of the mere opinion of the witness in the objectionable sense. In the language of Judge GASTON: "It approaches to knowledge, and *is knowledge*, so far as the imperfection of human nature will permit knowledge of these things to be acquired; and the result thus acquired should be communicated to the jury, because they have not had the opportunities of personal observation, and because in no other way can they effectually have the benefit of the knowledge gained by the observations of others." (2 Ired. 78.)

Fifth—It clearly appears by the evidence that at the time he made his statement to Burns of the circumstances under which the prisoner inflicted the wound upon him, the deceased had no hope of recovery. This is not seriously controverted, but it is said that at all events "it is obvious that the deceased when he made the purported dying declarations was not under any religious feelings." Burns, the witness, said: "I saw no change in his actions, only such as one would show suffering from pain. He did not speak of a future state—he gave no dying words to carry to his family."

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The rule by which dying declarations are admitted is set down in the authorities as constituting an exception to another rule—the general one, by which hearsay evidence is rejected. “The persons whose declarations are thus admitted are considered as standing in the same situation as if they were sworn; the danger of impending death being equivalent to the sanction of an oath.” (1 Greenl. Ev., Sec. 157.) It is true that the author immediately adds that where it appears that the declarant is wanting in religious sense of accountability to his Maker his dying declarations are not admissible. The result is that if the declarant, while living, would have been incompetent to testify as a witness in the case, because of want of a religious sense of accountability, then his dying declarations, if he remained in the same condition of mind on that point, must, under the rule of the common law, have been excluded. That in this State, however, the common law rule in that respect has been abrogated, and that no person is to be held incompetent to be a witness on account of his opinions on matters of religious belief, is clear. (Const., Art. I, Sec. 4; Hitt. Genl. Laws, Sec. 5330; 17 Cal. 605.) It mattered not, therefore, upon the point of the mere *competency* of the evidence, even had it appeared that the deceased had no religious belief. But however this may be, it did not in anywise appear what the views of the deceased, in fact, were upon the subject of a future state, or of his accountability to his Maker. Burns states that he said nothing on that subject, and Burns is the only witness who refers to it at all. But the mere silence of the deceased in that respect would not indicate the particular state of his mind upon such matters. We are of opinion, therefore, that the objection of the prisoner to the proof of the dying declarations of the deceased were correctly overruled.

Sixth—The evidence being in and the argument of counsel concluded, the Court proceeded to charge the jury. In respect to the charge the bill of exceptions states as follows:

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"The Court read from the statute several sections of the criminal code, but requested the Clerk to note the sections read as part of the instructions given at the instance of the District Attorney, and occupied some length of time in making to them oral remarks; observing, among other things, that they were exclusive judges of the fact; that they could reject the whole or part of the evidence; if the Court erred there was a higher tribunal to which the defendant could resort; that there was a deep responsibility resting upon them; that they must discard from their minds all bias, and regard the testimony and make a conscientious decision." There was no consent upon the part of the prisoner that the charge might be given in any other manner than in writing.

The amended statute of May, 1855, in reference to the charge of the Court in criminal cases, provides as follows: "Such charge shall be reduced to writing before it is given; and in no case shall any charge or instructions be given to the jury, otherwise than in writing, unless by the mutual consent of the parties." (Stats. 1855, p. 275.) In *The People v. Beder*, 6 Cal. 246, it was held that "the rule prescribed by the statute is mandatory and not directory;" and the judgment was reversed because the statute had not been observed by the Court below. In *People v. Payne*, 8 Cal. 341, an instruction had been given in writing, but a verbal qualification had been added, and the judgment there was reversed. In *People v. Demint*, 8 Cal. 423, the judgment was reversed upon the sole ground of non-compliance with the statute in respect to reducing the charge of the Court to writing before it was given to the jury. In *People v. Ah Fong*, 12 Cal. 345, the judgment was reversed here on the same ground, BALDWIN, J., delivering a somewhat elaborate opinion to the effect that a charge given, not in writing at the time, amounts, *per se*, to an error for which the judgment will be reversed, and that an offer to reduce it to writing after it had been given, would not cure the error. In *People*

Opinion of Crockett, J., concurring specially.

v. *Shaw*, 26 Cal. 78, a written charge had been delivered, and the jury had retired; they subsequently came in and were orally instructed by the Court in explanation of the charge already given in writing—the defendant neither consenting or objecting to the oral explanation. The judgment was reversed, the Court saying: “The cases are numerous and uniform to the point that the giving of an oral charge or instruction to the jury, in a criminal case, without the consent of the defendant, is error, and that his consent cannot be presumed from his presence and failure to make the objection when the oral instruction is given.”

For upwards of fifteen years this statute has been in force, and during all that time the decisions here have been uniform, not only as to the meaning and most obvious intent of the Act itself, but also as to the consequences certain to follow here upon its non-observance in the trial Court.

We hope that we have seen the last case brought here upon this point.

Judgment reversed and cause remanded for a new trial.

CROCKETT, J., concurring especially:

I concur in the opinion of the Chief Justice, except in so far as it holds that in this State dying declarations are admissible in evidence, even though it affirmatively appears that the dying person had no religious faith whatever, or any sense of future accountability. If it be conceded that his opinion in matters of religious faith, or his belief as to a state of future accountability, do not affect the competency of a witness testifying under oath, it by no means results that the same rule is applicable to dying declarations. The law has provided proper penalties for perjury, which are supposed to afford a sufficient guaranty that persons testifying under oath will speak the truth; and the only ground on which dying declarations are admitted in evidence is, that a

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person who is about to die and is conscious of that fact, has at least as strong a motive to speak the truth as a witness testifying under oath, who may be visited with a prosecution for perjury if he testifies falsely. But a dying person who is wholly devoid of religious faith, and who does not believe in a state of future accountability, has no other motive to speak the truth than his mere abstract sense of right and wrong. If he believes that he is in no danger of punishment, either in this world or the next, if his declarations should be willfully false, there would be nothing left but a mere abstract sense of right and wrong compelling him to speak the truth. If this alone be sufficient to justify the admission of his declarations, there is no reason why the same rule should not be applied to a witness in good faith. If I correctly understand the reason of this rule which admits dying declarations in evidence, it is that in the solemn hour of death a dying person who is about to enter upon a future state of existence in which he is to be, in some manner, held accountable for his acts in this life, has at least as strong a motive to speak the truth as if he were acting under oath, and for this reason the oath is dispensed with. But there would be no such motive if he did not believe in a future state.

[No. 2,945.]

JESSIE L. WETMORE v. THE CITY OF SAN FRANCISCO.

CHANGING POSITION OF CAUSE ON CALENDAR.—The position of a cause on the calendar will not be changed to a different day from that on which it is set by the Clerk, whether upon stipulation or motion, except for good cause shown.

APPEAL from the District Court of the Twelfth Judicial District, City and County of San Francisco.

Opinion of the Court—Rhodes, J.

The attorneys for the parties stipulated that the cause be placed at the foot of the calendar for the term.

W. H. Patterson and B. S. Brooks, for Appellant.

John B. Felton, for Respondent.

By the Court, RHODES, J.:

Motion to change the place of a cause on the calendar.

The position of a cause on the calendar will not be changed to a different day from that on which it is set by the Clerk, whether upon the stipulation of the parties or on the motion of either party, *except upon good cause shown.*

Motion denied.

[No. 1,277.]

W. GREGORY ET AL. v. N. A. HARRIS ET AL.

RIGHT TO THE USE OF FLUME FOR TAILINGS.—A party mining upon a ravine which runs into another ravine is not clothed, by virtue of his right to use the ravine upon which he is mining as an outlet for his tailings, with the general right to break in, at any point he may select, upon the tail-race of another constructed upon the other ravine.

APPEAL from the District Court of the Second Judicial District, County of Butte.

In an action to enjoin the defendants from using the plaintiff's tailrace judgment was rendered for the defendants. The plaintiffs moved for a new trial. The motion was denied, and they appealed from the judgment and from the order denying the motion for a new trial.

The other facts are stated in the opinion.

Haymond & Stratton and Jos. E. N. Lewis, for Appellants.

Campbell's Ravine was *publici juris*; but until plaintiffs' improvements were made was useless to any one. Plaintiffs

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appropriated a portion of it for a special purpose, and by their labor and industry rendered it useful. We fail to see why the maxim, *Qui prior est in tempore, portior est in jure*, does not apply to the particular right they claimed. The claim is not to the exclusive use of Campbell's Ravine, but to the exclusive use of their own cut and flume. The next miner who came along could exercise the same privilege that plaintiffs did, *i. e.*, make a cut and flume down the same ravine; and the testimony shows that from the defendants' claims to Sawmill Ravine a cut and flume similar to plaintiffs could be constructed cheaper than plaintiffs' was, and without any interference whatever with plaintiffs' improvements.

George Cadwalader, for Respondents.

The facts show: First — That an artificial mouth for Anderson's Ravine was constructed and used before plaintiffs' rights accrued in Campbell's Ravine. Second — That it had been used eight, and perhaps ten, years before the commencement of this suit; that the defendants bought the use of this outlet for ten years, and the plaintiffs afterwards purchased the remaining interest — that is, subject to the defendants' ten years right — which had not expired at the beginning of this suit. Third — That the running into Campbell's Ravine was invited, and attended with profit, and not loss, to the plaintiffs and their grantors.

It must follow from these facts that the Court below was not wrong in refusing the plaintiffs an injunction.

By the Court, WALLACE, J.:

The mining grounds of the plaintiffs are near "Campbell's Ravine" — those of the defendants lying southerly, and near "Anderson's Ravine." The general course of Campbell's

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Ravine is rather westerly, and that of Anderson's Ravine southwesterly, until the latter empties into the former, after which both run into "Sawmill Ravine," still further in a westerly or southwesterly direction. The controversy arises out of the conflicting claims of the litigants, respectively, to the use of these ravines, "Anderson's" and "Campbell's," so called, as means of carrying off the tailings from their respective mining grounds.

The plaintiffs had constructed a cut, flume, and tailrace, which, running along the general course of, and near to, Campbell's Ravine, crossed it twice — the defendants afterwards dug a cut some eight feet in depth, which, starting from a tunnel of theirs, and not running along the general course of Anderson's Ravine to, or near to, its mouth, but turning rather sharply to the southward, struck the tailrace of the plaintiffs at a point some three hundred yards above, where Anderson's Ravine naturally debouches into Campbell's Ravine; and through a flume laid in this cut the defendants pour their tailings into the race of the plaintiffs. These facts, by their mere statement, dispose of the principal defense upon which the defendants rely to justify their appropriation of the plaintiffs' flume and tailrace. The defendants say, in substance, that their mining claims are situate on Anderson's Ravine; that the "*natural outlet*" for their tailings is through that Ravine into Campbell's Ravine, which they, therefore, have the right to follow over and through any flume or other structure erected by the plaintiffs, upon the line of this "*natural outlet*;" but the answer is, that even if this claim to follow the "*natural outlet*" be conceded, and the consequent right to use the race of the plaintiff, at the mouth of Anderson's Ravine, be thereby established, it clearly does not clothe them with the general right to break in upon the tailrace of the plaintiffs at any point the defendants may select along its entire line — even

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as here, at a distance of three hundred yards above the "natural outlet," which they claim.

Judgment reversed, and cause remanded.

Mr. Justice RHODES dissented.

[No. 2,439.]

HIBBARD S. DANIELS v. FLETCHER T. LANSDALE.

PREMATURE FILING OF DECLARATORY STATEMENT.—The filing of a declaratory statement in the Register's office before the surveyor General files the plat of the survey, is premature and of no effect.

APPEAL from the District Court of the Eighth Judicial District, County of Humboldt.

The facts are stated in the opinion.

The plaintiff had judgment and the defendant appealed.

H. W. Havens and *Elisha Cook*, for Appellant.

Charles Westmoreland, for Respondent.

By the Court, RHODES, J.:

It appears from the cross-complaint that the parties were contesting preëmption claimants of the land in controversy; that the plat of the survey was filed with the Register of the proper Land Office, on the 26th day of April, 1856; that the defendant filed his declaratory statement February 20th, 1856; that the plaintiff filed his declaratory statement October 11th, 1858; that after a hearing of the contest before the Register and Receiver of the local Land Office, and before the Commissioner of the General Land Office, and finally before the Secretary of the Interior, the right of preëmption

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was awarded to the plaintiff, and subsequently a patent was issued to him. There are allegations in the cross-complaint, the purpose of which is to show that the decision of the Secretary of the Interior was procured by fraudulent acts and practices of the plaintiff; but that portion of the case need not be considered, as there is one point upon which the Court below was clearly right in sustaining the demurrer to the cross-complaint. The defendant's declaratory statement was filed before the Surveyor General had filed the plat of the survey in the Register's office. The declaratory statement was filed prematurely, and was therefore a nullity. Such is the current of the decisions of the Land Department, though there is one case, and perhaps more, to the contrary. It would seem to be no more unreasonable or illogical, to hold that the filing of a complaint, before the cause of action had accrued, would be valid, as the first step in the commencement of an action, than to hold that the filing of a declaratory statement, before the time authorized by law, was valid as a preëmption claim. The defendant had no standing in the contest before the officers of the Land Department, as he did not show that he occupied the status of a preëmption claimant, and he now claiming no right to the land, except in the capacity of a preëmption claimant, cannot be heard to aver that the plaintiff holds the land in trust for him.

Judgment affirmed.

[No. 3,150.]

H. T. PLANT ET AL. v. M. SMYTHE ET AL.

STIPULATION TO PLACE CAUSE ON CALENDAR.—When a motion is made to place a cause on the calendar of the Supreme Court, in accordance with a stipulation of the parties, it must be shown that the transcript, and the briefs or points and authorities of both parties, have been filed, or the motion will be denied.

Opinion of the Court — Rhodes, J.

APPEAL from the District Court of the Seventh Judicial District, County of Solano.

The plaintiffs had judgment enjoining the sale of certain land, and the defendants appealed.

Wells & Coughlan, for Appellants.

John G. Presley, for Respondents.

By the Court, RHODES, J.:

Motion that the cause be placed on the calendar.

A cause will not be placed on the calendar, in accordance with the stipulation of the parties, except on compliance with the provisions of Rule Fifteen. The transcript, and the briefs or points and authorities of both parties, must be filed before the Court will permit the cause to be placed upon the calendar on the stipulation of the parties. These facts must be shown when the motion is made. They are not shown in this case.

Motion denied.

[No. 3,091.]

ELLEN R. VAN VALKENBURG v. ALBERT BROWN.

STATUS OF CITIZENSHIP NOT CONFERRED BY RECENT AMENDMENTS TO THE FEDERAL CONSTITUTION.—No white person born within the limits of the United States and subject to their jurisdiction, or born without those limits and subsequently naturalized under their laws, owes his status of citizenship to the recent amendments to the Federal Constitution.

PURPOSE OF THE FOURTEENTH AMENDMENT.—The purpose of the Fourteenth Amendment to the Constitution of the United States was to confer the status of citizenship upon a numerous class of persons domiciled within the limits of the United States who could not be brought within the operation of the naturalization laws because native born, and whose birth, though native, had at the same time left them without the status of citizenship. Such persons were not white persons, but in the main were of African blood, who had been held in slavery in this country, or having themselves never been held in slavery, were the native-born descendants of slaves.

Argument for Appellant.

PRIVILEGES AND IMMUNITIES OF CITIZENSHIP—Under the Fourteenth Amendment to the Federal Constitution, the privileges and immunities of citizens of the United States are guaranteed and protected in every State beyond the operation of State laws.

THE ELECTIVE FRANCHISE NOT AN IMMUNITY OF CITIZENSHIP.—The elective franchise is not one of the immunities or privileges intended in the first section of the Fourteenth Amendment to the Federal Constitution.

POWER OF STATE TO DETERMINE WHO MAY VOTE NOT CURTAILED.—The mere power of the State to determine the class of inhabitants who may vote within her limits, is not curtailed in the Fourteenth Amendment.

FEMALES NOT MADE VOTERS BY THE FIFTEENTH AMENDMENT.—The Fifteenth Amendment took away the authority of the State to discriminate against citizens of the United States on account of either race, color, or previous condition of servitude; but the power of exclusion upon all other grounds, including that of sex, remains intact.

APPEAL from the District Court of the Third Judicial District, County of Santa Cruz.

The facts are stated in the opinion.

Albert Hagan, for Appellant.

The office of the Fourteenth Amendment is not to simply secure to all persons equal capacities before the law, but it grants to all persons who are citizens the broadest rights which attach themselves to every citizen of the Republic. (*Live Stock Association v. Crescent City*, 1 Abbott, 396.)

Suffrage is a fundamental right—one of the privileges of the citizen by virtue of citizenship in a free government. As soon as one is raised to the dignity of a citizen he can claim the right of suffrage as one inherent in a Republic and fundamental in its nature. (*Abbott v. Bailey*, 2 Kent, Sec. 72; *Corfield v. Correll*, 6 Pick. 42.)

California yet retains the word "white" in her organic law prescribing the qualifications of electors, yet the negro votes here by virtue of the Constitution of the United States. If the right of suffrage belongs to every citizen, by virtue of the organic law of the Union, then no State can prohibit

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any citizen from voting. It needs no prohibition in the Constitution of the United States to prevent States from disfranchising any citizen, for, if once invested with the fundamental right to vote, no State can destroy, no Legislature can abolish it.

To say that the Fifteenth Amendment goes far to interpret the Fourteenth Amendment and to thereby grant or imply that the States may restrict the right of suffrage as to other than male citizens, is an admission that the Fourteenth Amendment by its terms does away with the right of the several States to any restriction over the right to vote. States may regulate the manner of voting, but cannot take away the right to vote, if the latter is conceded to be a fundamental right guaranteed by the Constitution of the United States.

Albert Heath, for Respondent.

The respondent admits that the appellant is a citizen of the United States, over the age of twenty-one years, but denies that under and by virtue of the laws of the State of California, the Clerk of Santa Cruz County is authorized to place upon the Great Register of said county the name of a female, and refers the Court to the following authorities, viz: Sec. 1, Art. II, of the Constitution of the State of California; Sec. 2 of the Registry Act, and the amendments thereto, approved March 30th, 1868.

By the Court, WALLACE, C. J.:

The plaintiff applied to the Court below for a writ of mandamus against the defendant, who is the County Clerk of the County of Santa Cruz, to compel him to inscribe her name in the Great Register, and enroll her as a legal voter of said county. Judgment having been rendered refusing the writ, she brings this appeal.

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It appears that she is "a white female resident and citizen of the United States and of the State of California, over the age of twenty-one years, and for more than one year last past a resident of Santa Cruz County," and was born within the limits and subject to the jurisdiction of the United States.

The Court below held that by reason of her sex she was disqualified to exercise the elective franchise; and it is admitted that if her claim in that respect is to be determined alone by the Constitution and laws of this State, excluding, as they do, persons of her sex from the exercise of the elective franchise, the judgment below is correct, and should be affirmed here.

But it is claimed that she is entitled to registration as a voter by reason of the first section of the recent amendment to the Federal Constitution of July 20th, 1868, known as the Fourteenth Amendment. That section is in the following words:

"Article 14, Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

1. It is claimed that the plaintiff is a citizen of the United States and of this State. Undoubtedly she is. It is argued that she became such by force of the first section of the Fourteenth Amendment, already recited. This, however, is a mistake. It could as well be claimed that she became free by the effect of the Thirteenth Amendment, by which slavery was abolished; for she was no less a citizen

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than she was free before the adoption of either of these amendments. No white person born within the limits of the United States, and subject to their jurisdiction, or born without those limits, and subsequently naturalized under their laws, owes the status of citizenship to the recent amendments to the Federal Constitution. The history and aim of the Fourteenth Amendment is well known, and the purpose had in view in its adoption well understood. That purpose was to confer the status of citizenship upon a numerous class of persons domiciled within the limits of the United States, who could not be brought within the operation of the naturalization laws because native born, and whose birth, though native, had at the same time left them without the status of citizenship. These persons were not white persons, but were, in the main, persons of African descent, who had been held in slavery in this country, or, if having themselves never been held in slavery, were the native-born descendants of slaves. Prior to the adoption of the Fourteenth Amendment it was settled that neither slaves, nor those who had been such, nor the descendants of these, though native and free born, were capable of becoming citizens of the United States. (*Dred Scott v. Sanford*, 19 How. 393.) The Thirteenth Amendment, though conferring the boon of freedom upon native-born persons of African blood, had yet left them under an insuperable bar as to citizenship; and it was mainly to remedy this condition that the Fourteenth Amendment was adopted.

This is recent history — familiar to all.

2. It is next claimed that, by whatever means the plaintiff became a citizen of the United States, her privileges and immunities as such citizen cannot be abridged by State laws; and this is true. The purpose and the effect of the amendment, in this respect, is to place the privileges and immunities of citizens of the United States beyond the operation of State legislation. Those immunities and privileges, what

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ever they may be, are guaranteed and protected in every State by this clause in the Federal Constitution.

3. It is urged that, among these privileges and immunities, is included the privilege of the plaintiff to exercise the elective franchise within the limits of this State, even in disregard of the Constitution and laws of the State, which unquestionably exclude persons of her sex. And this brings us to inquire what is meant by the phrase "privileges or immunities of citizens of the United States," as used in this amendment.

This phraseology was known in our history anterior to the formation of the present Federal Union. In the articles of confederation between the American States it was provided "that the free inhabitants of each of these States (paupers, vagabonds, and fugitives from justice excepted) shall be entitled to all privileges and immunities of free citizens of the several States, and the people of each State shall, in every other, enjoy all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively," etc. (Art. IV.) The term "privileges and immunities" was therefore not a new one when, in the second section of the fourth article of the Federal Constitution, as originally ratified, it was declared that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." The words "*privileges and immunities*" had at that time acquired a distinctive meaning and a well-known signification. They comprehended the enjoyment of life and liberty, and the right to acquire and possess property, and to demand and receive the protection of the Government in aid of these. They included the right to sue and defend in the Courts, to have the benefit of the writ of habeas corpus, and an exemption from higher taxes or heavier impositions than were to be borne by other persons under like conditions and circumstances.

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The Federal Constitution went into operation in March, 1789, and within a few years thereafter — in 1797 — a question came before the General Court in Maryland in respect to the meaning of the words “privileges and immunities” as thus employed in that instrument. The question was argued by the most eminent counsel in the State, and among them was the celebrated Luther Martin, then Attorney General. At this point the Court said: “Privilege and immunity are synonymous, or nearly so. Privilege signifies a peculiar advantage, exemption, immunity; immunity signifies exemption, privilege. The peculiar advantages and exemptions contemplated under this part of the Constitution may be ascertained, if not with precision and accuracy, yet satisfactorily. By taking a retrospective view of our situation antecedent to the formation of the first General Government, or the Confederation, in which the same clause is used *verbatim*, one of the great objects must occur to every person, which was the enabling of the citizens of the several States to acquire and hold real property in any of the States, and deemed necessary, as each State was a sovereign and independent State, and the States had confederated only for the purposes of general defense and security, and to promote the general welfare. It seems agreed from the manner of expounding or defining the words ‘immunities and privileges’ by the counsel on both sides, that a particular and limited operation is to be given to those words, and not a full and comprehensive one. It is agreed it does not mean the right of election, the right of holding office, the right of being elected. The Court are of opinion it means that the citizens of all the States shall have the peculiar advantage of acquiring and holding real as well as personal property, and that such property shall be protected and secured by the laws of the State in the same manner as the property of the citizens

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of the State is protected," etc. (*Campbell v. Morris*, 3 Harr. & McH. 554.)

The expression, "privileges and immunities," had been found in the Constitution for a period of nearly eighty years prior to the adoption of the Fourteenth Amendment, and had never been supposed to include the right to the exercise of the elective franchise. Notwithstanding the citizens of each State were, during all that time, entitled to the privileges and immunities of citizens in the several States, it was never supposed that the citizen of any State might, upon his removal into any other State, lawfully claim to vote there because he had exercised that privilege in the State from which he had just emigrated.

In point of fact the States have generally conferred the privilege of the elective franchise upon such of their male inhabitants as had become citizens of the United States, if of the requisite age, etc. This circumstance has given rise to a notion in some quarters that the privilege of voting and the status of citizenship are necessarily connected in some way—so that the existence of the one argues that of the other. But the history of the country shows that there was never any foundation for such a view. Thus citizens of the United States, resident in the State of Virginia, were prevented by State law from voting there, unless seized of a freehold estate; and citizens of the United States, resident in Massachusetts, were by the laws of that State denied the privileges of the elective franchise, unless owners of personal property to a designated amount. While the privilege of voting was thus, by State laws, withheld in those States from persons who were citizens of the United States, the elective franchise was in other States of the Union conferred by State laws upon persons who were not citizens. In New York and North Carolina, for instance, at an early day the privilege of voting was conferred upon negroes, persons of African descent, under certain conditions. These were not

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citizens of the United States, nor then even capable of becoming such. In Wisconsin and Michigan, though negroes were excluded, persons of the Indian blood were admitted; and in Indiana, Illinois, Minnesota, and other States, unnaturalized foreigners were by State laws allowed to vote — following in this respect the early policy of the Federal Government, who, in the ordinance of 1787, for the government of the Northwestern Territory, had permitted the elective franchise to the unnaturalized French and Canadians, of whom the population of that Territory was then largely composed. It will be found that from the earliest periods of our history the State laws regulated the privilege of the elective franchise within their respective limits, and that these laws were exactly such as local interests, peculiar conditions, or supposed policy dictated, and that it was never asserted that the exclusion of any class of inhabitants from the privilege of voting amounted to an interference with the privileges of the excluded class as citizens. As was well said by Judge MILLS, of the Court of Appeals of Kentucky: "The mistake on the subject arises from not attending to a sensible distinction between political and civil rights. The latter constitute the citizen, while the former are not necessary ingredients. A State may deny all her political rights to an individual, and yet he may be a citizen. The rights of office and suffrage are political purely, and are denied by some or all the States to part of their population, who are still citizens. A citizen, then, is one who owes the Government allegiance, service, and money by way of taxation, and to whom the Government, in turn, grants and guarantees liberty of person and of conscience, the right of acquiring and possessing property, of marriage and the social relations, of suit and defense, and security of person, estate, and reputation. These, with some others which might be enumerated, being guaranteed and secured by Government, constitute a citizen. To aliens we

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extend these privileges by courtesy; to others we secure them — to male as well as female — to the infant as well as the person of hoary hairs." (1 Litt. R. 342.)

4. But the language of the *second* section of the Fourteenth Amendment itself demonstrates that the elective franchise is not one of the "privileges or immunities" mentioned in the *first* section, and as such not to be abridged or taken away by State laws.

The second section of the amendment (so far as material upon this point) is in the following words:

"Section 2. Representatives shall be apportioned among the several States, according to their respective numbers. But when the right to vote * * * is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States * * * the basis of representation therein shall be reduced" * * * etc.

It will thus be seen that by this second section of the Fourteenth Amendment it is expressly provided that if the State law shall deny the elective franchise to the citizens of the United States therein mentioned, the basis of Federal representation to which such State would otherwise be entitled shall be thereupon and in consequence of such denial readjusted and reduced in a designated ratio. If the power of the State to deny the elective franchise to a citizen of the United States had been absolutely taken away by the first section, then a State law enacted for that purpose would necessarily be absolutely void — as a bill of attainder passed or *ex post facto* law enacted, would be void, as being in contravention of the inhibitions of Article I, Section 10, of the Federal Constitution. But by the second section of the amendment under consideration it is provided that the action of the State authority denying the right of citizens of the United States to vote, so far from being null and void, shall

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furnish a new basis of Federal numbers in the State, upon which a new apportionment of representation in Congress is to follow. It is inconceivable that such constitutional consequences are to follow the doing of an act which the Constitution had just forbidden to be done at all.

5. The Fifteenth Amendment to the Constitution was adopted nearly two years after the Fourteenth. It provides that the right of a citizen of the United States to vote shall not be denied on account of *race, color, or previous condition of servitude*. If, under the Fourteenth Amendment already adopted, the right of a citizen to vote was not to be denied upon *any ground whatsoever*, what necessity or propriety in subsequently providing that it should not be denied upon either of three enumerated grounds? It will be seen that the construction claimed for the Fourteenth Amendment by the counsel for the plaintiff would leave nothing for the Fifteenth to operate upon.

Many other and hardly less cogent reasons might be mentioned going to show that the elective franchise is not one of the immunities or privileges secured by the first section of the Fourteenth Amendment. The mere power of the State to determine the class of inhabitants who may vote within her limits was not curtailed in the Fourteenth Amendment.

The Fifteenth Amendment took away her authority to discriminate against citizens of the United States on account of either race, color, or previous condition of servitude; but the power of exclusion upon all other grounds, including that of sex, remains intact.

Judgment affirmed.

Opinion of the Court—Rhodes, J.

[No. 2,202.]

CHARLES R. LEWIS AND JOHN SUTHERLAND
v. O. G. LONGMAID.

DEFECTIVE CERTIFICATE OF CLERK.—A Clerk's certificate which fails to state the amount or character of the judgment, the order or judgment appealed from, the date or fact of service of the notice of appeal, and that the undertaking on appeal is in due form, is insufficient to support a motion to dismiss the appeal under Rule Four of the Supreme Court.

APPEAL from the District Court of the Fifth Judicial District, San Joaquin County.

The plaintiffs had judgment in replevin, and the defendant appealed.

J. H. Budd, for Appellant.

D. S. Terry, for Respondents, moved to dismiss the appeal on Clerk's certificate.

[The certificate is not on file.—REPORTER.]

By the Court, RHODES, J.:

Motion to dismiss the appeal upon the certificate of the Clerk under Rule Four.

The reading of this certificate would scarcely excite a suspicion that it was drawn as the basis of a motion under that rule. It states neither the amount nor the character of the judgment; nor the order or judgment appealed from; nor the date or fact of the service of the notice of appeal; nor that the undertaking on appeal is in due form.

Motion denied.

Opinion of the Court — Wallace, J.

[No. 2,021.]

THE PEOPLE OF THE STATE OF CALIFORNIA
v. DAVID McAUSLAN AND FRANK McAUSLAN.

ERROR WILL NOT BE PRESUMED.—The presumption in the Supreme Court is that the proceedings below are correct, except in so far as the record manifests the contrary.

APPEAL FROM ORDER SETTING ASIDE VERDICT.—If, in a criminal case, the verdict of a jury be set aside on the ground that it is contrary to the evidence, and an appeal be taken from the order setting aside the verdict, the record must show what the evidence was, or the question as to the sufficiency or insufficiency of the evidence cannot be considered.

APPEAL from the County Court of Sutter County.

The facts are stated in the opinion.

Attorney General Jo Hamilton, for Appellant.

J. O. Goodwin, for Respondents.

By the Court, WALLACE, J.:

The defendants were tried, and, by the verdict of the jury, found guilty of the crime of assault with intent to commit murder.

They subsequently moved the Court below to set aside the verdict and grant them a new trial; the motion was sustained, and from the order granting the new trial the people have appealed.

The motion was made upon several grounds: that the verdict was found by unfair means and was not a fair expression of opinion on the part of the jury; misconduct of the jury in clandestinely procuring and drinking ardent spirits in the jury-room while deliberating upon their verdict; that the verdict was contrary to the law and the evidence; newly discovered evidence, etc. The order of the Court setting aside the verdict does not indicate upon what particular ground it was based.

Points decided.

It is hardly necessary to repeat that the judgments and orders made below are not to be disturbed here, unless error is, in some way, made to appear by the record. Error will not be presumed; on the contrary, the intendment here is, that the proceedings below are correct, except in so far as the record manifests the contrary.

One of the statutory grounds of a motion for a new trial in a criminal case (Section 440) is that the verdict is contrary to the evidence. That was one of the grounds upon which the defendants moved below. For aught we can see, it is the ground, or one of the grounds, upon which the motion was granted. The record being entirely silent as to what was the evidence given on the trial, it is obvious that we have no means of considering the question of its sufficiency or insufficiency, or of determining the propriety of the action of the Court below in setting aside the verdict on that ground.

Order affirmed.

[No. 2,162.]

JACOB C. HINCKLEY v. LUCIUS C. FOWLER.

GOOD DESCRIPTION IN APPLICATION TO PURCHASE TIDE LAND.—F. filed an application under the Act to provide for the sale of certain lands belonging to the State (Stats. 1863, p. 591), in which he described the land for which he applied as "the one half mile water front donated to the San Francisco and Marysville Railroad Company, by an Act of the Legislature of the State of California, approved April 24th, 1858." Held, that the description was in every respect in accordance with law.

DESCRIPTION OF TIDE LANDS IN APPLICATION TO PURCHASE.—The Act of 1863, *supra*, only requires the applicant to describe the land applied for, and a description which the County Surveyor can understand is sufficient. The survey, which it is his duty to make, ought to fix the lines with the requisite precision.

APPLICATION TO BUY TIDE LAND CONFERS A RIGHT TO BE LOST ONLY BY THE FAULT OF THE APPLICANT.—An application to buy tide land, made in accordance with law, confers a right to purchase upon the applicant

Argument for Appellant.

which, as against the State and all subsequent applicants, can be lost only by the failure of the applicant to pursue the further steps prescribed by the statute—not through the fault of any officer.

RIGHT OF APPLICANT WHERE LESS THAN THE TRACT APPLIED FOR IS APPROVED.—Where a party makes an application in accordance with the Act of 1863, to purchase a certain piece of tide land, but the County Surveyor actually surveys but a small portion of it, and such survey is approved by the Surveyor General, and subsequently under the advice of the Surveyor, the applicant makes a payment upon the tract approved, and then files a new application for the balance of the tract, he is not precluded from insisting upon his rights under the first application.

CONTEST, HOW ADJUDICATED.—Under the twenty-seventh section of the Act of 1863, for sale of tide land, when a contest is referred to the Courts for settlement, it is to be determined upon the principles of law and equity involved. The Court is to exercise its judicial authority in adjudicating the entire case as presented, and is not confined to the measure of relief which the Surveyor General might award.

SURVEYOR GENERAL TO DETERMINE FACTS ONLY.—The Surveyor General is to determine only those contests about the purchase of lands in which the survey, "or purely a question of fact," is involved.

QUESTION OF LAW TO BE REFERRED TO THE COURTS.—When a question of law only is involved, or one of law and fact, in relation to purchase of tide lands, the parties are to be referred to the Courts for the settlement of such questions.

RULES AS TO PLEADINGS AND EVIDENCE IN CONTESTED CASES.—The ordinary rules of pleadings and of evidence are to be observed, and judgment is to be rendered as in ordinary adversary proceedings.

APPEAL from the District Court of the Seventh Judicial District, County of Solano.

The defendant had judgment, and the plaintiff appealed. The other facts are stated in the opinion.

Williams & Thornton, for Appellant.

We contend that the respondent has affirmed the decision on the first application by his conduct. He might have abandoned it, but he has chosen to affirm it; and it is only reason and justice that a man who elects to affirm, when he might avoid, cannot retract his choice to the injury of others. (*Marsh v. Pier*, 4 Rawle, 273, 286; see, also, ante,

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209; *Hayes v. Gudykunst*, 1 Jones, 220; *Varick v. Edwards*, 11 Paige, 289; *Regina v. Sandwich*, 10 Q. B. 563, 571; *Ogden v. Rowley*, 15 Indiana, 56; *Brankley v. Kee*, 5 Jones Eq. 332; *Carlisle v. Foster*, 10 Ohio, [N. S.] 198; *Martin v. Ives*, 17 S. & R. 564; *Wells v. Kane*, 2 Grant, 60; *Scrags v. B. & W. R. R. Co.*, 10 Md. 268; *The Bank, etc. v. Ammon*, 3 Casey, 172; *Philadelphia and Wilmington R. R. Co. v. Howard*, 13 How. 307; *Bailey v. Bailey*, 8 Wright, 247; 2 Smith's Lead. Cases, 6 Amer. edit. 818.)

The Surveyor General performs, in his approval of survey, judicial or quasi-judicial duties; and when he had performed such duties his power was exhausted. (*People v. Supervisors of Schenectady*, 35 Barb. 415; *Jermaine v. Waggoner*, 1 Hill, 279; *Woolsey v. Tompkins*, 23 Wend. 324; *Martin v. Mayor of New York*, 20 How. Pr. 86; *Matter of Beekman Street*, 20 Johns. 271; *People v. Ames*, 19 How. Pr. 551; *Ayrault v. Sackett*, 17 id. 508; *Supervisors of Onondaga v. Briggs*, 2 Denio, 26; *Supervisors of Chenango v. Birdsall*, 4 Wend. 460.) According to the principles settled in the above cases, the Surveyor General cannot alter his decision approving the survey and location of Fowler to the five and fifty-seven one hundredths-acre tract. He cannot review, reverse, or vacate his own judicial action. It concludes him, and every one else, and is an end of the matter. (*Lott v. Prudhomme*, 3 Rob. La. 296; *Bours v. Zachariah*, 11 Cal. 292.)

This Court cannot go behind his action on the first application of Fowler. The judgment of approval is within the jurisdiction of this officer, from which there is no appeal. His action binds the Court. (*West v. Cochran*, 17 How. 403; *Stanford v. Taylor*, 18 id. 409; *Cooper v. Roberts*, 18 id. 173; *Guires v. Nicholson*, 9 id. 356; *Russell v. St. Louis Public Schools*, 18 id. 19; *Les Bois v. Bramell*, 4 id. 449; *Bryan v. Forsyth*, 19 id. 334; *Ballance v. Papin*, 19 id. 343; *United*

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States v. Ferreira, 18 How. 40; *Cassidy v. Conway*, 25 Pa. 243.)

Further, the application made by Fowler, on the 13th December, 1866, admitting that he filed the original with the County Surveyor, is a nullity in the eye of the law, because it describes no land. The third section of the Act under which the grant is sought to be obtained requires the application to describe the land. The description here is by reference to a certain Act of the Legislature.

C. Harston, W. S. Wells, and Geo. Cadwalader, for Respondent.

Fowler acquired a vested right to all the tide lands described in his application and oath on the 13th day of December, 1866. (Section 29 of Tide Land Act of April 27th, 1863; *Armour v. Alexander*, 10 Paige Ch. 571-573; *Lick v. Stackpole*, 18 Cal. 223; *Page v. Hobbs*, 27 Cal. 488; *Ketchum v. Dunn*, 38 Cal. 93; *Megerle v. Ashe*, 33 Cal. 85; *C. A. a* [N. S.], 58, 60, 4 Dana, 96; *The People v. James Cook*, 14 Barb. 252.) By no subsequent act or omission has he abandoned or forfeited any portion of the lands so acquired. Abandonment is matter of intention. (*Davis v. Perley*, 30 Cal. 636; *St. John v. Kidd*, 26 Cal. 272; *Keane v. Cannovan*, 21 Cal. 293; *Richardson v. McNulty*, 24 Cal. 389; *Armour v. Alexander*, 10 Paige Ch. 574; *Moon v. Rollins*, 36 Cal. 333.)

The misconduct or neglect of the County Surveyor, a public officer, will not deprive defendant of his rights. (*Lytle v. State of Arkansas*, 9 How. U. S. 333; *Himmelman v. Cofran*, 36 Cal. 413.)

The exercise of power by the Surveyor General is ministerial and may be reviewed and set aside by himself (*United States v. Hughes*, 11 Howard, 552; *Opinions of Attorneys Gen. Vol. I*, 158, 699; *Opinions of Attorneys Gen. Vol. III*, 263; *Dorwall v. Delanso*, 20 How. 29; *Opinions of*

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Attorneys Gen. Vol. II, 41.) However the doctrine *functus officio* may affect the particular survey, it cannot affect the application. In case there is an erroneous and fraudulent survey, both the power and duty to make a lawful and correct one remains. (*Himmelman v. Cofran*, 36 Cal. 413; *Pond v. Negus*, 3 Mass. 213; *Libby v. Burnohm*, 15 Mass. 148; *Bangor v. Laney*, 21 Maine, 473; *Middleton v. Low*, 30 Cal. 601, 609; *P. Tool Company v. Prader*, 32 Cal. 635; Section 27 of Act of 1863, vesting final right of trial in Courts.) The State selects her officers to make the surveys, and she guarantees the honesty and fairness of their acts.

By the Court, WALLACE, J.:

The controversy in this case is a contest arising under the provisions of the twenty-seventh section of "An Act to provide for the sale of certain lands belonging to the State." (Acts 1863, p. 591.)

It appears that in December, 1866, Fowler presented to the County Surveyor of Solano County an application for certain tide lands in that county, which were described as "the one half mile water front donated to the San Francisco and Marysville Railroad Company by an Act of the Legislature of the State of California, approved April 24th, 1858." Upon receiving this application, the Surveyor noted the same in his book of applications thus: "L. C. Fowler, Solano County: No. 8. Township 3 north, Ranges 3 and 4 west, Sections 19 and 24; fractions in east half of 24; fractions in west half of 19; Mount Diablo meridian." A copy of the description, as thus noted, was indorsed upon the affidavit of Fowler, pursuant to sections 28 and 29, and filed, along with the affidavit itself, in the office of the Surveyor of the county. It is claimed, however, by the appellant, Hinckley, that the paper thus filed in the Surveyor's office was a *certified copy* of the affidavit of Fowler, and not the

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original; but an examination of the evidence shows it to be substantially conflicting upon this point, and the finding of the Court below, that the original, and not the copy, was filed in the office of the Surveyor, will, therefore, not be disturbed here. The land described in the application, and of which note was thus made in the application book of the County Surveyor, embraced some sixty-five acres, and it was the duty of that officer within thirty days thereafter to make the survey and transmit a duplicate of it, and of the plat and field notes, and a copy of the application and affidavits in its support, to the Surveyor General for approval. In March, 1867, Fowler discovered that the County Surveyor, instead of surveying the land embraced in his application, had surveyed only a long narrow strip of it, which was of less than six acres in superficial area, and had returned that survey to the Surveyor General, who had approved the survey as thus made. Upon discovering this fact, Fowler complained to the County Surveyor, and called his attention to the omission, but that officer declined to correct it, or to take any further steps in relation to it, on the ground that his authority over the subject was at an end. He, however, on the 18th day of March, 1867, advised Fowler to make a new application for the land omitted from the survey, and this new application was accordingly made upon the first day of April following, and a new survey was made thereunder and transmitted to the Surveyor General, including the narrow strip shown by the first survey, and some fifty-eight acres besides. On the 13th day of March, 1857, however, the appellant, Hinckley, made an application to the same County Surveyor, in the usual form, for certain tide lands, including the lands which had been omitted from the Fowler survey on the first application; this application of Hinckley was entertained by the Surveyor, who, on the 15th day of March, completed the survey for Hinckley thereunder, and on the next day transmitted a duplicate of it, with plat, field notes,

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affidavits, etc., to the Surveyor General, by whom they were received on the 19th of March.

Subsequently the County Surveyor transmitted to the Surveyor General the new survey he had made for Fowler, under his second application of April, 1867, along with a copy of the plat, field notes, etc., accompanied by a notice to the Surveyor General that some fifty-nine acres included therein had been also embraced in the survey for Hinckley already transmitted. Fowler afterwards filed a protest in the office of the Surveyor General against the approval of the Hinckley Survey, on the ground that under his original application he was himself entitled to purchase the whole of the land included in that survey; and the contest thus made up was thereupon referred to the Courts for decision.

1. There is no doubt that the application of Fowler, made in due form on the 13th day of December, 1866, to purchase these lands, was in every respect in accordance with law.

Its validity is assailed upon the ground that a copy of the application, and not the original, was filed by Fowler in the office of the County Surveyor; but that objection has been disposed of already.

2. It is said that the first application of Fowler describes no lands whatever, and is, therefore, a nullity. We have seen already that it was an application for the water front, which had been donated to the railroad company by the Act of April 24th, 1858. A more exact description could hardly have been given, for the tract itself had been already accurately surveyed and platted by the railroad company, under the provisions of the Act; and the survey and plat so made constituted a record at the time of Fowler's first application existing in the office of the County Recorder of Solano County. That it was a description well understood in the office of the County Surveyor is evident, for he proceeded to act upon it without objection or hesitation. The Act of 1863 only requires the applicant to *describe the land*

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applied for—and a description which the Surveyor can understand is description enough; the survey which it is his duty to make ought to fix the lines with the requisite precision.

3. The application of Fowler, thus made in accordance with law, gave him, as against the State, and, so long as the statute remained in force, a privilege to purchase the land he applied for. As against the officers of the State, and all applicants for the same land subsequent in point of time, it conferred upon him a *right* to purchase, which could only be lost by his own failure to pursue the further steps which the statute had prescribed. The malfeasance or misfeasance of any of the officers could not deprive him of the benefit of his application, nor operate to postpone him to the claim of a subsequent applicant.

4. It is argued, however, that Fowler is concluded to claim the larger tract, because he knowingly accepted, as it is said, the first survey of five acres and a little more. The facts are, that upon discovering that instead of the sixty-five acres, for which he had applied, only some five acres and a little upwards had been surveyed, Fowler applied to the County Surveyor to correct the survey, and the latter declined the request, on the ground that he had done all the law required him to do, and, in connection with this refusal, the County Surveyor advised Fowler to begin *de novo*—and that, in his opinion, nothing else could be done. Subsequently, and in May, 1868, he paid to the County Treasurer a portion of the principal and interest upon the five-acre location. He testified that this was done because he had learned that the County Surveyor was advising other parties to enter upon the five-acre tract in default of the payment of this money to the County Treasurer. I see nothing, however, in this which would preclude Fowler from insisting upon his rights under the first application. It was only a very natural endeavor to avoid the possible loss of all that he had so far

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been able to obtain. It was the best that he could do under the circumstances. At that time his new application, made under the advice of the County Surveyor, was already pending and undetermined.

5. It is next insisted that the Surveyor General having approved the first application of Fowler to the extent of five acres and upwards only, it results that the contest here is confined to the application of Hinckley made in March, and the last application of Fowler made in April, 1867, and that Hinckley's, being the prior of these two, should be held to be superior to Fowler's. There is nothing in this point. Under the twenty-seventh section of the Act, when a contest is referred to the Courts for settlement, it is to be determined upon the principles of law and equity involved. The Court is to exercise its judicial authority in adjudicating the entire case as presented. It is not confined to the narrower measure of relief which the Surveyor General, in the exercise of mere quasi-judicial functions, in determining mere matters of fact, might award. Such was not the intent of the statute. Its purpose was to provide for the settlement of the rights of the parties litigant, at once and forever. The jurisdiction of the Court is as broad and effective as though one of the parties had already obtained a title to which the other had the better right. The Surveyor General is to determine only those contests in which the survey, "or purely a question of fact," is involved. But when a question of law only is involved, or one of law and fact, the parties are to be referred to the Courts for its determination, and in the Courts the ordinary rules of pleading and of evidence are to be observed, and judgment is to be rendered as in ordinary adversary proceedings.

Other, but minor, points are made which it is not necessary to notice in detail.

It is clear that Fowler by force of his application of December 13th, 1866, became entitled to purchase the land in

Points decided.

controversy—that nothing since then has occurred to postpone him to the subsequent application of Hinckley—the circumstances of the case presented are indeed such that had the latter even succeeded in obtaining the certificate, he must have been compelled by the decree of a Court of equity to surrender it to Fowler. These circumstances are those which characterized the conduct of the County Surveyor concerning the first application of Fowler made December, 1866, and the evident concert between that officer and Hinckley, the subsequent applicant, and to which it is not necessary, in view of the conclusion reached upon other grounds, to advert in detail.

The judgment must be affirmed, and it is so ordered.

[No. 2,064.]

**HENRY B. WILLIAMS, ADMINISTRATOR OF THE ESTATE
OF EDWARD MOTT ROBINSON, DECEASED, v. O. P.
SUTTON.**

TENANCY IN COMMON—EFFECT OF JUDGMENT “*QUARE CLAUSUM FREGIT*” AGAINST ONE TENANT.—Where Woods, being the owner of a lot in San Francisco, conveyed an undivided quarter which passed to Williams, and a quarter to Hastings, and a quarter to Haskell; and afterwards Sutton, claiming title under a Colton grant, brought trespass *quare clausum fregit* against Woods, Hastings, and Haskell for alleged interference with his possession, and recovered judgment, and also obtained an injunction against their interference with his possession: *Held*, in ejectment by Williams against Sutton, that the effect of the judgment was merely to estop Woods, Hastings, and Haskell from asserting title as against Sutton, not to transfer their title to him or make him a tenant in common with Williams; and that such judgment could not prevent Williams from recovering the whole property.

RIGHT OF TENANT IN COMMON TO RECOVER ENTIRE ESTATE.—A tenant in common is seized *per se et per totum*, and has an interest in the whole, which entitles him to the enjoyment of the entire estate as against every one except his cotenant.

Statement of Facts.

JUDGMENT IN TRESPASS AGAINST ONE TENANT IN COMMON NO ESTOPPEL AGAINST ANOTHER.—Where a judgment in trespass *quare clausum fregit* was recovered by Sutton against Woods, Hastings, and Haskell, who were tenants in common with Williams: *Held*, that though Woods, Hastings, and Haskell were estopped from asserting title as against Sutton, there was no such estoppel as against Williams' claiming and recovering the whole property.

JUDGMENT IN TRESPASS "QUARE CLAUSUM FREGIT" NO TRANSFER OF DEFENDANT'S TITLE.—A plaintiff, who recovers in trespass *quare clausum fregit*, does not thereby become invested with the title, or succeed to the interest, which the defendant in such action may have had in the property.

TITLE UNDER STATUTE OF LIMITATIONS DIFFERENT FROM ESTOPPEL UNDER JUDGMENT IN TRESPASS.—In ejectment by Williams against Sutton, where it appeared that Williams was a tenant in common of the property demanded, with Woods, Hastings, and Haskell; and that Sutton had recovered judgment in trespass *quare clausum fregit* in reference thereto against Woods, Hastings and Haskell, which judgment he set up to prevent Williams from recovering more than one undivided fourth: *Held*, that the rule invoked by Sutton (that if one of several tenants in common be under such disability as would preserve his rights under the Statute of Limitations, this would not save the rights of his cotenants against whom the statute had fully run), was not applicable, for the reason that the title of a disseisor under the Statute of Limitations was a new title, corresponding with that on which the disseisin operated, while Sutton acquired no new title by disseisin or otherwise, but could simply rely upon his judgment as concluding the defendants therein from asserting title against him.

APPEAL from the District Court of the Twelfth Judicial District, City and County of San Francisco.

This was an action of ejectment for a fifty-vara lot at the northeast corner of Montgomery and Lombard streets, in the City of San Francisco. The plaintiff owned an undivided one fourth of the property, but demanded possession of the whole. The defendant set up by way of bar or estoppel the recovery of a judgment in 1853 in an action of trespass *quare clausum fregit*, instituted by him in the Superior Court of the City of San Francisco against I. C. Woods, John Hastings, D. H. Haskell, and J. N. Briceland, the three first of whom were tenants in common in the property with the grantor of plaintiff, and claimed that by virtue of such recovery defendant became a tenant in common with

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plaintiff, and that no recovery in the action could be had against him.

It appeared that on June 20th, 1851, I. C. Woods was the owner of the fifty-vara lot in controversy, deriving his title under a grant to Jacob D. Hoppe, by Alcalde Leavenworth, on March 23d, 1848. On January 29th, 1853, Woods conveyed an undivided one fourth of the lot to Flint, Peabody & Co., which passed to plaintiff. Woods conveyed another undivided fourth to Hastings, and another fourth to Haskell. The defendant held and claimed under a grant by Justice of the Peace Colton, dated December 18th, 1849. It further appeared that in 1853, and while defendant claimed to be in possession, Woods, Hastings, Haskell, and Briceland entered and began excavating and carrying away ground from a portion of the lot for the purpose of filling up other lots in the vicinity. Sutton thereupon commenced the suit referred to in the Superior Court against them, and obtained a judgment therein for fifteen dollars damages sustained by reason of their trespasses; and the same judgment proceeded to enjoin them from any further excavations, or from in any manner interfering with Sutton's possession of the property.

The Court below seems to have regarded the record in *Sutton v. Woods et als.*, as operating as an estoppel so far as three fourths of the property was concerned and rendered judgment in favor of the plaintiff for the possession of only an undivided fourth, and costs. The plaintiff, being dissatisfied therewith, appealed from the judgment.

J. G. McCullough and John T. Doyle, for Appellant.

The judgment in *Sutton v. Woods* works no estoppel upon this plaintiff in favor of this defendant. The plaintiff was not a party to that proceeding, nor does he claim under any of the parties to it as such. His title passed out of Woods before that action was commenced, and is, therefore, entirely independent of the parties to that action. Assuming then

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that Woods and his other grantees are estopped by the judgment in the suit against them, still plaintiff and his grantors not being parties or privies to that record, it cannot be used against them for any purpose whatever. It could not be used either in bar or as evidence, because the parties are not the same. As evidence it does not go beyond proving that in a certain action between himself and Woods and others it was adjudged that Sutton had a better title then to the lands than Woods and others; but the judgment did not give title to Sutton in fee simple or otherwise, nor did it constitute him a cotenant of Flint, Peabody & Co.

The plaintiff, being the owner in fee of the undivided one fourth of the premises and not in any manner affected by the alleged judgment, is entitled to recover the demanded premises entire as against all persons, except his cotenants and persons holding under them. (*Hardy v. Johnson*, 1 Wallace, 371; *Treat v. Riley*, 35 Cal. 129.) The defendant does not come within either class. It may, however, be claimed that as we have brought ejectment, which goes to the question of the right of possession, it is a sufficient answer if defendant shows that Woods, Hastings, and Haskell were entitled to the possession, and that he obtained judgment against them to the effect that his right of possession was better than theirs, on the ground that as we could not oust them we cannot oust him. But this argument is fallacious. Sutton does not claim *under* Woods, Hastings, and Haskell, but *against* them. (*Satterlee v. Bliss*, 36 Cal. 489.) The judgment relied on might in a proper case prove that Sutton has a better title to the lands than Woods and others whenever *they* sue him; but it cannot prove that he has a better or as good a title as the plaintiff.

Winans & Patterson, for Respondent.

The plaintiff, while he concedes that on his own behalf he is only entitled to the fourth interest in the lot which the

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Court below awarded to him, seeks, by appeal, to recover the whole lot, on the ground that as tenant in common, if he obtains judgment at all, he is entitled to be let into possession of the whole on behalf of his cotenants as well as himself. He ignores the doctrine that Woods, Hastings, and Haskell are barred or estopped as to their three fourths ownership in the lot by the former adjudication, and claims that if they were, the proceedings were irregular and do not amount to an estoppel.

The former adjudication in the Superior Court was an estoppel and a bar to the recovery by plaintiff of the three quarter interests of Woods, Hastings, and Haskell. It put in issue and determined the very title here in controversy. Sutton then averred and relied on title in himself, and Woods, Hastings, and Haskell denied his title and set up ownership in themselves under the very title upon which the plaintiff founds his present suit. The judgment was in his favor and against them on the question of title; and it materially strengthens his case that a perpetual injunction was also awarded against Woods and his cotenants there defending from interfering with the premises or in any manner disturbing Sutton or those holding under him in the possession thereof.

Again, the judgment was conclusive upon plaintiff and his grantors as an estoppel, because a former recovery settles every question which was adjudicated, or which might have been adjudicated in the case. The plaintiff, so far as the three quarters formerly belonging to Woods, Hastings, and Haskell are concerned, stands in their shoes advocating their claims, and whatever defense would conclude them would be valid against him. He would, in short, be to all intents and purposes a party, and, therefore, directly within the application of the rule. It is plain that if plaintiff could recover for his coöwners their three fourths, they in turn could recover the same interest from him if he refused to let them

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into possession, and thus by this circuitous mode of proceeding they could gain from the defendant, Sutton, that which the law denies their right to have.

The theory that a party who proves himself a tenant in common can recover the entire possession of the land in which he has but a partial interest, because he represents his cotenants and may enter for them as well as himself, is overruled here by still another maxim of the law than that above referred to, viz: that when the reason upon which a legal principle is founded ceases to exist, the principle itself must fall. *Cessante ratione cessat ipsa lex*. Furthermore, the doctrine that one tenant in common may recover the whole is only applicable when the defendant in possession is a wrongdoer as against *all* the tenants in common. (*Collier v. Corbett*, 15 Cal. 183; *Clark v. Huber*, 20 Cal. 196; *Hart v. Robertson*, 21 Cal. 346.) Hence, if the defendant could defeat the other tenants in common, either by adverse possession or a former adjudication, the plaintiff can only recover his proportion.

Again, defendant, who has been in the actual adverse possession of the whole lot for ten years and more, holding it in express hostility to the claim of Woods, Hastings, and Haskell, has acquired thereby a title to the three quarters interest which is sued for, on their behalf, by plaintiff. Hence the judgment in this cause could only lawfully be that which was rendered, that plaintiff be let into possession of an undivided one quarter interest in the premises as tenant in common with defendant. Plaintiff can only recover for himself, because the theory on which he claims a right to recover the share of his cotenants Woods, Hastings, and Haskell, is negatived or overruled by the fact that their rights are barred by the statute and defeated by the adverse holding of defendant. (*Wade v. Johnson*, 5 Humph. 117; *Langdon v. Rowleston*, 2 Taunt. 46; *Pendergrast v. Gullatt*, 10 Geo. 218; *Jordan v. Thornton*, 7 Geo. 517; *Bowyer v. Judge*, 11 East, 287.)

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By the Court, CROCKETT, J.:

The plaintiff derails title to one undivided fourth of the premises in controversy under a valid alcalde grant, and is entitled to recover the possession of the whole property as against the defendant, who has shown no title, unless the judgment in the case of *Sutton v. Woods et al.* shall have the effect to limit his recovery to the one undivided fourth only. Neither the plaintiff or his grantors were parties to that action, or in privity with the defendants therein; and it is conceded that his rights are unaffected by the judgment. But it is said that Woods, Hastings, and Haskell, the defendants in the former action, who were then cotenants in common with the plaintiff's grantors, are concluded by the judgment, and are estopped thereby from setting up title or a right to the possession, as against the present defendant, who was the plaintiff in that action; and hence that the present plaintiff is not entitled to recover the possession of the three undivided fourths formerly claimed by them, and to which it has been argued the present defendant has the better title, as against Woods, Hastings, and Haskell. But one of the incidents of a tenancy in common holding the title, is that each of the cotenants is entitled to the exclusive possession of the entire property, as against the whole world, except his cotenants. A person without title and wrongfully in the possession, cannot gainsay the right of each of the tenants in common to the possession of the whole. As between tenants in common and a trespasser, each tenant in common is better entitled to the possession than a wrongdoer. The former is seized *per mi et per tout*, and has an interest in the whole, which entitles him to the enjoyment of the entire estate as against every one except his cotenants. Is the defendant a cotenant with the plaintiff? If so he must have acquired that *status* by means of the judgment in the former action, in which it was adjudged that as between him and

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Woods, Hastings, and Haskell he had the better title and the better right to the possession. But he did not thereby become vested with their title or succeed to their interest in the property. On the contrary the Court decided that they had no title, and left Sutton in possession under such claim of title as he had under the Colton grant. The judgment added nothing to his former title, but left it as it was before; and the point decided was that his was better than the title of his adversaries. I do not comprehend how all this can have the effect to convert the defendant into a tenant in common with the plaintiff's grantors, who were not parties to the action, and were unaffected by the judgment. Notwithstanding the judgment, the defendant, so far as it concerns the plaintiff and his rights, is as much a trespasser now as when he first entered on the lot; and I am not aware of any exception to the rule that as against a trespasser one of several tenants in common is entitled to the possession of the entire property. The judgment, it is true, estops Woods, Hastings, and Haskell from asserting title as against the defendant. But they are not asserting it in this action, nor are their rights in question here. On the contrary the plaintiff is entitled to the possession of the whole property, not on the strength of their title or right of possession, but of his own as one of several tenants in common, having a better right as such to the entire property than a mere intruder without-title. Nor can it be doubted that the plaintiff and Woods, Hastings, and Haskell are still tenants in common notwithstanding the judgment in the former action. As already stated the judgment did not have the effect to divest whatever title the defendants in that action had, nor to transfer it to Sutton, and consequently did not disturb the relation of tenancy in common before then existing between them and the plaintiff's grantors. The only effect of the judgment was to estop the defendants therein from asserting the title which they claimed against Sutton, the present defend-

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ant, and the Court did not attempt to interfere with the relation of a tenancy in common then existing between them and the plaintiff's grantors. No question of that kind was before the Court, and of course it had no power to deal with it, if it had attempted to do so. As between the several tenants in common their relations towards each other were therefore wholly unaffected by the judgment. But it is said that if one of several tenants in common be under such disability as will preserve his rights under the Statute of Limitations, this will not save the rights of his cotenants against whom the statute has fully run; and this rule of law is invoked to maintain the proposition urged in this case that if Woods, Hastings, and Haskell are estopped by the judgment, the plaintiff is entitled to the possession of his separate undivided interest only, and no more. But whilst fully admitting the soundness of the rule, I think it has no application to this case. The rule itself is founded on the proposition that when the statute has fully run, and has become effectual to bar an adverse title, the disseizor acquires a new title founded on disseizin. He does not acquire or succeed to the title and estate of the disseizee, but is vested with a new title and estate, founded on and springing from the disseizin; and the title of the disseizee, if not wholly extinguished, has at least become inoperative in law, and is without a remedy to enforce it. (*Arrington v. Liscom*, 34 Cal. 381, and authorities there cited.) The new title thus acquired by the disseizor must of necessity correspond with that on which the disseizin operated, as he could not acquire by disseizin a greater estate than that held by the disseizee. If the latter held only an undivided interest as tenant in common with another, the disseizor would acquire by disseizin a similar undivided interest; for it was only that on which the disseizin operated and took effect. The disseizor

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of one of several tenants in common acquiring a title by disseizin therefore becomes himself a tenant in common with the other cotenants; and hence in an action by one or more of them against him for the possession, the recovery is limited to the particular interest of the plaintiff, and does not include the whole property. But the reason on which the rule is founded has no application to this case. The defendant here has acquired no new title by disseizin or otherwise, but simply relies on the former judgment as concluding the defendants therein from the assertion of title as against him. But he is not a tenant in common with the plaintiff, as against whom he has neither title nor right of possession, and therefore does not come within the reason of the rule which he has invoked. Not being entitled to the possession of any portion of the premises, as against the plaintiff, it does not concern him to inquire what may be the effect of restoring the possession to the plaintiff, as between him and Woods, Hastings, and Haskell. If the technical bar of the former judgment shall thus be practically avoided as to them, no injustice will result therefrom, inasmuch as it now appears that for more than twenty years the defendant has been wrongfully in possession without title.

In my opinion the judgment ought to be reversed, and a new trial awarded.

Mr. Justice WALLACE, being disqualified, did not sit in this case.

Statement of Facts.

[No. 8,127.]

THOMAS F. POTTER v. J. P. AMES, ALEXANDER GORDON, AND JAMES BYRNES.

CONSTITUTIONALITY OF SAN MATEO ROAD LAW.—The provisions of the San Mateo County road law (Stats. 1867-8, p. 283), in reference to the notice to be given of a proposed alteration of a public road, and requiring persons claiming compensation for land to be taken to present their claims within a certain time, or be deemed as waiving all right to damages, do not violate section eight of Article I of the Constitution.

COMPENSATION FOR LAND TAKEN FOR PUBLIC USE—POWER OF LEGISLATURE TO PRESCRIBE STEPS.—It is competent for the Legislature to prescribe the several steps to be pursued in the assertion of a right to compensation for land appropriated for public use; but the prescribed procedure must not destroy or substantially impair the right itself.

ALTERATION OF ROAD IN SAN MATEO COUNTY—"PARTICULARITY" OF NOTICE.—Where a statute for the alteration of a public road required as a preliminary, the publication of a notice stating, with particularity, the starting point, and the course and terminus of the proposed alteration, and that those claiming compensation for land to be taken should present their claims within a certain time thereafter, or be barred (Stats. 1867-8, p. 283): *held*, that a notice of an alteration to run northerly from one point to another, "over the most practicable route for a road," was insufficient.

DAMAGES FOR TAKING LAND FOR ROAD ON INSUFFICIENT NOTICE—JUDGMENT ON FINDINGS.—Where a public road in San Mateo County was altered, and the owner of land taken therefor brought suit against the township trustees for damages, *quare clausum fregit*, and it appeared on the trial, and the Court found, that the notice of the proposed alteration required by law (Stats. 1867-8, p. 283) was such that plaintiff could not ascertain therefrom the amount and character of his land which would be affected by the proceedings, and that his damages, if such notice was insufficient to authorize the alteration, amounted to five hundred dollars: *held*, that plaintiff was entitled to judgment on the findings for that amount.

APPEAL from the District Court of the Twelfth Judicial District, San Mateo County.

The notice, referred to in the opinion, was "to make the following changes in the route and location of the Half-moon Bay and Pescadero Road, to wit: Commencing at the bridge, at the present crossing of the San Gregorio Creek, near Carte's Hotel; thence northerly over the most prac-

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ticable route for a road over and across the lands of James Quintin, W. Buckland, G. W. T. Carter, Asa Fletcher, A. Gordon, and Mrs. Thompson, to a point on the Tunitas Creek, near T. F. Potter; thence northerly along the west side of the present location of said road, over the most practicable route across the lands of T. F. Potter, Ganegan, and O'Conner; thence northerly over the most practicable route across the lands of Martin and Delany, Peter Seban and F. Wella, intersecting the present Half-moon Bay Road, at the crossing of the Lobitas Creek."

The Court below found, among other facts:

"3. That the damages done to said premises [of the plaintiff], by said digging and excavating, if the said proceedings gave defendants no authority to open a public road through said land, and on the line of said excavation, was and is the sum of five hundred dollars."

"14. No other description of the land through which said proposed road was to run, nor of the amount, quality, or quantity of land to be taken from any persons through whose land the same was to run, nor of the amount or character of the land affected by said proposed road, except the description thereof contained in the notice and petition, was made, until the report of said road viewers was made to said Board on the 7th of April, 1869."

"15. The plaintiff could not ascertain the amount or character of the land belonging to him, which would be affected by such proposed road, until after said survey was made."

There having been a judgment for the defendants, the plaintiff appealed.

John Reynolds, for Appellant.

It is found that the premises upon which the trespass was committed were owned and possessed by the plaintiff, and

Argument for Respondents.

that the amount of damages done to the same is five hundred dollars. If the defendants were not justified the plaintiff is entitled to judgment in his favor for this sum.

It is claimed that under the statute the plaintiff waived his claim for damages, and dedicated his land to the public, by not presenting his petition for damages on the day appointed in the notice. To this proposition there are these answers: 1. The notice was such as to render it impossible to comply with the requirements of the law. 2. The notice was not such as is required by law. 3. If the statute is to receive a liberal construction, so as to enable the public officers to effect the purposes designed by it, such liberality of construction must also extend to the claimant whose land it is proposed to take from him.

It is not competent for the Legislature to declare that a person shall be deemed to have dedicated his property to public use without any act on his part, from which it can be judicially determined that a dedication has been made. (*Beatty v. Kurtz*, 2 Peters, 566; *Hunter v. Trustees of Sand Hill*, 6 Hill, 411; *Chotard v. Pope*, 12 Wheat. 585; 3 Kent Com. 450.)

A law which proposes to take private property for public use must be strictly construed, and followed with exactness. (*Sherman v. Buick*, 32 Cal. 241.) Here the proceedings were irregular and inoperative, because the notice and petition were insufficient. They did not state with particularity the course of said road, or the proposed alterations, so as to enable the property owner to state the amount and character of the land thereby affected.

Edward F. Head, for Respondents.

The defendants opened the road in question, in pursuance of an order to them from the Supervisors of San Mateo County. The statute provides that, on receiving notice from the Supervisors, the Trustees shall proceed to open the

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road. No discretion is left with them. The statute is mandatory. Whenever the law imposes a duty upon a public officer it protects him in its discharge. (*Vanderheyden v. Young*, 11 Johna. 150; *Heney v. Lowell*, 16 Barb. 268; *Sheldon v. Van Buskirk*, 2 N. Y. 473; *Hutchinson v. Brant*, 5 N. Y. 208.) They are expressly protected by statute in this State. (Hitt. Gen. Laws, 6896.)

By the Court, WALLACE, C. J.:

This is an action of trespass, *quare clausum fregit*, brought by the plaintiff to recover damages for the digging and injury of his land, done by the defendants, who justify as being the Trustees of the Fifth Township, in the County of San Mateo, in which township the premises are situate.

The defendants justify under certain proceedings instituted before the Board of Supervisors of San Mateo County altering, or attempting to alter, a public highway in that county, and whereby they claim that a public road was legally opened through the premises of the plaintiff.

The statute of 1867-8, p. 283, concerning roads and highways in the County of San Mateo, provides, in substance, that any person intending to apply to the Board of Supervisors for the alteration of any highway shall give notice of such intention by posting notices that, at some designated regular meeting of the Board, to be held not less than fifteen days thereafter, an application for that purpose will be made, which notice must state, with particularity, the starting point and the course and terminus of the proposed alteration. (Section 2.)

It is further provided that any person owning lands to be affected by the proposed alteration, and who desires to apply for damages in consequence thereof, shall make application by petition to the Board, on the day on which the application shall be made, according to the notice, and that said

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petition shall set forth the particular road referred to, the amount and character of the land affected thereby, and any other circumstances having relation to the subject of damages to such land, and that, failing to present such petition at the time and in the manner prescribed, he shall be considered as waiving all right to damages, and as dedicating the lands affected by the proposed alteration to the public use as a highway, etc. (Section 4.)

The right of a party whose lands are appropriated to the public use to receive compensation therefor is undoubted under the provisions of the Constitution. (Article I, Section 8.) While it is unquestionably competent to the Legislature to provide the several steps to be pursued in the assertion of his claim for compensation, the prescribed procedure must not destroy or substantially impair the right itself. A reasonable opportunity must be afforded him to claim and receive his damages; then, if being so afforded, it be not availed of, the statute may provide that such failure shall constitute a bar to his claim.

I think that the provisions of the statute under consideration, in these respects, are free from constitutional objection, and that, if the steps therein prescribed be observed, the proceedings would be valid.

The first step to be taken is to give the notice, describing, with particularity, the termini and course of the proposed alteration. "*Particularity*," in these respects, is exacted. The reason is, that on the return day of the notice the party whose lands are to be taken must, upon pain of losing his claim, be prepared to present, and must then actually present, a petition to the Board, describing the particular road involved in the proceedings, and setting forth the amount and character of his land which will be affected by the taking, and other circumstances relating to the question of damages. He is held to particularity in time, subject matter, and circumstances. Of course, if the notice given

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be itself radically insufficient — if it be merely general, and practically indefinite as to the land to be taken, the owner cannot comply with the requirement of the statute — and being unable to comply, his property is taken without just compensation, which is just the thing the Constitution forbids to be done. The notice given in initiating the proceedings under consideration would seem to be insufficient on its face. The proposed alteration in the road is to run *northerly* from one point to another; but it is also to run "*over the most practicable route for a road,*" and what route that means cannot be known to the owner until after his day to present his claim for damages has already passed by — not till the viewers shall have made their report. Then he can learn, for the first time, how much damage he is to sustain, and how much he might have claimed had he known it in time. In other words, he can then learn the extent of the loss he has sustained.

However, even if the sufficiency of the notice of application here on its face were debatable, the Court below has expressly found that the plaintiff could not ascertain from it the amount or character of his land which would be affected by the proceedings.

Judgment reversed, and cause remanded, with directions to render judgment for the plaintiff on the findings.

RHODES, J., concurring:

I concur in the judgment.

Statement of Facts.

[No. 3,140.]

THE PEOPLE OF THE STATE OF CALIFORNIA
v. JOHN W. TAGGART.

TWO OFFENSES IN SAME INDICTMENT.—Burglary and breaking and entering a dwelling house, in the day-time, are intended by the law (Act of 1858 concerning crimes, and the Act of February 27th, 1864) to be two distinct offenses, and they cannot be made to constitute one and the same offense by means of an averment in an indictment to that effect.

A DEMURRER TO AN INDICTMENT, on the ground that it charges two offenses, is permitted by Section 289 of the Criminal Practice Act.

APPEAL from the County Court of Sonoma County.

The Grand Jury found the following indictment against the defendant:

“John W. Taggart is accused by the Grand Jury of the County of Sonoma, State of California, by this indictment found the 3d day of October, A. D. 1871, of the crime of burglary, committed as follows: The said John W. Taggart, on the 13th day of July, A. D. 1871, at the county and State aforesaid, at about the hour of nine o'clock in the night-time of said day, with force and arms the house and tenement of William Withrow, then and there situate, feloniously and burglariously did break and enter with an intent then and in said house and tenement to commit petit larceny — that is to say, with intent to steal, take, and carry away one claw-hammer, worth one dollar; one spokeshave, worth seventy-five cents; one two-foot rule, worth fifty cents; and one monkey-wrench, worth one dollar, of the goods and chattels of William Withrow and John Charlton. And by way of setting out the above burglarious entrance in a different count and in a different form, the said Grand Jury further accuses the said John W. Taggart of entering said house, in the day-time, with intent to steal, committed as follows: The said John W. Taggart, in the said County of

Argument for Appellant.

Sonoma, on the said 13th day of July, 1871, at about the hour of six o'clock p. m., and in the day-time of said day, the shop and building of William Withrow willfully and maliciously did enter, with intent to commit petit larceny therein—that is to say, with intent to steal, take, and carry away one claw-hammer, worth one dollar; one spokeshave, worth seventy-five cents; one two-foot rule, worth fifty cents; and one monkey-wrench, worth one dollar, of the goods and chattels of William Withrow and John Charlton. And the Grand Jury further say that the two foregoing counts in this indictment are descriptive of one and the same transaction, contrary to the form, force, and effect of the statute," etc.

The defendant demurred to the indictment, the demurrer was sustained, and the plaintiff appealed.

Barclay Henley, District Attorney, for Appellant.

While our Criminal Practice Act prescribes rules governing criminal pleading widely variant from those of the common law, yet in regard to the insertion of two counts in an indictment, the Legislature has made no change, except such as it will be seen this indictment exactly conforms to. (*The People v. O'Connor*, 17 Cal. 354.) The only difference in that particular between the rule under our code and the rule of the common law, is that under the former all of the counts, taken either separately or together, must appear to embrace but one transaction, and there must be an allegation to that effect (*The People v. O'Connor*, supra; *The People v. Thompson*, 28 id. 216), in the indictment, while under the latter, the common law rule, each count must profess to charge a distinct and independent crime. (1 Bish. Crim. Pro. Secs. 181, 182, 201, 202, 208.)

Wm. Ross, for Respondent.

Points decided.

By the Court, RHODES, J.:

The first count in the indictment charges the defendant with the commission of the crime of burglarly, as defined by Section 58 of the Act concerning crimes and punishments, as amended in 1858. The second count charges him with the commission of the crime of breaking and entering a dwelling house, etc., in the day-time, with the intent to steal, as defined in the Act of February 27th, 1864 (Stats. 1863-4, p. 104.) Those are, and are intended by the law to be, distinct offenses, and they cannot be made to constitute one and the same offense by means of an averment in the indictment to that effect.

The defendant demurred to the indictment on the ground that it charges two offenses, and the demurrer was sustained. The defendant is permitted, by Section 289 of the Criminal Practice Act, to demur to the indictment on that ground and there being two offenses charged, the demurrer was properly sustained.

Judgment affirmed.

[No. 2,454.]

JAMES LICK v. JAMES RAY AND JAMES H. RAY.

ACTION TO REMOVE "CLOUD UPON TITLE"—CIRCUMSTANCES AUTHORIZING RELIEF.—Where Lick held a Sheriff's deed to certain property under a judgment and execution, in an attachment suit against James H. Ray, and James Ray held another Sheriff's deed to the same property, under another judgment and execution, against James H. Ray, the latter judgment and deed being earlier in date than the former, but not so early as the attachment lien in the former suit, and it appeared by averment that James Ray held his deed in trust for his father, James H. Ray, and it was conceded that Lick's was the superior title, but Ray claimed that his deed did not amount to a cloud: *held*, that the apparent title held by Ray under his deed was a cloud, and that Lick was entitled to relief in equity to remove it.

Argument for Appellants.

WHAT CONSTITUTES A "CLOUD UPON TITLE."—If a title against which relief is prayed as a cloud be of such a character that, if asserted by action and put in evidence, it would drive the other party to the production of his own title in order to establish a defense, it constitutes a cloud, which the latter has a right to call upon equity to remove.

WHAT IS NOT A "CLOUD UPON TITLE."—If a title be void on its face, if it be a nullity, a mere *feble de es*, when produced, so that an action based upon it would "fall of its own weight," it does not constitute a cloud; and an action cannot be maintained to remove it as such, except upon a showing of special circumstances entitling the party to relief.

APPEAL from the District Court of the Twelfth Judicial District, City and County of San Francisco.

The trial of this cause in the Court below resulted in a judgment in favor of, and as prayed by, plaintiff—to the effect that the deed to James Ray was a cloud upon the plaintiff's title; that it was null and void; that it should be delivered up and canceled, and enjoining defendants from asserting any right, title, or interest, under or through it, to Santa Catalina Island.

The other facts are stated in the opinion.

The defendants appeal from the judgment.

S. F. & L. Reynolds, for Appellants.

To any action that might have been brought on the deed held by Ray, Lick would have had a perfect legal defense through the prior judgment of Hawkshurst. His proofs would have been those in any ordinary action of ejectment, a paramount legal title. He would prove the Hawkshurst judgment, execution, sale under it, and the Sheriff's deed to Hawkshurst, and then the deed to himself. That would have placed the paramount legal title in him, and as completely displaced such title out of Ray, the purchaser, as out of Ray, the judgment debtor and original owner, if the action had been against him. That would have been a complete answer and defense to Ray's action, and the result would have been a judgment in favor of Lick.

Argument for Respondent.

An inspection of the two deeds, and the proceedings upon which they are based, show clearly that no cloud is upon, or danger to, the title of the plaintiff. A Court of equity will not entertain a bill to remove a cloud from the title to real estate, or for the cancellation of a written instrument, when it is apparent from an inspection of the deed or writing that no danger to the title or interest of the plaintiff is to be apprehended. (*Cox v. Clift*, 2 Comst. 118.)

Williams & Thornton, and *C. H. Sawyer*, for Respondent.

The record here consists only of the judgment roll, and all presumptions and intendments of law are in favor of the decree. It will be presumed that there was sufficient evidence of all the averments of the complaint to justify the action of the Court below; and if no error appears in the judgment roll, the decree will be affirmed. (*Ritter v. Mason*, 11 Cal. 214; *People v. Quincy*, 8 Cal. 89; *Landers v. Bolton*, 26 Cal. 415; *Waldie v. Doll*, 29 Cal. 556.)

The deed to James Ray is a cloud on plaintiff's title, and the true test to ascertain the fact is this: would the owner of the property, in an action of ejectment founded on the deed, be required to offer evidence to defeat a recovery? (*Pixley v. Huggins*, 15 Cal. 132; *Fulton v. Harlow*, 20 Cal. 484; *England v. Lewis*, 25 Cal. 357; *Warrener v. Smith*, 27 Cal. 652; *Arrington v. Liscom*, 34 Cal. 388; *Thompson v. Lynch*, 29 Cal. 190; *Peirsoll v. Elliott*, 6 Pet. 98; *Ward v. Chamberlain*, 2 Black, 444; 2 Story's Eq. Sec. 700.)

This is not an action to quiet title under section two hundred and fifty-four of the Practice Act. It is a bill in equity, seeking the cancellation of a deed fraudulent and void, but which casts a cloud on plaintiff's title. It is, therefore, not necessary either to aver or prove possession of the land. (*Hager v. Schindler*, 29 Cal. 57; *Thompson v. Lynch*, 29 Cal. 190.) Fraud is not a necessary ingredient in this form of action. It is sufficient if the deed sought to

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be avoided in a cloud on plaintiff's title. (*Stewart v. Thompson*, 32 Cal. 263.)

By the Court, WALLACE, J.:

This appeal is brought from a judgment by which it was determined that a deed made to the defendant James Ray by the Sheriff of the County of Los Angeles of an undivided three eighths of the island of Santa Catalina, formerly owned by the defendant James H. Ray, and sold by said Sheriff under a judgment rendered against the latter in favor of Benjamin Wood, was null and void as against Lick, who claims to have acquired the said three eighths interest of the defendant James H. Ray through another deed made by the Sheriff of said county, by which he conveyed said three eighths to Walter Hawkshurst upon a Sheriff's sale under a judgment which the latter obtained against the defendant James H. Ray. It is conceded that the title to these three eighths is vested in Lick, but it is claimed that he cannot maintain this action to remove the cloud which, as he alleges, is cast upon his title by the existence of the Sheriff's deed to James Ray. The case, it is to be observed, is not brought under the provisions of Section 254 of the code, nor is it averred that Lick was at the commencement of the action in possession of the island or of any part thereof either by himself or his tenant.

It appears that the defendant James Ray, who holds the Sheriff's deed, under the Wood sale, is the son of his co-defendant James H. Ray, and the complaint sets out the fact that Hawkshurst brought an action against the defendant James H. Ray to recover the sum of money due to the former from the latter, and avers that in that action a writ of attachment was issued in the usual form against the property of the latter, and was levied upon his interest in the island, being the three eighths in controversy, so as to create a lien

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thereon; and a judgment being subsequently rendered against the defendant James H. Ray in that action, an execution was duly issued thereon to the Sheriff of Los Angeles County, who afterwards sold the interest of Ray to Hawkshurst, and in due time executed and delivered to him a Sheriff's deed thereof, and Hawkshurst subsequently conveyed this interest to Lick, who is now the owner of it.

It further appears by the averments of the complaint that Benjamin Wood recovered another judgment against James H. Ray, under which an execution was issued to the said Sheriff, and that said interest of James H. Ray was sold to J. B. Crockett, who received a certificate of sale thereof, and subsequently and before the expiration of six months thereafter Crockett sold and assigned this certificate to the defendant James Ray for a sum of money paid in hand, and that the Sheriff subsequently executed a deed of conveyance upon said certificate, which deed ran to the defendant James Ray as assignee of the certificate. The complaint avers that the money which was the consideration of the assignment of the Sheriff's certificate to the defendant James Ray, was advanced by his father and codefendant James H. Ray, and that the defendant James Ray took and held the assignment of the certificate of sale in trust for his father, and subsequently received and now holds the Sheriff's deed thereon, also in trust for his father, and that the transaction should be held to amount to a mere redemption made by the defendant James H. Ray himself from the sale under the Wood judgment, and that therefore the Sheriff's deed running to James Ray should be set aside and avoided as being a cloud upon the title of Lick.

The evidence is not set forth in the record, nor is any point made here by the appellants, except the point that these facts do not enable Lick to maintain the action to cancel the Sheriff's deed to James Ray as a cloud upon his own title. Unquestionably, if the complaint be true, and it must be

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considered to be so as the case is here presented to us, it is a fraud against Lick that the defendant, James H. Ray, whose title Lick has acquired, should, in the name of his son and codefendant, James, hold and keep on foot another title purporting to be derived through a Sheriff's deed upon an execution sale against himself, running in form to the latter as grantee; and upon well settled principles prevailing in Courts of equity, and which were asserted by this Court in the case of *Hager v. Schindler*, 29 Cal. 55, such an instrument ought not to be permitted to be retained by the defendants, since (conceding, as the appellants here do, that Lick has the title, both at law and in equity) they can retain their own Sheriff's deed only for some sinister purpose.

Singularly enough, however, the defendants point to the admitted superiority of Lick's title in connection with the conceded worthlessness of their own as a reason why Lick should not obtain any relief in this action. They claim that their own title does not even amount to a cloud upon that of Lick, who, as they therefore claim, has no right to resort to this proceeding to remove it as a cloud.

While it is conceded that a party in the position of Lick has the right to maintain an action to remove a cloud from his own title without awaiting its active assertion by suit, it is contended that the Sheriff's deed to James Ray is not such an one as amounts to a cloud.

It is settled by a long line of decisions in this Court that if the title against which relief is prayed be of such a character as that, if asserted by action and put in evidence, it would drive the other party to the production of his own title in order to establish a defense, it constitutes a cloud which the latter has the right to call upon the Court to remove and dissipate. If, on the other hand, the title be void on its face; if it be a nullity — a mere *felo de se*, when produced, so that an action based upon it will "fall of its own weight" as has been said, then the title of the party

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plaintiff is not necessarily clouded thereby, and he ought, if he would maintain an action to have it removed, show some special circumstances which entitle him, in the view of a Court of equity, to a decree for that purpose. Testing this case by these rules, it will be seen that in an action of ejectment brought upon the Sheriff's deed to James Ray to recover the possession of the three eighths of the island, the plaintiff in such an action would be able to make a prima facie case of great apparent strength. He could show, of course, that James H. Ray was the owner of the three eighths; that Wood regularly obtained a money judgment against him; that under that judgment his estate in the island had been sold by the Sheriff, and that after the expiration of the time allowed for a redemption a Sheriff's deed in due form had been delivered to the assignee of the Sheriff's certificate of sale. He could show a judgment of unquestionable validity, an execution duly issued thereon, and a Sheriff's deed duly delivered, and these are all that would be necessary to constitute a sufficient prima facie title in the grantee of the Sheriff. Lick, if in possession, must obviously, under such a state of facts proven, suffer a recovery, unless he should produce his own title in his defense. And taking that course, if he should even rest with the proof of the Hawkshurst judgment, execution, and Sheriff's deed thereunder, he would still fail in his defense, for his adversary would in that case have shown the elder Sheriff's deed, which would be prima facie the better title. Lick would be compelled to go further and show the facts (in which the superiority of his title really consists), that the lien (being an attachment lien in aid of the Hawkshurst judgment) under which he claimed was elder upon the premises, and, therefore, superior to the lien of the judgment under which his adversary derived his title, upon the prin-

Opinion of Rhodes, J., dissenting.

ciple that a "prior lien gives a prior claim, which is entitled to a prior satisfaction out of the subject it binds, unless the lien be intrinsically defective, or be displaced by some act of the party holding it, which shall postpone him in a Court of law or equity to a subsequent claimant," and that "the single circumstance of not proceeding on it until a subsequent lien has been obtained and carried into execution has never been considered as such an act." (*Rankin v. Scott*, 12 Wheat. 177.) It is evident that if Lick should succeed in the defense of such an action he could only do so by so establishing his own title as to overcome the very formidable case already made by his adversary.

We think that the apparent title held by James Ray to the three eighths of the island is not only a cloud upon the true title of Lick, but one of a remarkably formidable character, and which he is entitled to remove by the judgment of the Court.

Judgment affirmed.

RHODES, J., dissenting:

This action cannot, in my opinion, be maintained. A Court of equity, as I understand the rule, will order a deed to be delivered up to be canceled, which was fraudulent or invalid at its execution — which, at its inception, had some inherent defect in its character which rendered it void or voidable; but a deed will not be ordered to be canceled, which, at its execution, was valid and free from fraud, unless it be a mortgage, or some instrument that may be satisfied or defeated by payment, the performance of a condition, or the like. I, therefore, dissent from the opinion of Mr. Justice WALLACE, and from the judgment.

Mr. Justice CROCKETT, being disqualified, did not participate in the foregoing decision.

Points decided.

[No. 2,701.]

**THE PEOPLE OF THE STATE OF CALIFORNIA,
EX REL. ALEXANDER W. MACPHERSON, v. THE
BOARD OF SUPERVISORS OF THE CITY AND
COUNTY OF SAN FRANCISCO.**

EFFECT OF DECISION IN THE "MATTER OF BEALE STREET," 39 CAL. 495.—

The directions given by the Supreme Court, in its decision on appeal from the County Court of San Francisco, in *The Matter of Beale Street*, 39 Cal. 495, were but the announcement of results to be ultimately reached, and had no reference to the mere procedure to be pursued in the County Court for that purpose; and they did not authorize that Court to itself modify the report of the Commissioners and enter final judgment thereon.

CHANGING GRADE OF STREETS IN SAN FRANCISCO—FINAL JUDGMENT

MUST CONFORM TO FINAL REPORT.—Under the statute of March 28th, 1868, authorizing the Supervisors of San Francisco to modify or change the grade of streets (Stats. 1867-8, p. 463), the final judgment to be rendered by the County Court must be one rendered in conformity with the report of the Commissioners on file; and when it is ascertained that there are errors in the report they must first be eradicated from it before the Court can proceed to final judgment; nor can any report become the basis of final judgment except it shall first have received the approval and sanction of the Supervisors.

CONTROL BY SAN FRANCISCO SUPERVISORS OVER PROCEEDINGS TO CHANGE

GRADE OF STREETS.—As, under the statute of March 28th, 1868, for the change of grade of streets in San Francisco (Stats. 1867-8, p. 463), the County Court, before it is authorized to hear objections to the proceedings, must be notified "that the Board of Supervisors have confirmed the report" of the Commissioners; and as, if they reject it, it must fail, and without their approval the proceedings must halt, it follows that the Supervisors have an unqualified veto power over the proceedings in this respect—the proceedings being in reality their own, and none the less so because carried on through the instrumentality of the County Court.

REPORT OF COMMISSIONERS CHANGING STREET GRADE IN SAN FRANCISCO

TO BE APPROVED IN ALL ITS PARTS BY SUPERVISORS.—Under the statute for the change of grade of streets in San Francisco (Stats. 1867-8, p. 463), the report of the Commissioners, upon which the judgment of the County Court is to be rendered, as therein provided, must be one which as a whole and in all its parts and details, and, if modified, with all its modifications, has received the approval and confirmation of the Board of Supervisors.

THIS was an application for the writ of mandate to the Supreme Court.

Argument for Relator.

The facts are stated in the opinion.

Jo Hamilton, Attorney General, and McAllisters & Bergin,
for Relator.

The action of the Board of Supervisors was conclusive, unless set aside by the County Court, where alone exclusively resided the power to correct or revise it. The entire procedure for the change of grade of streets in San Francisco is of purely statute creation, and, therefore, the mode of correcting any errors that may intervene is confined exclusively to that allowed by the statute. This is provided by the statute to be by application to the County Court.

The Act (section two) provides that "the County Court shall take jurisdiction of the proceedings;" and, having such jurisdiction, its action is final and conclusive upon the legality and validity of the proceedings. Jurisdiction is a term of well known and defined legal import; it is the power to hear and determine in a cause or proceeding. (*Ex Parte Watkins*, 3 Pet. 290; *Grignon v. Astor*, 2 How. 338; *Brewster v. Judkins*, 19 Cal. 171.) As was said in *Peck v. Jenness*, 7 How. 624: "It is a doctrine of law, too long established to require citation of authorities, that where a Court has jurisdiction it has the right to decide every question that occurs in the cause; and, whether its decision be correct or otherwise, its judgment till reversed is regarded as binding in every Court." (See, also, *Semple v. Hagar*, 27 Cal. 169.)

The Act further provides that if the Supervisors confirm the report, the grades of the streets shall be changed as contemplated. The action of the Supervisors has been done, and its action has been affirmed, not only by the County Court, but by the judgment of this Court. In any and every view then that may be taken of these proceedings, they are legal and valid and effectual to operate the change of grades prayed for.

Mandamus will lie and is the proper remedy. The relator

Argument for Relator.

has a vested right under the judgment awarding him damages, of the benefit of which he cannot be deprived by the Board of Supervisors. In proceedings of this kind, though the Board has a discretion to institute or prosecute them or not, before rights have vested, yet once they have so far progressed that rights have vested under them, they cease any longer to have any discretion in the premises, and may be compelled by mandamus to proceed if they fail to do so. (*People v. Corporation of Brooklyn*, 1 Wend. 322; *In the Matter of Beckman Street*, 20 Johns. 268; *Safford v. Mayor of Albany*, 7 Johns. 545; *Hawkins v. Trustees of Rochester*, 1 Wend. 54; *Ganson v. City of Buffalo*, 1 Keyes, N. Y. 454; *McCullough v. City of Brooklyn*, 23 Wend. 458; *People v. Common Council of Syracuse*, 20 How. Pr. 491; *State v. City of Keokuk*, 9 Iowa, 442.)

William Irvine, also for Relator.

The Board of Supervisors had jurisdiction of the subject matter. (*Smith v. Corporation of Washington*, 20 How. 135.) In passing upon the petition, and ordering the change of grade, it acted in a judicial character, and its adjudication was conclusive upon all parties affected by the change, unless objected to at the time and in the manner specified in the Act, as by the express provisions of the Act, all errors, omissions, and irregularities in any of the proceedings are declared to be waived, unless the particular errors, omissions, or irregularities be objected to and specified. (*Kavanagh v. City of Brooklyn*, 38 Barb. 237.)

There having been no objections made in the County Court, as provided in the Act, the judgment became conclusive of the entire subject matter, as well upon those to whom damages were awarded as upon those assessed for benefits. And all errors, omissions, and irregularities, if any, were tolled by the final judgment of confirmation. After such confirmation the city had no authority to dis-

Argument for Respondent.

continue the proceedings. Upon such confirmation rights become vested; and the city is bound to go on with the proceeding, and will be compelled to do so by mandamus on the application of any person interested in the proposed improvement. (*People ex rel. Green v. Common Council of Syracuse*, 20 How. Pr. 491.)

S. M. Wilson, R. C. Harrison, and W. C. Burnett, for Respondent.

The writ of mandate is never issued to control the discretion of a deliberative body. In the case presented the Board of Supervisors has a discretionary power intrusted to it in determining whether it will order the work asked for. (*Eustace v. Jahns*, 38 Cal.)

The relator proceeds upon the ground that the proceedings for the change of grade have ended, and have resulted in an actual change of grade, and that now the Board of Supervisors must begin and carry out the actual work of reducing the present plane of the street to that official grade. But it will be observed that the mandamus asked for is not to compel the Board to go on and establish a grade, but to compel the actual work of grading to an established grade. As a matter of fact, the proceedings to do the work have not been commenced by the Board. It refuses to declare its intention to do the work. It refuses to take the very first step. How utterly inapplicable, then, are authorities, that after a Board has proceeded to a certain degree of progress in a public work, and until great public and private interests are affected, they must go on to completion, and may be compelled by mandamus?

The relator has no vested right, and he himself concedes that he has none, unless the report of the Commissioners has been finally confirmed; and we shall show that it has not been confirmed. But it is plain that he could not be damaged until the work is done, nor can any assessments

Argument for Respondent.

for paying damages be enforced until the necessity for making payments arrives. The only right, then, that the relator can claim to be "vested" is the right to be damaged; and we know of no principle which guarantees such a right to any citizen. Again, the Board of Supervisors are not attempting to deprive the relator of any "right." They have done nothing to impair his right to receive those damages whenever they shall have been suffered. His judgment therefore is forever good; and whenever he shall suffer any damage from the change of grade, the means of enforcing that judgment will be ample and unimpaired.

But the Board never acquired any jurisdiction, and the grades have never been changed. There was not a sufficient representation of the property in the original petition; and the defeat there is not aided by any subsequent proceedings in the County Court. The act does not say that the County Court shall "have" jurisdiction over the parties or property to be affected. Such a declaration would have no force. A Court cannot, of its own motion, "have" jurisdiction of the person or the subject in controversy. It may "acquire" jurisdiction by following the steps prescribed by law; but the Legislature cannot, by its act, confer jurisdiction upon a Court over a person. It can only authorize the Court to obtain jurisdiction. This is the full extent of its powers; and unless jurisdiction is "obtained" in the first place the acts of the Court are *coram non judice* and void. The provision of the statute under discussion is, that "the County Court shall 'take' jurisdiction of the proceedings," i. e., it shall have just the jurisdiction which the Supervisors had. It does not acquire any additional jurisdiction, but simply "takes" the matter in hand, and proceeds to a certain step, when it surrenders the jurisdiction again to the Board of Supervisors, who finally determine whether the grade shall be changed. The powers of the County Court are merely ancillary to the Board of Supervisors, and given to it to

Argument for Respondent.

enable the moneys to be raised to be collected by means of the machinery with which Courts are provided, and which the Supervisors have not at their command.

The Board never confirmed the report of the Commissioners. After the report had been filed the County Court fixed a day for hearing objections, and, after argument, confirmed the report; but this confirmation of the Court was an entirely distinct thing from the confirmation by the Supervisors, required by the statute. The one was a judicial confirmation of the legality of the report, while the other would have been an adoption of the report thus confirmed by the Court. An appeal was taken from that confirmation by the Court; and this Court reversed the confirmation by the County Court, and remanded the case, with directions to the Court below "to take such further proceedings to carry out the decision of this Court, not inconsistent with the opinion herein, as may be necessary." But the Court below did not cause the report to be amended, and did not cause any notice of any modification or change in the report to be given to the Board of Supervisors. Instead of doing so, the County Court took upon itself the office of performing the functions of the Commissioners, and attempted to enter a judgment in conformity with what the revised report should have been, but without having the report revised. It did not conduct the subsequent proceedings in conformity with the provisions of the statute. In so doing the Court neglected the very step which was essential to the change of the grade. It follows that neither the mandate of this Court nor the provisions of the statute, as to "the subsequent proceedings," have been followed. There has been a defect in the proceedings, which has prevented their consummation; there has been no confirmation of the report; there has been no change of grade.

By the Court, WALLACE, C. J.:

This is an application for a peremptory writ of mandamus requiring the Board "to pass the necessary and proper resolutions and orders, and give the notices required by law, to grade Beale street from Folsom street to Bryant street, and Harrison street from Fremont street to Main street, to the newly established grade of said Beale street and Harrison street, between said Folsom street and Bryant street, and said Fremont street and Main street, and to proceed and execute the prayer of the petition of the property owners praying for the grading of said streets, * * * presented * * * October 24th, 1870."

It appears that in January, 1869, a petition signed by certain persons, owners of lots in San Francisco, was presented to the Board of Supervisors, praying that a change in the grade of Beale street from Folsom street to Bryant street, and also a corresponding change in the grade of Harrison street, an intersecting street, be ordered by the Board. The petition was presented under the provisions of the Act of March 28th, 1868, p. 463, authorizing the Board to modify and change the grade of streets in San Francisco, and it purported to be signed by the owners of three fourths of the property to be affected by the proposed change. In response to this petition, the Board, on the 23d day of February following, adopted a resolution reciting the substance of the petition presented, declaring their intention to accede to its prayer, designating certain limits within which the lots of land would be benefited by the proposed change, and directing that the resolution be published for the period of thirty days in the official newspaper as a notice of such intention, under section 2 of the statute. The publication was had accordingly — the first publication being made upon the 26th

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day of February, 1869 — and within twenty days after such first publication, some nine persons, owners of lots of land, filed their several duly verified petitions under subdivision two of section 2 of the statute, setting forth the damages which they claimed they would respectively sustain by the proposed change of grade, and asking the appointment of Commissioners to assess such damages, etc.; of the filing of which petitions the County Clerk gave immediate notice to the President of the Board. The County Court thereupon proceeded to appoint three proper persons to be Commissioners to assess the benefits and damages growing out of the proposed change of grade. This was on the 16th of April, 1869, and on the 4th of October following the Commissioners filed their report, in which they awarded damages not only to the nine persons who had so petitioned therefor, but to divers other persons, owners of lots, who had filed no petitions in that behalf. One of the nine persons who had duly filed petitions claiming damages was the present petitioner, A. W. McPherson, and there was awarded to him by the Commissioners in their report some thirty three thousand dollars as damages which he would sustain by the change of grade proposed. On the filing of this report the County Clerk notified the Board of Supervisors of the fact that it had been so filed, and the Board thereafter, on the 11th of October, 1869, by its ordinance, duly passed for that purpose, confirmed the report, of the fact of which confirmation the Clerk of the Board in turn gave notice to the County Court, and the County Court thereupon by its order fixed the 1st day of November, 1869, as the day for hearing parties feeling aggrieved by reason of the proceedings.

On that day the "Union Lumber Association," who, as owners of certain premises, had been assessed by the report in some sixty-five thousand dollars for supposed benefits to their property by the proposed change of grade, made objections to the report upon several grounds; among others, upon

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the ground that damages had been allowed to non-petitioning owners; that the damages as awarded were exorbitant in amount, and that the assessment imposed upon the property of the association for supposed benefits was excessive, etc. These objections coming on to be heard before the County Court, on the 17th of February, 1870, that Court held that the report of the Commissioners was correct in undertaking to award damages to non-petitioning owners, and that the Court had no authority to hear evidence or entertain an inquiry as to alleged errors committed in the estimates made by the Commissioners respecting benefits to be received or damages to be sustained, but that the estimates contained in the confirmed report, in the absence of fraud, were conclusive, and all objections being overruled, judgment was thereupon rendered against the several lots of land in accordance with the report on file.

From this judgment of the County Court the Union Lumber Association brought an appeal here, and this Court considering that, in so far as an award of damages had been made in favor of non-petitioning lot owners error had intervened, thereupon delivered its opinion to that effect and reversed the judgment and remanded the cause "with directions to render judgment, omitting the damages awarded to parties not filing petitions therefor as required by the statute, and for such further proceedings as may be necessary and not inconsistent with this opinion." (*In The Matter of Beale Street*, 39 Cal. 495.)

At a subsequent day, the remittitur not having issued, the counsel upon either side of that cause presented to this Court a stipulation to the effect that the judgment theretofore entered in the above entitled cause should be changed and modified so as to read as follows: "The judgment of the County Court is reversed and the cause remanded with directions to render judgment in favor of the nine persons who filed petitions for damages, omitting the damages

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awarded to parties not filing petitions therefor as required by the statute, and to deduct from the several assessments for benefits their respective proportionate part of the sum of two hundred and fifteen thousand and eighty dollars and fifty-seven cents, that had been awarded to persons not filing petitions for damages, and to apportion the amount of the several awards of said nine persons, together with the expenses of these proceedings, upon the lands and premises assessed for benefits, as reported by the Commissioners, and take such further proceedings to carry out the decision of this Court, not inconsistent with the opinion herein as may be necessary," and the order of modification was accordingly entered here.

The cause having been remanded to the County Court, that Court, on the 29th day of August, 1870, entered an order reciting the several steps which had been theretofore taken, including the proceedings had in this Court upon appeal, and thereupon, without setting aside or recommitting the report of the Commissioners, or correcting the report itself in any wise, the County Court rendered a judgment by which it awarded damages to the nine petitioning owners only, and by its judgment reduced the assessment for benefits in a like proportion, and upon the basis which had been here indicated as correct. The amount awarded by this judgment to McPherson, the Petitioner here, as damages was not reduced below the amount the Commissioners had reported in his favor, and upon the entry of judgment in the County Court he applied for an order of sale to enforce the collection of the sum so awarded to him, but the County Court denied the application on the ground that no such process could be lawfully issued until the work of actually grading said streets had been done and the fact of its completion ascertained by the Court. The petitioner, McPherson, thereupon presented to the Board of Supervisors a written petition, subscribed by himself and other owners of property fronting

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on the work proposed to be done, in which petition they prayed the Board to cause the work of grading of these streets to be done, in accordance with the resolution and notice of February 23d, 1869, and the Board refusing to accede to the petition, he now makes application for the writ of mandamus to compel them to do so.

The judgment of this Court, reversing that of the County Court, and remanding the cause, with directions, placed the cause, upon its return to the County Court, in the same situation as to the further proceedings to be had thereafter, as though that Court had itself finally sustained the objection of the Union Lumber Association in respect to the award of damages to non-petitioning lot owners. Had that Court itself sustained the objection made in that behalf, it must have resulted that any judgment thereafter to be rendered by it must have been one confining the award of damages to the nine petitioning owners, and reducing, of course, the assessment for benefits in a relative proportion.

The directions given here, that judgment should be rendered in favor of certain persons, and that a reduction of damages awarded, as well as of benefits assessed, should be made, were but the announcements of results to be ultimately reached, and had no reference, of course, to the mere procedure to be pursued in the County Court for that purpose. The mandate of this Court directed that Court to take such further proceedings as might be necessary to carry into effect the decision rendered here. That Court was thus thrown back upon the statute to ascertain for itself what proceedings were necessary to be pursued for that purpose, for no question upon that subject had been made, or considered, or decided here. And it is clear that had the objection of the association as to the allowance of damages to the non-petitioners been sustained in the County Court, without the resort to an appeal to this Court, the Commissioners must have been directed to modify their report, and

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to reduce the amounts therein set forth for damages to be sustained, and for benefits to be received as well. That objection being sustained in the County Court in the first instance, or here on appeal in the second, it unavoidably resulted that an excess of damages awarded, aggregating more than two hundred thousand dollars in amount, would appear upon the face of the report itself. As, under the statute, the judgment to be rendered must be one rendered in conformity with the report on file, it is obvious that the ascertained errors of the report itself should be first eradicated before proceeding to final judgment thereon. The means to be availed of by the County Court for the correction of a report, ascertained to have been made upon an erroneous basis of law or fact, are not pointed out in the statute, nor is it important that they should be so pointed out. An order directing the particulars in which, or enunciating the principles upon which, a modification should be made is all that would be necessary in that respect. This is mere practice, and the particular procedure adopted, whatever it be, nothing more than form. But the duty to direct the modification of the report in some form is clear, and had it been observed in this instance another duty, and one which is important in its consequences, must have thereupon arisen — *the duty of resubmitting the modified report for the confirmation or rejection of the Board of Supervisors*. There can be no doubt that the intent of the statute is, that no report shall become the basis of the judgment of the County Court, in proceedings to change the grade of streets, except such report shall itself have first received the approval and confirmation of the Board. Unless this be the correct interpretation of the statute, the provisions of the ninth subdivision of the second section amount to a mere delusion and a snare. It is there enacted, that before the County Court shall be authorized to hear any objection to the proceedings by persons aggrieved, it must have been

notified "*that the Board have confirmed the report.*" Of course if the Board *reject* it, it *must* fail — the Board has thus an unqualified veto power over the proceedings in this respect, for these proceedings are in reality their own, and not the less so because carried on through the instrumentality of the County Court. When the report upon which judgment is to be rendered is filed there, the Board must have notice of the fact. The report is first for them to consider. They are to determine whether, in view of what is now developed, the proposed change is still advisable; whether the results anticipated at the passage of the resolution, in the first instance, appear to have been attained, or to be indeed attainable; to inquire what proportion the aggregate damages to be suffered bear to the aggregate benefits to be accomplished; whether a reasonable measure of substantial justice among the property holders affected has been observed by the Commissioners; in fine, the projected measure is, so far as the public is concerned, now brought up before the Board for definitive disposal, by the light of all the reasons which influence public bodies in the discharge of public duties involving high considerations of policy and justice.

This approval of the Board, accorded to the report, constitutes the warrant and the authority of the Court to proceed further. Without that approval the proceedings must halt. The *approved report* is indispensable to the taking of further steps in the business. A mere report filed, one which has not been sanctioned by the Board, as affording the requisite authority to proceed, is as worthless as though the signatures of all the Commissioners had been omitted upon its face.

And though a report be filed, and even, upon consideration, it be approved by the ordinance of the Board, yet if through any agency, or by any means subsequently occurring, in the judicial proceedings to follow, the report itself

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be modified in a material point, has it not thereby ceased to be the report approved by the Board? Or is it to be said that the approval of the original report filed in the case is to be applied by operation of law to any modified or substituted report by which the original report may be thereafter supplanted or superseded?

We think that these questions can be answered in but one way, and that is that *the report upon which the judgment of the County Court is to be rendered must be one which, as a whole and in all its parts and details, has received the approval and confirmation of the Board.*

But the judgment of the County Court of August 29th, 1870, was not a judgment in accordance with the report on file, which had received the approval of the Board—that report, as we have said, must have been first amended before the judgment directed by the mandate of this Court could be properly entered—the amendment of the report, in the respects indicated here, was one of *the further proceedings* directed by the judgment of this Court, and then, if the Board had by ordinance approved the report as so amended, and its approval had been notified to the County Court, the judgment of that Court might have been appropriately rendered thereon. Had the report, as thus amended, been resubmitted to the Board, new considerations of a grave character must have unavoidably been thereby presented for determination.

It would then have appeared, for the first time to the Board, by the amended report, that only nine persons were to receive their damages occasioned by the proposed change; that a large number of persons, having claims probably equally as meritorious as those nine, were about to lose them by reason of a mere misapprehension upon their part of the terms of the statute requiring them to present their petitions therefor; that the omission of these claims, amounting, as we have seen, to upwards of two hundred thousand

Points decided.

dollars, would be a great hardship upon the claimants, from which the Board alone had the power and the discretion to relieve them, by withholding its approval from the amended report, and thus, by forcing proceedings *de novo*, have promoted substantial justice in that respect. But whatever view the Board might have entertained upon this, or any other matter appearing upon the proceedings at that point, the statute contemplated that the amended report should pass the ordeal of their judgment, and receive an approval or rejection at their hands, as the case might be, before it could become the subject of further action in the Courts.

The petition and exhibits, constituting the record upon this application for the writ of mandamus, failing, as they do, to show that final proceedings have yet been had in the County Court, pursuant to the mandate of this Court, it results that there was no absolute duty upon the part of the Board to accede to the petition of the applicant, demanding that it begin the work of grading the streets referred to.

The application for the writ must, therefore, be denied; and it is so ordered.

[No. 2,942.]

DAVID PORTER v. FRANCES E. GAMBA.

SOLE TRADER—FINDING OF "FULL COMPLIANCE WITH STATUTE."—A finding that there was a full compliance by a married woman with the statute of 1862 relating to sole trader (Stats. 1862, p. 108), is equivalent to a finding that she was authorized to carry on the business specified in her own name and on her own account.

MANAGEMENT OF HUSBAND DOES NOT EXEMPT SOLE TRADER FROM LIABILITY.
—A sole trader cannot claim exemption from liability, as such, on the ground that she permitted her husband to manage and control the business.

SOLE TRADER ACT—CONSTRUCTION OF PROVISION AGAINST HUSBAND'S MANAGEMENT.—The provision in section three of the Sole Trader Act (Stats.

Argument for Appellant.

1862, p. 108), that "nothing contained in this Act shall be deemed to authorize a married woman to carry on business in her own name when the same is managed or superintended by her husband," was intended only for the protection of the creditors of the husband, and to prevent collusion and fraud between husband and wife, but not to shield the wife from her liability as a sole trader.

FORM OF JUDGMENT AGAINST SOLE TRADER.—There is no objection to a general judgment against a sole trader on a claim for which she, as such, is liable.

EVIDENCE.—Matters of mere inducement do not require strict proof.

APPEAL from the District Court of the Twelfth Judicial District, City and County of San Francisco.

The demand in this action was for the sum of six hundred and fifty-eight dollars, the value of wines and liquors furnished defendant for the purposes of her business as a sole trader. The judgment was in favor of plaintiff and against defendant, by name, for that amount, with costs. In the course of the trial the plaintiff called Wm. M. Pierson as a witness, who testified that he was an attorney at law; that he knew the Gambas; that as attorney for certain persons he had advised the levy of an attachment or execution against the restaurant on Market street, in San Francisco, where Mrs. Gamba did business. Being requested by defendant to fix dates, he said that he could not tell when it was; that he thought the suit was against defendant's husband; that the suit was in a Justice's Court, and Mrs. Gamba testified in it, and that there was an attachment or execution levied against the restaurant. The defendant moved to strike out the testimony of the witness referring to the suit, on the ground that no date was fixed, and it was not the best evidence. The motion was denied.

The defendant appealed.

J. C. Bates, for Appellant.

The findings do not support the judgment, because it appears therefrom that defendant was only authorized to

Argument for Respondent.

carry on business in her own name as sole trader, and not on "her own account." And it also appears therefrom that defendant failed to comply with the statute by having her husband manage and superintend the business. The Act requires certain formalities to be complied with, which are: First, that the business be described; second, that she intends to carry on business in her own name; and third, on her own account—and unless she has all those privileges she is not a sole trader in law. (*Adams v. Knowlton*, 22 Cal. 289.)

The Act is not fulfilled by a married woman making, advertising, and recording certain declarations and orders, but the substantive provision of the Act is that those prescribed forms, having been duly observed, the woman shall in good faith carry on the business thereafter on her own account. (*Hurlburt v. Jones*, 25 Cal. 229.)

The form of the judgment is erroneous, as it is valid only so far as concerns defendant's separate property invested in and resulting from such business as sole trader. (*Camden v. Mullen*, 29 Cal. 566.)

There was error in admitting the testimony of Mr. Pierson, for the reason that no date was fixed, and it was not the best evidence.

George & Loughborough, for Respondent.

The Sole Trader Act does not prohibit the husband from assisting his wife in the business, or taking part in its management.

The prohibition in the third section of the Act was intended only for the protection of creditors, and to cut off an easy escape for fraud; but the construction claimed by appellant would furnish another and greater facility for the practice of fraud. The plaintiff having shown that the defendant had regularly obtained the right to carry on a particular business as sole trader, the fact that she dealt with the plaintiff within the scope of that business, was sufficient evidence

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that she availed herself of the privilege, and that her contract was on account of the business. (*Melcher v. Kuhland*, 22 Cal. 522.)

Mr. Pierson was called as a witness for the sole purpose of contradicting certain evidence given by the defendant, which is omitted from the statement. No error appears in the admission of his testimony, whether for that or any other purpose, but if erroneous, it was not prejudicial.

There is no objection to the form of the judgment, for the reason that the statute does not limit the responsibility of the wife for debts contracted as a sole trader, but she becomes liable generally.

By the Court, CROCKETT, J.:

The defendant is a married woman, and the plaintiff sues to recover the amount of a book account for merchandise sold to her, as a sole trader, carrying on the business of keeping a saloon and restaurant. The plaintiff had judgment and the defendant appeals, both from the judgment and from an order denying her motion for a new trial. The Court finds, that after a due compliance with the statute of 1862 (Stats. 1862, p. 108), the defendant was authorized, in her own name, as a sole trader, to carry on the business of keeping a saloon and restaurant, and that as such sole trader she purchased of the plaintiff the merchandise in question for use in her said business. It is objected, that the finding does not show a full compliance with the statute, because it does not appear that she was authorized to carry on the business on her own account as well as in her own name. But the Court finds there was a full compliance with the statute, which is equivalent to a finding that she was authorized to carry on the business in her own name and on her own account. Nor can we disturb the findings on the ground that they were not justified by the evidence. There was

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evidence tending strongly to show that she purchased the goods as a sole trader, and promised to pay for them as such; nor can she claim exemption from liability as a sole trader on the ground that she permitted her husband to manage and control the business of the saloon and restaurant. The third section of the Act of 1862 contains a provision to the effect that "nothing contained in this Act shall be deemed to authorize a married woman to carry on business in her own name when the same is managed or superintended by her husband." This provision was intended only for the protection of the creditors of the husband, and to prevent collusion and fraud between the husband and wife, but not to shield the wife from her liability as a sole trader. Creditors of the wife, dealing with her as a sole trade, would have but little security if their claims could be defeated at the option of the wife by her turning over the management of her business to her husband. Obviously this provision of the statute is not capable of the construction placed upon it by the defendant's counsel. The objection to the form of the judgment is not well taken, and there was no error in the admission of testimony. The witness Pierson was called to contradict the defendant by proof of her admissions, and what he stated in respect to the pendency of the action before the Justice was only by way of inducement.

Judgment affirmed.

Mr. Chief Justice SPRAGUE did not participate in the foregoing decision.

Points decided.

[No. 2,017.]

**FERDINAND ROSEMAN AND L. L. HOWLAND v.
JOHN CANOVAN AND JOHN SANBORN.**

FRAUDULENT SALE OF WOOL—ACTIVE CONCEALMENT OF DEFECTS BY VENDOR—DAMAGES.—Where the seller of wool in sacks knew that it had been rained on and was badly damaged, and that for the purpose of concealing its real condition the fleeces had been turned outside in and so packed; and the purchaser, when making an examination, cut a few inches into several of the sacks without discovering the damage, but remarked the extraordinary weight of the sacks and water stains upon them; and in answer to his inquiries as to these circumstances indicating damage, the seller said that the wool had not been rained on, so far as he knew, and had not got wet; that the weight was occasioned by extra good packing, that the water stains arose from sprinkling the sacks to make them hold more, and that all the wool, so far as he knew, was as good as that examined: *Held*, that though the rule of *caveat emptor* might apply if the seller had remained silent, yet under the circumstances and on account of the active concealment and artifice of the seller, he was responsible in damages for a fraudulent misrepresentation.

"CAVEAT EMPTOR" NOT APPLICABLE WHERE ARTIFICE USED TO PREVENT INQUIRY.—Unless there be warranty or fraud a purchaser of chattels cannot be heard to complain of condition or defects open to his observation, or which he might have seen had he thought proper to make an examination for that purpose; in such case the maxims of "*caveat emptor*" and "*qui vult decipi, decipiatur*" apply; but these rules have no application to a case in which the vendor resorts to a trick or artifice for the purpose of diverting the purchaser from the line of inquiry otherwise open to him, and which, but for such diversion, he might have followed.

"ALIUD EST CELARE, ALIUD TACERE."—Though a vendor of chattels may be excused from the obligation of pointing out defects or blemishes in the property he purposes to sell, he is not thereby at liberty to hinder or obstruct the purchaser in his attempts to find them out for himself.

FRAUDULENT MISREPRESENTATION ON SALE OF CHATTELS—ERRONEOUS INSTRUCTION.—In an action to recover damages for a fraudulent misrepresentation of the quality and condition of certain wool, which the plaintiff had been induced to purchase of the defendant, where there was evidence tending to show that defendant knew that the wool was damaged, and that by his false misrepresentations he induced the plaintiff to omit the examination for himself, which he would otherwise have made: *Held*, that an instruction to the effect that if plaintiff might by examination have ascertained the condition of the wool, defendant would not be responsible for concealing its condition, was practically directing a verdict for defendant, and was error.

Argument for Appellants.

APPEAL from the District Court of the Fifth Judicial District, County of San Joaquin.

The facts are stated in the opinion.
Plaintiffs appealed.

Carr & Wilkes, for Appellants.

Though Chancellor KENT says that "if defects in an article sold be open equally to the observation of both parties, the law does not require the vendor to aid and assist the observation of the vendee, and that even a warranty will not cover defects that are plainly the objects of the senses;" yet he proceeds in the very next sentence to say that "if the vendor says or does anything whatever with an intent to divert the eye or obscure the observation of the buyer, even in relation to open defects, he would be guilty of an act of fraud." (See 2 Kent, 484; 3 Blackstone, 165.)

In this case the wool was not equally open to the observation of both parties. It was packed into large sacks, weighing, on an average, three hundred and fifty-six pounds. The sacks themselves and the outside of the wool were dry while the wool near the center of the sacks was wet, very dirty, and heating. The real condition of the wool could not be known by the vendees without laying the sacks open to the centers. This would have resulted in great inconvenience, as the sacks were lying upon the steamboat, and defendants took advantage of this fact. Under the circumstances the parties were not on an equality; neither was their knowledge nor their means of knowledge equal; and so, even without the representations by the vendor, the knowledge possessed and not communicated, but concealed by him, was a fraud upon the vendee. (2 Kent, 482; 1 Story Eq. Jur. Sec. 212.) Besides, the vendor was guilty of actual fraud in telling the vendee the wool was not wet, when in fact it was wet. His representations were made to induce, and did induce the

Argument for Respondents.

purchasers, and were relied on by the vendee to his loss and the vendor's gain.

D. S. Terry, for Respondents.

The question of fraudulent representations was passed upon by the jury, and found in favor of defendants; and its finding on an issue of fact will not be reviewed by the appellate Court, where there is a conflict of evidence.

The plaintiffs seem to have proceeded under the civil law doctrine, that "sound price implies warranty of sound goods," as in their complaint they allege a purchase at the market price of good merchantable wool — an averment immaterial at common law, which permits a party to purchase at the lowest price he can, and imposes upon him the duty of examining and judging of the quality and condition of the goods, unless he chooses to require an express warranty. The rules of the common law were not framed to protect or favor ignorance or carelessness, nor to relieve the purchaser from the duty of exercising ordinary diligence in taking care of his own interests. While the common law affords to every person protection against fraud, it does not, in the apt language of KENT, "go to the romantic length of giving identity against the consequences of indolence and folly, or a careless indifference to the ordinary and accessible means of information." (2 Kent, 485.)

In *Parkerson v. Lee*, 2 East, 315, all the Judges held "that the rule of *caveat emptor* applied to the sale of all kinds of commodities; that without an express warranty by the seller, or fraud on his part, the buyer must stand all loss by latent defects, and that there was no instance in the English law of a contrary doctrine being laid down."

The doctrine contended for by plaintiffs would seriously embarrass commercial transactions, and lead to endless litigation. It would create obligations where none were intended to be assumed, and construe every word uttered by

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a vendor in commendation of his goods into a warranty, when it was neither so intended by the vendor nor understood by the purchaser; it would take away from commercial men one great excitement to the exercise of judgment, activity, and diligence in their business, by giving them protection against the consequences of indolence, negligence, and folly.

In this case, it is clear from the evidence, that no words were used which were intended by the seller, or understood by the purchaser, to be a warranty of the condition or quality of the wool sold. After the seller had cut open some sacks, the purchaser took the knife and cut and examined till he was satisfied. The condition of the wool could have been readily ascertained by ordinary diligence and attention.

By the Court, WALLACE, C. J.:

This is an action to recover damages for a fraudulent misrepresentation as to the merchantable quality and condition of certain wool sold by the defendants to the plaintiffs. The defendants had judgment below, and the plaintiffs, being denied a new trial there, bring this appeal.

The evidence tended to show that the wool was grown at the ranch of the defendants, in San Joaquin County, where it was sheared, and being put into sacks, was brought by them to Stockton, and placed on board the steamer there, with a view to its shipment to San Francisco. While it was lying on board the steamer at Stockton, the plaintiff Roseman, and the defendant, Canovan, went to examine it, with a view to its purchase by the former. Some of the bales were cut into, and the wool opened upon the surface, and to the depth of two or three inches. It appeared to be

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merchantable wool, dry, and looking well. Some of the sacks appeared to be stained upon the outside; and the testimony for the plaintiff tends to show that the attention of the plaintiff was awakened by that circumstance to the possibility that the wool might have been exposed to the rain, but that upon inquiry of the defendant, Canovan, upon that matter, the latter declared that the wool had not been rained on, that he knew of, and that it was throughout of as good a quality as the surface examination had indicated. After the price per pound had been agreed upon, it was found upon weighing the sacks that they were exceedingly heavy; and upon the plaintiff calling this fact to the attention of Canovan, and expressing his fears that the wool had got wet, the latter assured him that it had not, and that the large quantity of wool put in each sack was owing to the sacks having been sprinkled with a view to tight packing — which sprinkling, also, as the defendant said, accounted for their being stained on the outside. This is the purport of the evidence adduced by the plaintiff upon the point; and upon looking into the testimony of the defendant, Canovan, we do not perceive any substantial conflict. He states that after Roseman had got through cutting into the sacks in examining the wool, the latter inquired of him if all the wool was of the same quality, and that he replied that it was, so far as he, Canovan, knew. It is true that he states, in a general way, "I made no representations whatever to Roseman as to the quality of the wool;" yet he admits that when his attention was called to the stains on the sacks, he gave as a reason for their appearance that his "packer had sprinkled them to make them hold more." He admits, too, that he knew that some of the wool had got wet, and that he did not tell Roseman that fact when inquired of, but that when asked by the latter about the unusual weight of the sacks, he replied that they were "better packed, and therefore more wool in them, than common." He cannot recol-

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lect that Roseman inquired of him if the wool had been wet, but does remember that Roseman remarked the extraordinary weight of the sacks in which it was packed.

In point of fact, undisputed, the shearing of this wool was done in a muddy corral, without shed or covering — a portion of the time in the rain. Part of the wool sheared was so wet and muddy as to have been thrown away entirely. It was nearly all rained upon, more or less, during the shearing. Some of it was piled out with a view to being dried, and, in packing, the fleeces were rolled outside in. Defendant, Canovan, was personally present at the shearing, and cannot have been ignorant of these facts. Instead of having been tightly packed, the wool was found, upon its arrival at San Francisco (to which market the plaintiffs sent it immediately upon their purchasing it), to have been *poorly* packed. The bales averaged some three hundred and fifty-six pounds in weight, while, had they contained good wool, packed no more closely than this wool was packed, they would not have averaged more than about two hundred and fifty pounds. It was found, on examining the wool at San Francisco, that it was badly damaged, and unmerchantable, and that it was "packed wet, and very muddy and dirty" — "in a heating condition;" and the commission merchant to whom it was consigned there states that its condition in these respects could not have been detected without opening the bales.

The Court charged the jury as follows: "If, from the evidence in this case, you find that plaintiffs had an opportunity to examine for themselves, before purchasing the wool in question, as to its quality and condition, then it was their duty so to examine said wool as to ascertain for themselves the quality and condition of said wool; and plaintiffs cannot recover in this action unless you find from the evidence that defendants concealed from the plaintiffs the condition in

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some particular which plaintiffs might not have ascertained from an examination of the wool for themselves."

The instruction as thus given to the jury assumed to lay down the rule by which the case of the plaintiffs, as they had attempted to prove it, was to be determined. The instruction must have assumed, of course, that at the time of the sale Canovan knew that the wool was wet and in a damaged condition, and knew, too, that Roseman was ignorant that such was its condition; that though Roseman, upon cutting into the surface of the sacks had failed to detect this fact, he did, nevertheless, discover the water stains upon the sacks themselves, and subsequently upon their being weighed, with a view to the purchase, his attention was drawn to the unusual weight of the sacks; that thereupon his suspicions were aroused that the wool had been exposed to the rain, and that to allay these suspicions and to induce him to complete the purchase Canovan represented to him that, so far as he, Canovan, knew, the wool had not been exposed to the rain; "that it had not got wet; that it was not wet; that the stains came on the sacks from their having been sprinkled in order to get more wool into them; that he was scarce of sacks, and that he had a superior packer, who could put more wool into a sack than any man he ever saw; that to make the sacks hold an extra quantity they had been sprinkled; that by these means more wool was put into such sacks than common, and that the sprinkling of the sacks and the tight packing, resulting in each sack containing more wool than common, constituted the reason for the sacks weighing heavier than they usually did." And the instruction must have assumed, too, that Roseman believed these representations of Canovan, and because he believed them, he laid aside his suspicions, and so was induced to purchase without further examination. The rule which would rather seem applicable to such a case was stated by Lord BROUGHAM in *Atwood v. Small*, in the House of Lords, as follows: "If

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two parties enter into a contract, and if one of them, for the purpose of inducing the other to contract with him, shall state that which is not true in point of fact, which he knew at the time he stated it not to be true, and if upon that statement of what is not true and what is known by the party making it to be false, the contract is entered into by the other party, then, generally speaking, and unless there is more than that in the case, there will be at law an action open to the party entering into such contract, an action of damages, grounded upon the deceit," etc. (6 Cl. and Fen. 232.)

The jury were here told in substance that it was the duty of the plaintiffs to thoroughly examine the wool, with a view to discover its condition, and that not having done so they could not recover.

But possibly the plaintiffs would have ascertained its condition except for the active concealment and artifice which their evidence tends to show was practiced by Canovan. Had the latter remained silent, and made no representations as to the condition of the wool; had he not undertaken to account for the weight of the sacks and the water stains upon them, and so to account for them, too, as to put to rest the expressed apprehensions of the purchaser concerning the condition of the wool, it might have been that the transaction would have fallen within the rule of *caveat emptor*, and so have involved no responsibility upon his part. For unless there be warranty or fraud the purchaser cannot be heard, at least in Courts governed by the rules of the common law, to complain of conditions or defects open to his observation, or which he might have seen had he thought proper to make an examination for that purpose. If under such circumstances he refused to protect himself when, by lending his attention, he might do so, it is of his own choice — *qui vult decipi, decipiat*. But these rules have no application to a case in which the vendor has resorted to a trick or artifice

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for the purpose of diverting the purchaser from the line of inquiry otherwise open to him, and which, but for the diversion, he might have followed, and so have protected himself from loss. If the vendor may innocently remain silent as to the quality or condition of his goods, he shall not, at all events, *ex industria*, mislead the purchaser in that respect. *Aliud est celare, aliud tacere*. If he is excused from the obligation to point out the defects or blemishes of the property he proposes to sell, he is not thereby at liberty to hinder or obstruct the purchaser in his attempt to find them out for himself.

Mr. BENJAMIN, in his recent most valuable work on sales, thus states the rule: "In general when an article is offered for sale and is open to the inspection of the purchaser, the common law does not permit the latter to complain that the defects, if any, were not pointed out to him. The rules are *caveat emptor* and *simplex commendatio non obligat*. * * * But the use of any device by the vendor to induce the buyer to omit inquiry or examination into the defects of the thing sold is as much a fraud as an active concealment by the vendor himself. (Pp. 315-16.)

It will be observed that the instruction as given by the Court wholly withdraws from the jury the question of fraudulent representation upon which the plaintiffs relied for recovery. The jury were told in substance that if the plaintiffs *might* by examination have ascertained the condition of the wool, then the defendants would not be responsible for concealing its condition. The defendants were only to be responsible for the concealment of something which the plaintiffs *could not* have found out by their own examination. Inasmuch as there was nothing concerning the quality or condition of the wool which the plaintiffs *might not have found out*, had Roseman cut deeper into the sacks, or insisted that they should be opened and the fleeces unrolled to his inspection, this instruction was practically an instruction to find a

Points decided.

verdict for the defendants. The jury should have been instructed that if they believed that Canovan, knowing that the wool was wet and in a damaged condition, and knowing that the plaintiffs were ignorant that such was its condition, made the representation and statements already alluded to for the fraudulent purpose of allaying the suspicions of Roseman and inducing him to forego a further and more extended examination of the wool; and that, relying upon such representations and statements of Canovan, Roseman was thereby influenced and induced to purchase without making a further examination of the bales, then the defendants would be liable, and that the failure of Roseman to make further examination under such circumstances would constitute no defense to the action.

Judgment reversed, and cause remanded for a new trial.

Mr. Justice NILES did not participate in the foregoing decision.

[No. 2472.]**WILLIAM McKENZIE v. HARVEY DICKINSON.****RIGHT OF ONE PARTNER TO PURCHASE JUDGMENT AGAINST ANOTHER.—**

There is no principle of equity which forbids a partner from purchasing, with his own funds, and outside of the partnership business, a judgment or other evidence of indebtedness against his copartner, or prohibits him from enforcing its collection by a levy upon, and sale of, the interest of the other in the firm assets.

OBLIGATIONS OF PARTNERS "INTER SE" CONFINED TO FIRM BUSINESS.

— The obligations of copartners *inter se*, whatever may be their nature and extent, refer only to the conduct of the business in which the firm is engaged; beyond and outside of such business there is no restraint upon the right of either partner to traffic for his own profit.

OLD PARTNER NOT ENTITLED TO ACCOUNT OF PROFITS SINCE DISSOLUTION.

— Where McKenzie and Dickinson, bag manufacturers, dissolved partnership, leaving certain assets of the firm in McKenzie's hands, and afterwards McKenzie purchased, for much less than its face, a judgment against Dickinson, and had it levied upon Dickinson's interest in the

Argument for Appellant.

assets, and on the execution sale bought them in on his own account: ~~held~~, that Dickinson was not entitled to an account of the profits made by McKenzie in the transaction, nor could he attack the sale made to McKenzie.

APPEAL from the District Court of the Twelfth Judicial District, City and County of San Francisco.

The facts are stated fully in the opinion.
The defendant appealed.

G. F. & W. H. Sharp, for Appellant.

McKenzie occupied the position of a surviving partner, and was a trustee to settle and liquidate the business of the firm. All the obligations and duties of that position were immediately imposed upon him, from which only a faithful performance of the trust can discharge him. (*Boyd v. Blankman*, 29 Cal. 19; *Smith v. Walker*, 38 Cal. 385; *Crawshay v. Collins*, 15 Vesey, 238; *Pond v. Ormsbee*, 2 Abbott, [N. S.], 376; *Goodburn v. Stevens*, 5 Gill, 1; *Parsons* on Part. 441; *Ogden v. Astor*, 4 Sand. 349; *Case v. Abell*, 1 Paige, 398; *Walker v. House*, 4 Md. Ch. 39; *Hyde v. Easter*, id. 80.)

A trustee cannot speculate in or take advantage of his position; and if he does, and makes a profit, it belongs to his *cestui que trust*. (2 Story Eq., Secs. 1210, 1260; *Fawcett v. Whitehouse*, 1 Russ. & My. 132; *Giddings v. Eastman*, 5 Paige, 501.)

The report and judgment was founded upon the astonishing proposition that when a firm is dissolved, whether its affairs be settled or not, that instant its members become strangers; that all their duties and obligations to the firm and to each other cease; that they are at liberty to pirate upon each other, and to use any means to carry out their nefarious projects; and all this, notwithstanding it has been decided from time immemorial that the only effect of a dissolution, as in this case, is to revoke the agency of the

Argument for Appellant.

members to bind each other in new transactions, whilst in all other respects, and for all purposes, it is deemed to continue until its affairs are finally settled. (Story on Part. 375; Parsons on Part. 393; Collyer on Part. 324; Willard's Eq. 99; 3 Kent Com. 64; *Crawshay v. Collins*, 15 Vesey, 226; *King v. Smith*, 4 Car. & P. 108; *Bell v. Morrison*, 1 Peters, 351; *Murray v. Mumford*, 6 Cow. 441; *Combes v. Buswell*, 1 Dana, 475; *Peacock v. Peacock*, 16 Vesey, 57.)

Whether one partner can legally buy a judgment against another has no relevancy to the case. We are not seeking relief against the judgment, or claiming any interest in it. We are complaining of a sale of trust property; and it is immaterial whether it was sold under a judgment or by private agreement. The law had drawn around this property its sacred circle, and plaintiff could not enter it hostile to defendant, though armed with all the judgments in Christendom.

If a partner, placed in possession of firm property to settle its business, continues to carry on trade with that property, to the exclusion of the other, the latter is entitled to the same interest in the property and the profits so made as if the firm continued. (*Crawshay v. Collins*, 15 Vesey, 218; *Ex Parte Ruffin*, 6 Vesey, 128; *Featherstonough v. Fenwick*, 17 Vesey, 309; *Heartcote v. Holme*, id. 128; *Sigourney v. Munn*, 7 Conn. 20.)

The proposition that the sale and purchase by McKenzie of the firm property, under the Lane judgment, vested that property in him, is untenable. Such sale and purchase by him was nugatory and void. (*Boyd v. Blankman*, 29 Cal. 15; *Fox v. Macreath*, 1 Leading Cases in Eq. 297; *Webster v. King*, 33 Cal. 552; *Hardenberg v. Bacon*, id. 357; *Van Epps v. Van Epps*, 9 Paige, 237; *Devoue v. Fanning*, 2 John. C. 252; *Hawley v. Cramer*, 4 Cow. 717; *Iddings v.*

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uary 18th, 1861, he and the defendant were partners in San Francisco, doing business under the firm name of McKenzie & Co.; that about the last named day the partnership was dissolved, and that before the month of November next following all of the interest of the defendant in the property which had belonged to the partnership was sold by the Sheriff under an execution against the property of Dickinson, issued upon a judgment obtained against him in the District Court of the Fourth Judicial District. The plaintiff further alleges that Dickinson at some time unknown to the plaintiff made and delivered in the firm name of McKenzie & Co. a promissory note to one Burns for one thousand six hundred dollars, with interest at two per cent. per month — the note bore the date of January 1st, 1861, and ran for five months from date; that the note was not in fact given for any partnership purpose, but for the personal debt of Dickinson; that the plaintiff did not know of the existence of the note at the time the partnership was dissolved, nor at any time thereafter until demand was made upon him for its payment in December, 1861.

The complaint further alleges that a judgment was subsequently recovered against the firm upon this note, and that plaintiff was compelled to pay and did pay the same, with the accumulated interest, costs of action, etc., amounting to three thousand and ninety dollars.

To this complaint Dickinson filed an answer and cross-complaint, alleging that no dissolution of the partnership firm of McKenzie & Co. had ever taken place; that on January 19th, 1861, an account of partnership affairs was taken by the parties, by which it appeared that the firm then had in money and bills receivable some ten thousand dollars, and that the stock in trade, goods, etc., amounted to some five thousand dollars more; that it was then agreed that the plaintiff should collect the indebtedness due the firm as far as possible, and should retain for himself thereout four thou-

sand five hundred and seventy-seven dollars, and also one half of the amount, if any, collected above that sum, and should retain in his custody, but in trust for the defendant, the other half of the surplus collections; that the plaintiff was to hold the defendant's moiety of moneys collected as trustee, partner, and agent for the defendant, who at the time purposed to be shortly absent from the State, and who did immediately thereafter depart the State and did not return for some four months; that the stock in trade and goods on hand were also left with the plaintiff as a copartner, and to be used by the firm of McKenzie & Co. in the prosecution of its accustomed business. It was further averred by the defendant that shortly after his departure the plaintiff purchased a judgment for some two thousand two hundred dollars, which one Lane had recovered against the defendant in the year 1857, and which was in full force and effect against the property of the defendant; that the purchase was made for five hundred dollars, and the assignment of the judgment procured in the name of one Gordon, as assignee thereof, with the intent to conceal the fact that McKenzie was the real holder thereof; that McKenzie obtained his knowledge of the existence of said judgment only by means of the copartnership and fiduciary relations between himself and the defendant, and that when he purchased it he had in his hands sufficient copartnership property to have discharged and satisfied it in full; that in March, 1861, during the defendant's absence from the State, plaintiff caused an execution to be issued upon the Lane judgment, and caused himself to be served by the Sheriff with notice that all moneys, etc., in his hands and belonging to the defendant had been levied upon; that a Sheriff's sale was had under this judgment of all the interest of defendant in the firm, business, and property of McKenzie & Co., at which sale the plaintiff bid in his own name, and was the purchaser at two hundred dollars, the bid being credited by the Sheriff upon the judgment; that on the

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return of the defendant to this State in May, 1861, plaintiff met him at the steamer and informed him that Lane had issued process upon the two thousand two hundred dollars judgment, garnished the plaintiff and sold out all of defendant's interest in the firm of McKenzie & Co., and that these proceedings had dissolved the firm. The answer further alleges that after this period the plaintiff still carried on profitably the business of the firm of McKenzie & Co., and with the moneys left with him by the defendant, upon his departure early in 1861, and with the property of defendant, which the plaintiff had purchased at the sale under the Lane judgment; that the profits made by the firm amount to some thirty thousand dollars; that certain real estate in the City of San Francisco had during this time been purchased by McKenzie with the partnership funds, and the title deeds taken in the name of McKenzie alone; and that, on the 1st day of January, 1863, McKenzie had retired from business and sold out the firm's stock in trade, goods on hand, etc., to one Bardwell, for three thousand dollars.

To the cross-complaint an answer was filed by McKenzie traversing many of its allegations, and setting up, among other defenses, that, at the time of the purchase of the Lane judgment, the plaintiff had not in his hands any money or property belonging to the firm of McKenzie & Co., or to the defendant. The plaintiff also pleads the Statute of Limitations in bar of the matters averred in the cross-complaint of the defendant, and avers that the several matters and things in the said cross-complaint set forth were discovered by and known to the defendant more than three years before the filing of the said cross-complaint.

By consent, the cause was subsequently referred to Hon. SAMUEL COWLES to hear the proof and report a judgment, who afterwards filed the following findings of fact and conclusions of law:

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“First— That the plaintiff and the defendant became co-partners in the business of manufacturing bags early in the year 1857.

“Second — That said copartnership continued to the 19th day of January, 1861, at which time there was a settlement and accounting between the partners, and, by mutual consent, a dissolution of said copartnership.

“Third — That at the time of said dissolution said defendant received from the firm the sum of eight thousand four hundred and eighty-two dollars, and that plaintiff sold to him his interest in city slip lot number twenty, upon which the firm had their shop, and that said defendant agreed to sell to said plaintiff said lot, on or before June 1st, 1861, at the price of two thousand six hundred dollars.

“Fourth — That upon said settlement there was found due to the plaintiff, from said firm, the sum of four thousand five hundred and seventy-seven dollars.

“Fifth— That by the terms of said settlement the assets of said copartnership were left with the plaintiff to be converted into cash; and from the proceeds he was to pay himself said sum of four thousand five hundred and seventy-seven dollars.

“Sixth — That the defendant made mistakes in his own favor, in footing up the cash account, amounting in the aggregate to the sum of one thousand nine hundred and thirty-three dollars and twenty-five cents, which mistakes were not shown, and not embraced in the settlement of January 19th, 1861.

“Seventh — That plaintiff paid, on the order of defendant, to M. N. Cowan, the sum of two hundred dollars, and to the defendant himself the sum of one hundred dollars, after the settlement and dissolution.

“Eighth — That the total amount collected by the plaintiff from the notes and accounts left in his hands, upon the settlement and dissolution, was six thousand five hundred

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and ninety dollars and seventeen cents, and that defendant has received two hundred and twenty dollars and eight cents in excess of the collections made by plaintiff since the dissolution.

“Ninth—That on the 11th day of March, 1861, the plaintiff purchased a judgment from one N. C. Lane against defendant, bearing date June 8d, 1857, for the sum of two thousand two hundred and seventy-eight dollars and fifty-three cents, and drawing interest at the rate of five per cent per month, paying therefor the sum of five hundred dollars, and that said plaintiff caused said judgment to be assigned to Joseph Gordon, who held the same in trust for plaintiff.

“Tenth—That at the time of the purchase of said judgment the said plaintiff had no money in his hands belonging either to the said defendant or to the late firm of McKenzie & Co., and that said judgment was purchased by said plaintiff with his own money.

“Eleventh—That all of the interest of the defendant in the assets of the late firm of McKenzie & Co. was sold under an execution issued on the same judgment, on the 11th day of June, 1861, and that said interest was bought in for the benefit of the plaintiff, the amount bid therefor having been credited on the said judgment.

“Twelfth—That on or about the 1st day of January, 1861, the defendant made a note in the name of McKenzie & Co. for one thousand six hundred dollars, with interest at the rate of two per cent per month, payable five months after date, to the order of one Julian W. Burns.

“Thirteenth—That said note was given for the individual liability of the said defendant, and not for a liability of the firm of McKenzie & Co., and that the money obtained from said Burns never went into the business of McKenzie & Co., but was obtained and used for the benefit of the defendant.

“Fourteenth—That on the 9th day of March, 1864, said Burns obtained a judgment against the plaintiff and defend-

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ant for the sum of two thousand six hundred and sixty-six dollars, with interest at two per cent per month, and that the plaintiff, on the 24th day of August, 1864, was compelled to and did pay said judgment, the principal and interest due on said judgment at the time of the payment thereof amounting to the sum of (\$3,090) three thousand and ninety dollars.

"And as a conclusion of law from the facts found, I find that the plaintiff is entitled to recover from the defendant the sum of three thousand and ninety dollars, with legal interest thereon from the 24th day of August, 1864, together with the costs of this action."

The defendant having excepted to the findings of fact in this case, and upon due notice having moved that findings be framed upon certain other issues in this case, and the counsel of the respective parties having been heard, after due consideration the undersigned, referee, finds the following additional facts, which are hereby made a part of the original findings so far as regards the conclusions of law arrived at in the case:

"Fifteenth — At the time of the dissolution of the partnership — January 19th, 1861 — the parties had a settlement of their partnership affairs; the defendant claimed that there was due to him from the firm the sum of one thousand two hundred and fifty dollars, for money advanced by him in the purchase of city slip lot No. 20, owned by the firm; also the sum of three thousand and thirty-two dollars and thirty-five cents, being the cost of certain drills purchased by him on individual account, but which were afterwards used in the business of the firm; also the sum of four thousand two hundred dollars, for moneys advanced by him from time to time in the business of the firm; these sums, amounting to the sum of eight thousand four hundred and eighty-two dollars and thirty-five cents, were allowed by the plaintiff, and

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the defendant was permitted to draw the amount from the funds belonging to the partnership; at the same time the defendant purchased from the plaintiff his interest in the firm lot for the sum of one thousand two hundred and fifty dollars, agreeing in writing to resell the whole lot to plaintiff at any time before the first day of June, 1861, for the sum of two thousand six hundred dollars; the sum of three thousand three hundred and twenty-seven dollars was then agreed upon as the amount which the partnership owed to the plaintiff; the assets of the firm were to be left with the plaintiff, who was authorized to retain the last named sum from them, and the balance was to be divided between them, and a memorandum in writing to this effect was given by the plaintiff to the defendant, but this memorandum on the following day was destroyed, and another similar in terms was substituted, except the amount was changed from three thousand three hundred and twenty-seven dollars to four thousand five hundred and seventy-seven dollars, to correct a mistake of one thousand two hundred and fifty dollars made at the time of the settlement in allowing the claim preferred by the defendant against the partnership for the last named sum, when the plaintiff had relinquished to the defendant his interest in the partnership lot; no inventory of the assets or property belonging to the firm was made at the time of the dissolution, nor were they appraised, nor was any valuation placed upon them.

“Sixteenth — The plaintiff collected all the solvent notes and accounts left in his hands belonging to the partnership, which collections amounted to the sum of six thousand two hundred and ninety dollars, and exchanged the engine and boiler for another; the interest of the defendant in the shop, sewing machines, stock, and fixtures was sold under the Lane judgment for the sum of two hundred and twenty-one dollars and twenty-five cents, and bid in and for the benefit of plaintiff.

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“Seventeenth — Defendant went to New York immediately after the dissolution, and on his own private business, and returned to San Francisco early in May, 1861.

“Eighteenth — The defendant, while in the Eastern States, brought drills and sheetings to the amount of about eighteen thousand dollars; and also a quantity of coal oil, in the name of McKenzie & Co., but for his own account and use.

“Nineteenth — The plaintiff and defendant did not correspond with each other, but the defendant, while in New York, wrote one letter to plaintiff, in which he stated that he had bought certain bagging material, and thought of dipping into coal oil; also, that there was bagging material on two ships then on their way to San Francisco.

“Twentieth — The plaintiff did not acquire his knowledge of the Lane judgment by reason of any copartnership or fiduciary relation then or ever existed between himself and defendant.

“Twenty-first — At the time of the purchase of the Lane judgment the plaintiff had in his hands the property received by him at the time of the settlement and dissolution, except some of the notes and accounts which had been collected, and the engine and boiler, which had been exchanged for others.

“Twenty-second — The defendant had knowledge of all the facts alleged in his cross-complaint more than three years before the commencement of this action.

“Twenty-third — The defendant, on his return from New York, asked and obtained from plaintiff leave to examine the books in possession of the plaintiff, to ascertain the amount of money received from the assets of the firm of McKenzie & Co., and said books truly showed said amount, and the defendant never asked for, until the trial of this cause, any other or further accounting of the affairs of McKenzie & Co., or the matters of difference between himself and plaintiff.”

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Judgment being thereupon rendered for the plaintiff, Dickinson moved for a new trial, which being denied, he brings this appeal from the judgment and order.

The referee having found that the copartnership was dissolved by mutual consent on the 19th day of January, 1861, and the evidence being sufficient to sustain the finding in that respect, we will not disturb it here. From that point of time, therefore, the parties must be regarded as no longer sustaining toward each other the relation of copartners, and upon this view, the cross-complaint filed by the defendant upon the return of the cause from this Court on the former appeal must fail, in so far as it seeks a dissolution of the copartnership and an account of its transactions.

It further appears by the findings (and, upon looking into the evidence, I think that none of them can now be disturbed), that at the time (March 11th, 1861) at which McKenzie purchased the Lane judgment he had no funds in hand belonging to the defendant, or to the late firm.

The cross-complaint of Dickinson, indeed, does not allege that he had such funds at that time, but only that he had "all the property hereinbefore mentioned," i. e., notes, outstanding debts, stock in trade, and goods on hand. That he had no money, either belonging to Dickinson, individually, or to the late firm of McKenzie & Co., is rather probable, from the fact that Dickinson, when leaving for New York, had taken all the money of the late firm, leaving the plaintiff to make such collections as he might, and to pay himself thereout the sum of four thousand five hundred and seventy-seven dollars.

The referee finds that the total amount of these collections by the plaintiff was six thousand five hundred and ninety dollars and seventeen cents, and that while this would have entitled Dickinson to receive of McKenzie a little more than one thousand dollars, according to the terms of the memorandum of January 19th, the latter, in fact, had

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already at that time received some two hundred dollars in excess of that sum; but by reason of the mistakes which Dickinson had made in his own favor, in footing up the cash account of the firm, this did not appear when the settlement of January 19th was made between McKenzie and himself.

The partnership having been dissolved on the 19th of January, 1861, Dickinson withdrawing for himself all the cash on hand — some eight thousand dollars — and leaving the late firm in arrears to McKenzie to an admitted amount of nearly five thousand dollars (but to an actual amount, it seems, of upwards of six thousand dollars), with authority to the latter to reimburse himself by the collection of debts due the late firm, and by the sale of its property in his hands, McKenzie purchased the judgment which Lane held against Dickinson, took the assignment in the name of one Gordon, levied an execution thereunder upon the interest of Dickinson in the assets of the late firm, and at the execution sale purchased them for himself, etc.

I know of no principle of equity which forbids one partner from purchasing with his own funds a judgment or other evidence of indebtedness, even against one who may be at the time his own copartner in business, or prohibiting him from enforcing the collection by a levy upon and sale of the interest of the other in the firm assets. The obligations of copartners *inter sese*, whatever may be their nature and extent, refer only to the conduct of the business in which the firm is engaged. The copartnership of McKenzie & Co. was engaged in the business of manufacturing and selling bags, and buying and selling bagging material in San Francisco. It was not engaged in purchasing judgments or other securities, and whatever transactions either partner might effect in that respect, by the use of his private means, would be for his own benefit, and not for the benefit of the copartnership.

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This principle is well illustrated by the late case of *Wheeler v. Sage*, 1 Wallace, S. O. U. S. 518, in which it is held that such fiduciary relation as may be said to subsist between copartners, *as such*, is confined to and limited by the business of the copartnership, and that beyond and outside that limit there is no restraint upon the right of either partner to traffic. In that case the copartnership was engaged in a "general produce business," and in the course of that business became the mortgagee of valuable real estate, the title to which it was desirous of acquiring. One of the partners was intrusted with making that acquisition in behalf of the partnership. It turned out, ultimately, that he acquired it for himself, in connection with a third person, not a member of the copartnership, the amount of the mortgage debt, however, being paid to the firm. The property thus acquired having largely appreciated in value, and a bill having been brought by a member of the copartnership to obtain a share of the profits, the Court said:

"Each partner is the agent of his copartners in all transactions relating to the partnership business, and is forbidden to traffic therein for his own advantage, and, if he does, will be held accountable for all profits. But beyond the line of the trade or business in which the firm is engaged there is no restraint on his right to traffic. As one partner has no authority to bind the firm outside of their ordinary business, he cannot, of course, be held liable to account should he make a profitable adventure in a matter not legitimately connected with the business of the firm. The difficulty generally is to ascertain what acts are in the scope of the particular trade or business. But in this case there is no embarrassment whatever in the application of the principle. This was a partnership to do a general produce business. It contemplated no dealings in real estate, and each partner was at liberty to buy and sell real estate, and was under no

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legal liability to account to his copartners. The debt due from Sweet (the mortgagor) belonged to the partnership, and not the premises mortgaged. To the extent of their debt the partners had an interest in the mortgaged property, and no further. They were interested to have the debt paid — not to procure title to the mortgaged property. It can readily be seen that it would be profitable to get a real estate worth fifty thousand dollars for thirty-four thousand dollars; but *how* an engagement to do a general produce business could embrace that speculation is not so apparent."

Dickinson, not having been a member of the firm of McKenzie & Co. since January 19th, 1861, is not entitled to an account for profits made since then; and there is no principle of equity upon which he can attack the sale to McKenzie, made under the Lane judgment.

The judgment and order appealed from must be affirmed; and it is so ordered.

Mr. Chief Justice SPRAGUE did not participate in the foregoing decision.

[Two other cases, arising out of the same general transactions, and involving, to a greater or less extent, the same principles, were considered in connection with the foregoing action, and decided upon its authority. They were the cases of *Harvey Dickinson v. William McKenzie et als.* (No. 2,479), and *Harvey Dickinson v. Joseph Gordon et als.* (No. 2,573). In the former the judgment below in favor of defendants was affirmed. In the latter, after a judgment for defendants, the Court below granted a new trial in favor of plaintiff; and on appeal by defendants the order was reversed.—REPORTER.]

Statement of Facts.

[No. 2,938.]

VICTOR M. FOUCAULT v. JOHN PINET.

CORRECTION OF ERROR APPARENT ON RECORD — Where a judgment is based upon a Court Commissioner's report, which finds all the facts, but discloses upon its face a palpable error in stating an account, such judgment will be corrected on appeal.

APPEAL from the District Court of the Fourth Judicial District, City and County of San Francisco.

This was an action for an accounting as between partners after dissolution. It appears that in 1866 the parties went into the coal business in San Francisco, on a capital of five thousand dollars. In 1868 they dissolved, and defendant received all the moneys that were collected.

The cause was referred to the Court Commissioner, who reported, among other things, that the parties were to share alike; that the profits and assets, excluding uncollected debts, amount to two thousand seven hundred and twenty dollars and forty-two cents, and that plaintiff had received out of the concern two hundred and nine dollars and twelve cents more than defendant. In stating the account the Commissioner did it substantially as follows:

Profits and remaining assets.....	\$2,720.42
One half of excess received by plaintiff	104.56
	<hr/> \$2,615.86
Half thereof	<hr/> \$1,307.93

Upon the account as thus stated the Commissioner found that plaintiff was entitled to judgment against the defendant for one thousand three hundred and seven dollars and ninety-three cents; and upon his report judgment was afterwards entered in favor of plaintiff.

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The defendant appealed.

N. Hubert, for Appellant.

Montgomery & Kittrell, for Respondent.

By the Court, NILES, J.:

There is an error apparent upon the face of the report of the Commissioner. The plaintiff should have had judgment for one thousand two hundred and fifty-five dollars and sixty-five cents, with interest from its date at seven per cent per annum and costs.

Judgment reversed and cause remanded, with directions to the Court below to modify its judgment in accordance with this opinion. Remittitur forthwith.

[No. 2,382.]

THE PEOPLE OF THE STATE OF CALIFORNIA v.
LAURA D. FAIR.

CRIMINAL LAW — DISQUALIFICATION OF JUROR NOT GROUND FOR NEW TRIAL. — The fact that a juror had formed and expressed an unqualified opinion of the guilt of the accused, is not, under our practice, ground for a new trial, when the objection is taken for the first time after the trial, upon affidavits showing disqualification.

CRIMINAL PRACTICE ACT, SECTION FOUR HUNDRED AND FORTY — GROUNDS FOR NEW TRIAL. — Section four hundred and forty of the Criminal Practice Act, which declares what shall be grounds for new trial, and uses the words "in the following cases only," clearly excludes all other grounds whatsoever.

PEOPLE v. PLUMMER, 9 CAL. 298, OVERRULED. — In so far as it holds that an objection to the competency of a juror, taken for the first time after verdict, may be availed of on motion for new trial.

TRIAL FOR MURDER BY A MISTRESS — DEFENDANT'S GENERAL CHARACTER FOR CHASTITY. — Where, on the trial of a woman for the murder of a man, with whom she had been having unlawful intercourse, defendant's

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counsel took the ground that her prospects had been ruined by the acts of the deceased, and introduced testimony tending to show, and for the purpose of showing, that fact; and, in view of such position taken by counsel and the testimony offered by him, the prosecution was allowed in rebuttal to prove, against defendant's objection, that her general character for chastity was bad: *Held*, error.

MURDER TRIALS — GENERAL CHARACTER OF ACCUSED NOT INVOLVED.

On a trial for murder, proof of the general character of the accused is not received, even on his own behalf — the inquiry in such cases being confined, when pertinent at all, to the general character as to the trait involved in the offense charged.

TRIAL OF WOMAN FOR MURDER — WHEN HER GENERAL CHARACTER FOR

CHASTITY MAY BE ATTACKED. — The general character for chastity of a female charged with the murder of a man is no more necessarily involved in the question of her guilt or innocence than her general character in any other respect; and on the trial of such a person the prosecution will not be allowed to introduce testimony upon the point, unless the defendant initiate the inquiry.

PRESUMPTION OF GOOD CHARACTER — PROOF OF GENERAL BAD CHARACTER

FOR CHASTITY. — The fact that the defense made by a woman charged with the murder of a man is rendered more formidable, when considered in connection with the good character which the law presumes her to possess, does not of itself open the door for the prosecution to prove that her general character for chastity is bad.

ACCUSED PERSONS ENTITLED TO PRESUMPTION OF CHARACTER OF ORDINARY

FAIRNESS. — The presumption of a character of ordinary fairness, with which the law for the purposes of trial clothes a person accused of crime, is one to which he is entitled and which cannot be put in peril, unless he, by introducing testimony in reference thereto, elects to put it distinctly in issue.

ARGUMENTS ON MURDER TRIAL — IF PROSECUTION OPEN, RIGHT OF DEFENSE

TO CLOSE. — On a murder trial, where two counsel on each side argue the case, they must speak alternately; and if the prosecution open, the defense has the right to the close; and it is error to refuse an application for leave to do so.

CONSTRUCTION OF CRIMINAL PRACTICE ACT, SECTIONS THREE HUNDRED

AND SIXTY-TWO, THREE HUNDRED AND SIXTY-THREE, AND THREE HUNDRED AND SIXTY-FOUR. — The amendments of 1854 to sections three hundred and sixty-two and three hundred and sixty-three of the Criminal Practice Act, providing that in criminal trials the prosecution must open and may conclude the argument, but that this order may by permission of the Court be departed from (*Stats.* 1854, p. 169), do not change the rule, prescribed in section three hundred and sixty-four, that in murder cases the accused has a right to be heard by two counsel, and that if the case be argued by two counsel on each side in addressing the jury, counsel shall do so alternately.

Statement of Facts.

ARGUMENTS IN MURDER TRIALS — DISCRETION OF COURT AS TO WHO TO OPEN.— Under section three hundred and sixty-three of the Criminal Practice Act, as amended in 1854 (Stats. 1854, p. 169), the Court in a capital case may, in its discretion, direct by which side the argument to the jury is to be opened; but by whichever side it is thus opened, the other side, under section three hundred and sixty-four, will have the close.

APPEAL from the District Court of the Fifteenth Judicial District, City and County of San Francisco.

The defendant was indicted by the Grand Jury of the City and County of San Francisco for the murder of Alexander P. Crittenden, on the evening of November 3d, 1870. The facts of the homicide are briefly, that Crittenden, on the afternoon of that day, left his residence, in San Francisco, and went to Oakland for the purpose of meeting his wife, son, and daughter, who were on their way from the Eastern States. He met them at the wharf, went with them on the steam ferryboat "El Capitan," and sat down, between his wife and daughter, on the deck. In a few minutes after the steamer left the Oakland wharf, on her way to San Francisco, Laura D. Fair, the defendant, closely veiled, stepped in front of Crittenden, drew a pistol, and exclaiming, "You have ruined me and my child," fired at him. The ball took effect in his left breast, inflicting a mortal wound, of which he died on November 6th following. Mrs. Fair, after the fatal shot, ran into the cabin of the steamer, and mingled among the rest of the passengers, but was soon afterwards arrested; and being accused of the murder, she replied: "Yes, I don't deny it; I admit that I shot him; I don't deny it. He has ruined me and my child. I was looking for the clerk to give myself up. Take me; arrest me; I am ready to go with you."

The indictment having been transferred to the District Court of the Fifteenth Judicial District, and the accused having been arraigned, and pleaded "not guilty," the trial commenced on March 27th, 1871. It continued until April

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26th, 1871, upon which day, after a short retirement, the jury returned a verdict of "Guilty of murder in the first degree." The defendant subsequently moved for a new trial, upon numerous points and exceptions, among which were the points of objection discussed in the opinion of this Court. The motion for new trial being denied, and defendant sentenced to be hanged, she took this appeal from the judgment and order.

E. Cook and L. Quint, for Appellant.

I. The Court below should have granted a new trial, on the ground that the juror Beach was incompetent, on account of having formed and expressed an unqualified opinion as to the guilt of the defendant. (*People v. Plummer*, 9 Cal. 372; *State v. Hopkins*, 1 Bay. R. 372; *Sellers v. The People*, 8 Scammon, 412; *U. S. v. Freis*, 3 Dallas, 515; *Busick v. The State*, 19 Ohio, 198; *Wade v. The State*, 12 Geo. 25; *Cady v. The State*, 3 Howard, 27; *McKenley v. Smith*, Strange, 645; *Bishop v. The State*, 9 Geo. 121; 2 Graham and Waterman on New Trials, 374, et seq.; *Wellman v. Hulbert*, 2 Clief, 45; *McKinley v. Smith*, Harding's R. 167; *Monroe v. State*, 5 Geo. 139.) It is contended, it is true, that we cannot reach the incompetency of Beach as a juror on motion for new trial; that no matter what his prejudices may have been—no matter if by perjury of the most deep and damning character he had stolen into the jury box, and thus imposed upon the defendant, yet she is remediless. She must abide the consequences, and forfeit her life, and why? Because the statute does not, in express terms, point out this particular ground as one to be used upon motion for a new trial. No single case, however, has been cited in support of this proposition, while we have cited above, a number directly to the contrary.

II. The general reputation or character of the defendant for chastity, or want of chastity, was clearly inadmissible.

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She was not on trial for her chastity, virtue, or moral character. Her character was not in any aspect of the case in issue. She was being tried for her life. She, and she alone, could have put her character in issue. (Wharton's Am. Crim. Law, Secs. 636, 637, 638, 824; *State v. O'Neil*, 7 Iredell, 251; *Dewitt v. Grunfield*, 5 Ohio, 227; *Com. v. Hopkins*, 2 Dana, 418; *Fausier v. State*, 14 Miss. 386; *Com. v. Webster*, 5 Cush. 325; *Carter v. Com.*, 2 Virg. Oa. 169; *Griffin v. State*, 14 Ohio, 55; *State v. Creson*, 38 Missouri, 372; *People v. White*, 14 Wend. 111; *Ackley v. The People*, 9 Barb. 609; *People v. Bodine*, 1 Dana, 282; Roscoe's Crim. Ev. 94.) Omission to produce evidence of good character was no presumption that her character was bad. (Wharton's Amer. Crim. Law, Secs. 641, 668; *People v. McCauley*, 10 Cal. 309; *People v. White*, 24 Wend. 520; *People v. White*, 14 Wend. 111; *Williams v. State*, 19 Geo. 402; *State v. Howson*, 26 Miss. [5 Jones] 431; *Com. v. Stewart*, 1 S. & R. 342; Arch. C. P. 105; *R. v. Rejier*, 1 B. & C. 431; *Com. v. Hopkins*, 2 Dana, 418; *Overstein v. State*, 3 How. Miss. 328.) It is urged, however, that the defendant opened the door to this testimony as to her general character. All that we did was to introduce testimony as to when and where the parties met; that there was a mutual engagement to marry; that this engagement was made months before defendant knew that Crittenden had a wife living; that after she ascertained he was a married man, then, under a promise on his part to procure a divorce and marry her, their intimacy continued up to the very day of his death. This, in brief, is all the testimony introduced on her part, under which, it is claimed the prosecution had the right to assail her character for chastity, for the purpose of rebutting any presumption that might arise from this proof that her mind became disordered. But that this claim cannot be maintained is shown by the authorities cited.

III. The Court below should have directed the counsel in

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the case to argue to the jury alternately, or at least have allowed the defendant's counsel the closing argument. (Criminal Practice Act, Secs. 362, 363, 364.) The Court below was of opinion that the Legislature intended by the amendments of 1854 to sections three hundred and sixty-two and three hundred and sixty-three, to give the prosecution the concluding argument, meaning of course that the amendments effected a repeal by implication of section three hundred and sixty-four; but where, let us ask, is the evidence of any such intention? We submit that none such exists; but that, on the contrary, the plain and irresistible inference to be drawn from the action of the Legislature is that that body never intended to alter the rule prescribed in section three hundred and sixty-four in any case "where the punishment is death." That the Legislature intended to change the general rule of argument in ordinary cases of felony is perfectly manifest; but that it intended nothing more is equally apparent.

Alex. Campbell, for Respondent.

I. There was no error in refusing a new trial on the ground of the incompetency of the juror Beach. The Court had no power to grant a new trial for such a reason, because it is not one of the grounds upon which "only" a new trial can be granted. (Criminal Practice Act, Sec. 440.) I am aware that *People v. Plummer*, 9 Cal 372, holds a contrary doctrine; but I submit that in that case the Court committed a palpable error. It seems to have based its action on the idea that the defendant had a constitutional right to a trial by an impartial jury, but seems not to have considered the question whether the Legislature has the power to determine when and how the impartiality of the juror shall be ascertained. Provision is made for the challenges to jurors, and it seems obvious that a challenge cannot be interposed after the completion of the jury. If, however, the Court below had the

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power on motion for new trial to investigate the question, its decision on the conflicting evidence would not be disturbed here. The affidavits filed by defendant on the point of the juror's expression of opinion are vague and uncertain, and are fully contradicted by the juror himself, by proof of his good character, and by proof that, so far from being anxious to get on the jury, he endeavored to be relieved from service as a juror at that term of Court.

II. Was the prosecution entitled, by way of rebutting evidence, to go into the question of the reputation of the accused for chastity prior to and during her acquaintance with Crittenden, independent of her relations with him? The question is novel, for it arose in a novel case. The defense set up by the appellant has no precedent or parallel. That it should call for a new application of established principles is not surprising. The cases cited by the defense have no relation to the question here, but are in perfect harmony with the doctrine for which we contend. It is claimed on her part that she had not put her character for chastity in issue. I answer that she had. In her testimony she represented herself as a respectable widow, deceived into a marriage engagement with a man supposed by her to be single or a widower, and that lured on by his representations as to his condition into that belief, she consented to become his wife. The prosecution had a right to show, as well by circumstances as by positive evidence, that these allegations were entirely false. Crittenden was in his grave and could not directly contradict her. But we had a right to show in answer to these pretenses: First — That she was not a single woman at the time of the alleged engagement. Second — That at the time she alleges that he was living in her house under this professed engagement, he was residing with his own wife within about a block of her house, and that his nights were spent at home in the society of his wife and family. Third — That at the same time she was a woman of notoriously bad

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reputation, whom no man pretending to any self-respect could undertake to marry.

III. In the earlier legislation of this State the defendant in criminal cases was allowed to have the closing argument to the jury. It was found that this practice led to great evils; therefore, in 1854, the Legislature changed the rule, and provided, by an amendment to the Criminal Practice Act, that "the counsel for the people must open and may conclude the argument"—thus entirely reversing the previous order of discussion; and at the same time section three hundred and sixty-three was amended. Section three hundred and sixty-four was evidently intended to be repealed, so far as it provides for the alternate argument, for it is inconsistent with the two preceding sections. Such has been the established and unquestioned construction of the law, as amended, for the last seventeen years, in every District Court of the State, and this Court will not now undertake to disturb it. "The District Attorney must open and may conclude the argument." How is this possible if counsel are to argue the cause alternately? Besides, if as provided in section three hundred and sixty-three, the Court has a discretion in the matter, how can this Court in this case interfere with the exercise of that discretion? At the commencement of the argument the defendant's counsel did not claim to open the discussion. They acquiesced then in the uniform construction of the law, ever since its enactment, and it was too late for them to question it afterwards.

Jo Hamilton, Attorney-General, and D. J. Murphy, also for Respondent.

By the Court, WALLACE, J.:

The appellant was found guilty in the Court below of the crime of murder in the first degree, in the felonious killing of A. F. Crittenden; and was, thereupon, adjudged to suffer

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death. A motion for a new trial having been denied, this appeal is taken from the judgment and from the order denying a new trial.

First—In impaneling the trial jury, Henry M. Beach, being examined as to his qualification to serve as a juror, stated, in substance, that he had read in the newspapers an account of the homicide; that he had not conversed with any one about it; had heard but little said upon the subject; that he had neither formed nor expressed an unqualified opinion as to the guilt or innocence of the prisoner; that his mind was entirely unimpressed upon that point, and that he could give the prisoner a fair trial, etc.; and he was thereupon accepted and sworn as a juror.

A verdict of guilty having been rendered by the jury, the prisoner moved for a new trial on many grounds—among the rest, that Beach was not a competent juror—he having in fact, as the prisoner alleged, both formed and expressed an unqualified opinion, before he was called as a juror, that she was guilty of murder in killing Crittenden, and that she ought to be executed. Numerous affidavits were produced and read at the hearing of the motion, which tended to show that Beach had, in point of fact, shortly after the killing, openly declared that he considered it a willful murder, and that if he should be upon the jury he would consider that the offense of the prisoner was murder in the first degree, and would hang her. Counter affidavits were also produced and read, going to show that the statements contained in the affidavits, upon behalf of the prisoner, were incorrect and untrue.

The alleged disqualification of Beach to serve as a juror is relied upon here; and it is claimed that in view of the affidavits in the record the Court below should have set aside the verdict on that ground.

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We think, however, that in this respect the motion was properly overruled. The right of the prisoner to move for a new trial in a criminal case is given by section four hundred and forty of the Criminal Practice Act, and the grounds upon which such a motion is to be made are therein prescribed and enumerated. The statute declares that such a motion, when made, must be based upon one or more of the grounds in that section mentioned—“*in the following cases only*” is the expression—and it clearly excludes all other grounds whatsoever.

Could the question of practice involved be quite regarded as *res integra* here, this mere reference to the terms of exclusion employed in the statute would be sufficient to dispose of the point; but in *The People v. Plummer*, 9 Cal. 298, it was held by this Court that under this statute an objection to the competency of a juror might be made by the prisoner for the first time after verdict rendered, and might be relied upon as a ground of motion for a new trial.

We have carefully examined the elaborate and able opinion rendered in that case, and we find in it nothing whatever as to the construction or interpretation of section four hundred and forty in the particular already referred to. It is undoubtedly true, as there remarked by the Court, that every citizen has the right “to demand that all offenses charged against him shall be submitted to a tribunal composed of honest and unprejudiced men, who will do equal and exact justice between the Government and the accused, and, in order to do this, weigh impartially every fact disclosed by the evidence.” The right of trial by jury is unquestionably a sacred right, and one secured by the guarantees of the Constitution; and this is much, if not all, of what is said in the opinion delivered here in the case of *Plummer*. But when this proposition of constitutional law is conceded, we have advanced but a little way toward the point of practice involved here and in the *Plummer* case as well. The jurors

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should undoubtedly be indifferent, *omni majores exceptiones*. But they may not, in fact, be so; and if not, the question is, at what time in the progress of the case, and through what method of procedure, may the prisoner be heard to allege that fact. Undoubtedly, if the fact be known to him, and he make it appear before the juror is sworn, he may interpose a challenge for cause. But if the prisoner do not know the fact of disqualification, or knowing it, is still unable to establish it before the juror is sworn, what step may he subsequently take to avail himself of the objection? May he make it a ground of a motion in arrest of judgment, under section four hundred and forty-two? Certainly not — no one pretends that he could — because the statute itself has undertaken to enumerate the grounds upon which the judgment may be arrested, and the incompetency of a juror not being one of these, the intention to exclude that and all other non-enumerated grounds must be apparent. But in reference to a motion for a new trial, the statute has not only enumerated the grounds upon which it may be made, but has *expressly excluded all others*. A single decision of this Court, in which the provisions of the statute upon the subject, though cited in argument, appear to have been wholly overlooked, cannot prevail against the words of the statute unmistakably expressing the legislative intent. The case of *The People v. Phummer*, in so far as it holds that an objection to the competency of a juror, taken for the first time after verdict rendered, may be availed of on motion for new trial, is therefore overruled.

Second — The evidence of the defense having been concluded, the prosecution were permitted, against the objection of the prisoner, to prove that her general character for chastity was bad.

The nature of the charge against the prisoner certainly did not *per se* involve an inquiry into her character for chastity. A good reputation for that virtue, had it been

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hers, and had she even offered to show, as part of her defense, that she possessed that reputation, must have been excluded upon objections of the prosecution, inasmuch as it involves a trait of character not in the slightest degree involved in the alleged commission of the crime with which she stood charged. It is inexact to say that proof of the general character of the prisoner is received, even on his own behalf, in Courts of common law, in trials for felonious homicide. The inquiry in such cases is confined to the general character as to the trait involved in the offense charged. The chastity, or general character for chastity, of a female charged with the commission of such an offense, is no more necessarily involved thereby than is her general character for honesty of dealing in pecuniary transactions. The rules of evidence in criminal cases limit the inquiry to the characteristic impugned in the alleged commission of the offense under investigation.

Mr. PHILLIPS, in his work on evidence, expresses the true rule upon this subject, and which will be found to accord with the current of judicial decisions, and the opinions of the text writers upon the law. He says: "On a charge of stealing it would be irrelevant and absurd to inquire into the prisoner's loyalty or humanity; on a charge of high treason, it would be equally absurd to inquire into his honesty and punctuality in private dealings. Such evidence relates to principles of moral conduct, which, however they might operate on other occasions, would not be likely to operate on that which is alone the subject of inquiry. It would not afford the least presumption that the prisoner might not have been tempted to commit the crime for which he is tried, and is, therefore, totally inapplicable to the point in question." (Page 490.) It is apparent that if such an inquiry must, upon objection by the prosecution, have been excluded for mere irrelevancy, had the prisoner sought to introduce it in her own behalf, the same rule

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should have rejected it when tendered by the prosecution itself.

Supposing, however, that an investigation upon that point, or upon any other given point of the general character of the prisoner, had been pertinent in itself, it is, nevertheless, settled by an overwhelming current of judicial decisions that it is not competent to the prosecution to initiate the inquiry, and that it is only after the prisoner has elected to put his character in issue, by calling witnesses and adducing evidence in its distinctive support, that the prosecution is permitted to follow and disprove the evidence so offered, if it can. Nor is the prisoner to be held to have thus led the way, and opened up her character to the attack of the prosecution, merely because the case made or attempted in the defense is rendered more formidable when considered in connection with the good character—good in the sense of not being bad—which the law assumes the prisoner to possess in cases in which no evidence upon the subject of general character is offered. The presumption of a character of ordinary fairness, with which the law clothed her for the purposes of the case, was one to the benefit of which she was entitled, and which could not be put in peril unless, discarding the presumption thus afforded her, she had elected to put it distinctly in issue, and so constitute it a fact to be determined by the jury as other facts in issue were to be determined.

“Whenever the defendant chooses to call witnesses to prove his general character to be good, the prosecution may offer witnesses to disprove their testimony. But it is not competent for the prosecution to go into the inquiry until the defendant has voluntarily put his character in issue.” (*Comm. v. Hardy*, 2 Mass. 317.)

“A prisoner on trial may show what his reputation is, and then the question is open to the prosecution, and for the jury

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to determine like other controverted facts." (*People v. Bodine*, 1 Denio, 314.)

We have remarked already that the defense called no witness to establish the general character of the prisoner, and when she objected to the attack of the prosecution in that respect, the learned Court below said: "It is very certain that in the opening of the case the counsel for the defendant took the ground that the prisoner's prospects had been ruined by the acts of Mr. Crittenden. The evidence, as I had supposed, has been given tending to show that fact, and given for that purpose. It is true the books say that no evidence of that character can be given by the prosecution unless some evidence has been given on the other side by the defense. In other words, there must be something to rebut or counteract. But I think the tendency of the evidence introduced by the defense was to show that her prospects had been injured, even taking the testimony of the defendant herself. That being the case, the testimony is admissible."

We are of opinion, however, that the mere fact that the evidence, as introduced upon the part of the prisoner, tended to show that her prospects had been injured by reason of her relations with the deceased, was not of itself enough to authorize the prosecution to begin a direct assault upon her character. No adjudicated case nor treatise upon the law brought to our attention maintains that it was, and such a doctrine would operate a grave innovation upon a recognized rule governing the introduction of evidence in criminal trials — an innovation, in our opinion, totally irreconcilable with the principle of law upon which the rule itself is founded, and which would, in practice, insensibly lead to its entire abrogation.

The authorities upon this point support the rule laid down by Mr. BURLING in his work on Evidence (p. 533): "When the prisoner has once voluntarily offered his character as a

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distinct subject of examination, and has actually put it in issue by adducing evidence in relation to it, the prosecution may then call witnesses to impeach his character, in order to rebut and counteract such evidence."

It is not sufficient, within this rule, that there be something in the facts or line of defense relied upon by the prisoner which might be made to appear in a less favorable aspect for her, by instituting an inquiry into her character and proving it to be other than of that ordinary degree of fairness which the law presumes it to be, for however peculiar the facts or circumstances may be in a given case, the rule is absolute upon the point that the character of the prisoner is not open to assault, as a distinctive feature of the case, until the prisoner shall have brought it forward and invited the attack of the prosecution, by arraying the evidence in its support. Until the prisoner thus initiates the inquiry, the prosecution are bound to assume it to be, as the law presumes it, ordinarily fair, and must establish her guilt, if at all, in the face of this presumption, and despite the benefit it affords her.

We are therefore of opinion that there was error in the ruling of the Court below in this respect.

The third and last point which we shall notice concerns the relative order in which the respective counsel — two upon either side of the case — were permitted to address the jury in summing up.

It appears by the record that on the fifteenth day of April the associate counsel of the District Attorney opened the argument and concluded on the same day. The Court then adjourned until the seventeenth of April, on which day Mr. Quint, one of the counsel for the defense, opened upon behalf of the prisoner, concluding on the twentieth of April, and that during his argument on the nineteenth he referred to the statute, and asserted that the defense had the right to finally close the argument. On the conclusion of Mr. Quint's

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argument on the day following, this question arose for determination, when the Court ruled that though the prosecution had opened, it was entitled, also, to make the closing argument. The result was that the prosecution both opened and closed the argument to the jury, the two counsel for the prisoner speaking in immediate succession.

Section three hundred and sixty-four of the Criminal Practice Act provides as follows: "Section 364. If the indictment be for an offense punishable with death, two counsel on each side may argue the cause to the jury, in which case they must do so alternately. If it be for any other offense, the Court may, in its discretion, restrict the argument to one counsel on each side."

It is to be remarked that section three hundred and sixty-four, as above recited, formed a part of the Act to regulate proceedings in criminal cases, as enacted April 20th, 1850, where it is to be found as section three hundred and ninety-four (p. 303). In 1851 (pp. 251, 252) it was reenacted *in totidem verbis* in the new statute of that year regulating proceedings in criminal cases, where it appears as section three hundred and sixty-four, and it has ever since then remained upon the statute book, without express alteration, amendment, or repeal.

The distinctive features apparent in this section, considered by itself, are two:

First — That in capital cases the prisoner may insist upon being heard through two counsel, and is not to be restricted to one, as may be done in other cases.

Second — That in such cases the counsel addressing the jury must do so alternately.

As originally enacted, in 1850, it was preceded by sections three hundred and ninety-two and three hundred and ninety-three of that Act, which provided, in substance that, *unless the Court should otherwise direct*, the counsel for the people *must* commence and *might* conclude the argument, but that

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in every case the counsel for the prisoner might, if he chose, insist upon making the closing argument. It will be seen, that under the Act of April, 1850, the order of the argument in a capital case, when two counsel on each side were to address the jury, was that the prisoner was entitled to the close absolutely, if insisted upon, and that in other respects the order of the argument was subject to the direction of the Court, except that the respective counsel must alternate in the argument.

The absolute right of the prisoner to conclude the argument being insisted upon under the Act of 1850, it would result that the prosecution must open; and the rule of alternation being then observed, the prisoner's counsel would necessarily make the closing argument. But if the counsel for the prisoner should not assert their right to make the closing argument, but, waiving that, should nevertheless insist upon the alternation of argument provided for by section three hundred and ninety-four of the Act of 1850, then the Court, under the authority conferred by section three hundred and ninety-three, might change the order of argument so that the defense would open, and the argument thence proceeding by alternation, the prosecution would necessarily make the closing argument.

In 1851 (pp. 251, 252), the Act of 1850 was repealed, and a new statute enacted — in which statute sections three hundred and ninety-two, three hundred and ninety-three, and three hundred and ninety-four of the Act of 1850 were introduced as sections three hundred and sixty-two, three hundred and sixty-three, and three hundred and sixty-four, without any change of expression — and thus the statute remained until 1854. But in 1854 the right of the prisoner to conclude the argument, theretofore absolute in every criminal trial, was taken away by amendments then made

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(p. 81) to sections three hundred and sixty-two and three hundred and sixty-three of the Act of 1851.

By these amendments (yet in force) it was provided, in substance, that the counsel for the people must open, and might conclude the argument, but that, by the permission of the Court, this order of argument might still be departed from. Section three hundred and sixty-four was, however, suffered to remain without express alteration or amendment. Of course, under the settled rule of statutory construction, that section of the statute is not to be considered as repealed by mere implication, either in whole or in part, except in so far as its provisions are found to be absolutely inconsistent with sections three hundred and sixty-two and three hundred and sixty-three, as amended in 1854. If, therefore, after giving full effect and scope to the amendment of 1854, section three hundred and sixty-four, as enacted in 1851, is still found to include any subject matter not at all embraced in the amendment of 1854, or if including the same subject matter as that embraced in that amendment, it still deals with that subject matter not inconsistently with the amendment itself, then so far forth the provisions of section three hundred and sixty-four of 1851 must continue to be observed in the conduct of that class of criminal cases to which it especially refers.

And after an attentive examination of the statute, and a consideration of the numerous amendments, which portions of it here have undergone, we are unable to discover any repugnance between section three hundred and sixty-four of 1851, upon the one hand, and sections three hundred and sixty-two and three hundred and sixty-three, as amended in 1854, upon the other. It is clear that the admitted right of a prisoner in capital cases to be heard at this day through two counsel, instead of being positively restricted to one, as he may in cases of a lesser grade, exists solely by force of section three hundred and sixty-four of the Act of 1851,

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and has not been impaired by the subsequent amendments to sections three hundred and sixty-two and three hundred and sixty-three of that Act passed in 1854. Those sections, referring, as they did, to the general subject of the argument of counsel in criminal trials of every grade, prescribed certain rules as to the right to open and close the argument; but those rules, when applied to the conduct of cases capital in degree, in which two counsel on each side were to address the jury, were qualified and restrained by the positive provisions of section three hundred and sixty-four, which provisions will be found to have always harmonized with sections three hundred and sixty-two and three hundred and sixty-three, notwithstanding the repeated amendments which these latter sections have from time to time undergone. It should be borne in mind that section three hundred and sixty-four (which, as we have seen, has been in force ever since April, 1850), never, by its terms, assumed to confer, or to take away either the right to open or the right to conclude the argument in any criminal case. That subject belonged elsewhere in the statute, and was provided for by the other sections referred to. The right to begin and the right to conclude were matters of distinct regulation by sections three hundred and sixty-two and three hundred and sixty-three of the Act of 1851. Section three hundred and sixty-four undertook to deal with an argument already begun — it mattered not by which side — and declared that, by whomsoever begun, it should proceed by alternation between the counsel engaged. No matter how often by amendments to sections three hundred and sixty-two and three hundred and sixty-three of the statute the right to close might be shifted from one side to the other, the rule of alternation in the argument, under section three hundred and sixty-four, would still remain undisturbed. The general result, under the rule of alternation, would naturally be that the one side would open and the other would close the

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argument to the jury, and that neither side would have the right to both the opening and the close of the argument. Had the amendments to sections three hundred and sixty-two and three hundred and sixty-three, as adopted in 1854, provided in terms that the prosecution should, at all events, both open and close the argument, it might then have been claimed that the principle of alternation, before then provided for by section three hundred and sixty-four, had been swept away by necessary implication, since, upon the supposition that each of the counsel should address the jury but once, such alternation would have become incompatible with the absolute right so conferred upon the prosecution to both open and close the argument. But these amendments of sections three hundred and sixty-two and three hundred and sixty-three do not so provide. The language of section three hundred and sixty-two is that "the counsel for the people must open and may conclude the argument," followed immediately by section three hundred and sixty-three, providing that the Court may, in the exercise of its discretion, change the order of argument named in section three hundred and sixty-two. The result is, that so long as the rule of alternation in the argument of a capital case remains upon the statute book, in the absence of an order of the Court on the subject, the prosecution must open and the counsel for the prisoner conclude the argument to the jury. And in view of this rule it devolves upon the Court, in its discretion, under section three hundred and sixty-three, to direct in such a case by whom the argument is to be opened, and thus it will occur that the opening argument must fall to one, and the closing argument to the other side, which result, we think, was intended by the statute, when, in 1854, it took from the prisoner the exclusive right to close in all cases, which he had theretofore possessed.

The Court having given no direction upon the subject at the trial, and the counsel for the prosecution having opened

Opinion of Crockett, J., concurring.

the argument to the jury, we think that the right to the close fell to the counsel for the prisoner, and there was error in refusing to him the exercise of that right.

Judgment reversed and cause remanded for a new trial.

CROCKETT, J., concurring:

The defense relied upon in this cause is, that at the moment when the fatal shot was fired the accused was laboring under a temporary insanity, proceeding from certain physical causes, aggravated by the extraordinary mental excitement occasioned by the circumstances which immediately preceded the killing. The proof of the defendant's bad reputation for chastity was offered and submitted solely on the ground that it tended to rebut the inference that the alleged mental excitement of the defendant was occasioned by a sense of shame and mortification which she experienced on account of the damage which she supposed her reputation had suffered by reason of her connection with Crittenden. The proof was, therefore, admitted for the purpose of throwing some light on the question of her mental condition at the moment when the deed was committed. If the defendant had offered any proof whatever that, previous to her relation with Crittenden, her reputation for chastity was good, and that the damage to that reputation which ensued from her connection with Crittenden so preyed upon her mind, in her then state of physical debility, as to result in a state of temporary insanity, it would have been clearly competent for the prosecution to rebut this presumption by proof that she had no reputation to lose, and consequently that she could not have experienced any great mental excitement occasioned by the loss of a reputation which she did not possess. But the defendant offered no proof whatever as to her previous reputation; and even in her own account of the transaction, and of the state of her mind at the time, did not attribute

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her alleged temporary insanity to any mental excitement resulting from a supposed loss of her reputation. On the contrary, she attributes it partly to her physical condition and partly to the excitement produced by a fear that she was about to lose or was in danger of losing the affections of Mr. Crittenden, to which, it appears, she claimed to have a better right than his lawful wife. In the absence of all proof on her part tending to show that her alleged mental aberration was in any degree produced by a sense of shame or mortification occasioned by any damage to her good name, it was not competent for the prosecution to prove that her reputation for chastity was bad. She had offered no proof tending to show that it was good, and she did not pretend, in her version of the transaction, that her alleged insanity resulted in any degree from the loss of a previously good reputation.

I am, therefore, of opinion that the proof offered by the prosecution on this point was improperly admitted, inasmuch as it did not tend to rebut any proof offered by the defense, nor to elucidate the causes to which she attributes her alleged insanity. I have deemed it proper to add my views on this branch of the case to those of Mr. Justice WALLACE, not because I dissent from any proposition stated by him, but for the reason that it has been insisted with much earnestness by the counsel for the prosecution that the proof of reputation in this case does not fall within the general rule which allows the reputation of the accused to be assailed only in rebuttal of proof of a good reputation offered by the defendant.

I concur in the judgment and with Mr. Justice WALLACE on the other questions discussed in his opinion.

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[No. 2,965.]

GEORGE W. WARD v. JAMES McNAUGHTON,
DEXTER A. DAVIS, ALEXANDER HENDER-
SON, H. B. McNEIL, OLIVER WOLCOTT, AND
FRANK ROCK, ADMINISTRATOR OF THE ESTATE OF
JAMES HOLBERT, DECEASED.

CONTRACT EXPRESSED IN DEED NOT TO BE ENLARGED BY PAROL.—When a negotiation for the purchase and sale of real estate culminates in a deed from the vendor to the vendee, reciting the whole consideration agreed to be paid, and, in a mortgage from the vendee to the vendor, on the land conveyed, to secure the purchase money, the vendee will not be permitted to show by parol that the vendor also agreed in the same contract to sell and convey other lands not included in the deed.

RIGHT OF INCUMBRANCER UNDER JUNIOR MORTGAGE.—In an action to foreclose a mortgage, a subsequent incumbrancer under a junior mortgage is a proper party, and is entitled to have his rights protected by an appropriate provision in a decree as to the disposition of the surplus of the proceeds of the sale, if there be any, after satisfying the demands of the senior mortgagee.

APPEAL from the District Court of the Fifth Judicial District, County of Stanislaus.

The facts are stated in the opinion.

Terry & Carr, for Appellants.

J. H. Budd, and *Schell & Hewel*, for Respondent.

By the Court, CROCKETT, J.:

This is an action to foreclose a mortgage on certain real estate to secure a promissory note made by certain of the defendants to the plaintiff. The complaint alleges that the lands described in the mortgage were sold and conveyed by the plaintiff to said defendants, who made the note and mortgage to secure a portion of the purchase money. The answers set up as a defense that at the time of the purchase it was verbally agreed between the plaintiff and defendants,

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as a part of the same transaction, and for the same consideration, that the plaintiff would perfect his preëmption claim to certain other lands, and obtain a patent therefor, and on obtaining the patent, would convey to the defendants said other lands without any other or further consideration therefor; that the plaintiff, in part execution of the verbal agreement, conveyed to the defendants the lands described in the mortgage, but, in violation of his contract, abandoned his preëmption claim to the other lands, and has never perfected the same, or conveyed said lands to the defendants. On these facts they claim that the whole contract of purchase was illegal and void, as contrary to public policy, and that the consideration for the note and mortgage has failed.

The Court sustained a demurrer to the answers, and a final judgment was entered for the plaintiff, from which the defendants appeal. On behalf of the plaintiff it is insisted that it was not competent for the defendants to set up a parol agreement which would contradict, vary, or enlarge the written contract, as embodied in the deed and mortgage; whilst the defendants claim that such an agreement would not contradict, vary, or add to the deed and mortgage, but would establish an independent contract, and that the deed and mortgage were made only in part execution of the verbal agreement. The verbal contract set up in the answers related solely to the purchase and sale of real estate, and included but one contract of sale and purchase. The offer was to show that in addition to the lands which the plaintiff actually conveyed to the defendants, he, at the same time and by the same contract, also agreed verbally, to convey to them other lands for the same consideration recited in his deed, and to secure which the mortgage was made. I think it is clear that the defendants are precluded from setting up a verbal agreement of that character. When a negotiation for the purchase and sale of real estate culminates in a deed from the vendor to the vendee, reciting the

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whole consideration agreed to be paid, and in a mortgage from the vendee to the vendor on the land conveyed to secure the purchase money, it would lead to great frauds and abuses if the vendee were permitted to show by parol that the vendor also agreed to sell and convey other lands not included in the deed. It would open the door to all the evils which the Statute of Frauds was intended to prevent, and would be to vary and enlarge by parol the contract of sale expressed in the deed, which must be held to embody the result of the negotiations between the parties. I am, therefore, of opinion that the demurrer to the answer was properly sustained.

But the answer of Rock, as administrator of James Holbert, sets up that he is a subsequent incumbrancer under a junior mortgage of the same premises, and the demurrer to this portion of his answer ought not to have been sustained. He was a proper party to the action, and was entitled to have his rights protected by an appropriate provision in the decree as to the disposition of the surplus, if there be any, of the proceeds of the sale, after satisfying the plaintiff's demand and costs.

Judgment affirmed as to all the defendants, except the defendant Rock, administrator of Holbert, as to whom it is reversed, and the cause remanded for a new trial.

STATEMENTS OF FACTS.

(No. 3,221.)

THE PEOPLE OF THE STATE OF CALIFORNIA v.
WILLIAM DONOVAN.

EVIDENCE ON RECORD.—Showing the original verdict of a Coroner's jury to a witness in a criminal case and asking the witness if he had signed the verdict, is not "an effort to prove the contents of a written record by parol."

FORM.—Where a witness is asked, if he had signed a paper of a certain tenor, stated in the question, and before answering is shown and examines the original, it is not error to admit his answer in evidence.

EXERCISE VALUE OR OPINION BY WITNESS.—The value of the opinion of a witness may be tested by showing that on a former occasion he has expressed a different opinion, and by inquiring as to the grounds upon which the change of his opinion had been brought about.

APPEAL from the District Court of the Fifteenth Judicial District, City and County of San Francisco.

The first three instructions asked by the defendant were as follows:

"1. A person while in a state of insanity is by law deemed to be incapable of crime. And insanity of the prisoner at the instant of commission of the offense can be established by evidence tending to prove that he was insane at some period before or afterwards.

"2. The presumption of law is always *prima facie* in favor of sanity. Whenever the exemption from liability is claimed on the ground of mental unsoundness it devolves on the party claiming it to allege and prove it. That allegations and proof being furnished the legal presumption changes, and the mental unsoundness is presumed to continue until the allegation and proof of a complete restoration or a lucid interval.

"3. In a criminal case, if the defendant relies upon insanity as a defense, proof beyond a reasonable doubt is not required, but the burden of proof is cast upon him, and his insanity must be established by such a preponderance of

Statement of Facts.

evidence, that if the single issue of the sanity or insanity of the defendant was submitted to the jury in a civil case they would find that he was insane."

The defendant excepted to the refusal of the Court to give these instructions. The Court, among other instructions, gave the following:

"As a general rule an insane man is incapable of committing crime; but there are exceptions to the rule. A person sometimes insane, who has lucid intervals, or is so far sane as to distinguish good from evil, right from wrong, may commit crime and be legally held responsible. * * * If you find from the evidence that the prisoner committed the offense charged, and at the time he committed the same his mind was so far disordered or diseased that he was incapable of distinguishing good from evil, right from wrong, he was irresponsible and should be acquitted; or if he was, at the instant of the alleged shooting, deprived of reason, though then in a semi-conscious state, the act in law was non-volitional, and he is not responsible; or, if he was at that instant unconscious, he is not responsible. Nor is he legally responsible if he was impelled to shoot the deceased by an uncontrollable influence and was at the moment unconscious of doing wrong. * * * You can also, in determining the question of sanity or insanity, or responsibility, consider all the evidence given either on behalf of the prosecution or the prisoner, and apply to the facts developed your knowledge of human nature and the tendencies of the human mind, and thereby ascertain whether or not he was, at the time the mortal wound was inflicted, responsible for the act. If it be shown that the intellectual faculties were so impaired as to produce a general habitual derangement of them, not traceable to some temporary cause, the law would presume the mind to have continued in the same state until the contrary was shown; but the principle is dif-

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ferent in reference to temporary or periodical insanity, resulting from some transient cause, for then the presumption would be that the mind was restored to its normal condition when the disturbing element had ceased to operate. On a trial for murder the accused is presumed to be sane until the contrary is made to appear by the evidence, and if insanity is relied upon as a defense it must be established affirmatively by a preponderance of proof."

The other facts are stated in the opinion.

Thomas A. Brown, for Appellant.

John L. Love, Attorney General, for the People.

By the Court, WALLACE, C. J.:

The prisoner upon trial upon an indictment for the crime of murder relied for defense upon his alleged insanity at the time of the homicide, and called as a witness one O'Neal, who testified to some peculiarities in the appearance and conduct of the prisoner on the day of the homicide, and stated his belief therefrom to be that the prisoner "must have been entirely out of his right mind," etc. Upon cross-examination, the District Attorney exhibited to the witness a paper purporting to be signed by the witness and inquired if his name appearing thereto was in his handwriting, to which the witness answered that his signature thereto was genuine. To this inquiry and to the answer thereto, there was no objection made upon behalf of the prisoner. The witness was then asked by the District Attorney if he had signed a verdict as a member of the Coroner's jury—the verdict being produced and read to the witness as part of the question—it appearing that the verdict was to the effect that the killing done by the prisoner was done with malice aforethought and with premeditation. Before he answered the question, the verdict inquired of was placed in his hands,

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and he was permitted to read and examine it. The counsel for the prisoner thereupon objected to the question on the ground that it was "incompetent, irrelevant, and inadmissible, and as an effort to prove the contents of a written record by parol." This objection was overruled, and the witness thereupon answered that he did sign the verdict in question.

1. That the examination of the witness did not involve "an effort to prove the contents of a written record by parol" within the objection made by the prisoner is clear, for it distinctly appears that the paper placed in the hands of the witness, and concerning which the inquiry was made, was the *original verdict* referred to.

2. It also appears by the bill of exceptions contained in the record that the District Attorney did inquire of the witness whether or not, as a member of the Coroner's jury, he signed a verdict of a certain tenor or effect — undertaking, in the question as asked, to state its tenor and effect. Conceding that such a question was objectionable within the rule to be observed upon cross-examination of a witness in such cases, it does not appear that any objection was taken to the question by the prisoner's counsel; but even had such objection been made at the time the question was asked, it also appears that before the witness answered the "original verdict" was shown to him, and he answered only after he had examined and read the same.

3. It was competent to inquire of the witness whether or not he had signed the verdict in question, or if he had alone, or in connection with other persons, signed any other writing then produced and shown to him, to the effect that the prisoner was not insane. Though proof that the witness had signed a paper, written a letter, or made statements at any former period of time to the effect that in his then opinion the prisoner was sane, would not amount to an impeachment of him in the strict sense as a witness, yet it would at all events go to the reliability of his opinion. It would, in this

Points decided.

view, certainly be pertinent to inquire of a person testifying to his opinion in a case whether or not he had before then expressed a different opinion, and also, if desired, to inquire of the grounds or matters upon which the change of his opinion had been brought about, and to do so would not necessarily be to discredit or to question his veracity, but to test to some extent the value of his opinion.

The charge given by the Court correctly set before the jury the principles of law applicable to the case, and there was no error in refusing the first three instructions asked by the prisoner.

Judgment affirmed and the Court below directed to fix a day to carry the sentence into execution.

Neither Mr. Justice RHODES nor Mr. Justice CROCKETT expressed an opinion.

[No. 2,596.]

THE PEOPLE OF THE STATE OF CALIFORNIA v.
F. W. VOLL.

NEW TRIAL IN CRIMINAL CASE.—It is no ground for a new trial in a criminal case that, on a challenge of a juror for actual bias, one of the triers appointed is on the panel of the jury in attendance in the case.

OBJECTION TO APPOINTMENT OF TRIER.—If an objection is to be made to the appointment of a trier in a criminal case it must be made at the time, and the grounds of objection brought to the attention of the Court; and if the objection be overruled an exception must be reserved in the usual mode.

NEW TRIAL — NEWLY DISCOVERED EVIDENCE.—The affidavits in support of a motion for a new trial, on the ground of newly discovered evidence in a criminal case, must set forth such evidence as would be received on the trial.

APPEAL from the District Court of the Fifteenth Judicial District, City and County of San Francisco.

The facts are stated in the opinion.

Opinion of the Court—WALLACE, C. J.

Alexander Campbell, for Appellant.

John L. Love, Attorney General, for Respondents.

By the Court, WALLACE, C. J.:

The prisoner, Francis W. Voll, was convicted of the crime of manslaughter, in killing one Walsh, and brings this appeal from the judgment, and from an order denying his motion for a new trial.

1. The first error assigned is that the Court, upon a challenge for actual bias, interposed by the prisoner, appointed as trier one Bolton, the said Bolton being himself of the jury panel in attendance in the case; and the statute (Section 852) providing that the triers shall be three impartial persons, "not on the jury panel," etc., is cited. No objection was made by the prisoner when Bolton was appointed—no exception was reserved—and the error is attempted to be shown only by means of a motion for a new trial. The statute (Section 440) has prescribed the grounds upon which such a motion must be made—of which this is not one—and we have lately held that it cannot be rested upon any ground not there enumerated. (*People v. Fair*, ante, 137.) If objection is to be made to the appointment of a trier it must be made at the time, and the grounds of objection brought to the attention of the Court, when, if such objection be overruled, an exception may be reserved in the usual mode. The Court below was probably not aware that Bolton was upon the panel at the time he was appointed as a trier; and it was the duty of the prisoner to call attention to that fact, if it was his purpose to rely upon the disqualification of the appointee to serve. The prisoner might, with just as much propriety, have moved for a new trial on the ground that the trier—though appointed without objection—was not, in fact, an impartial person.

Opinion of the Court — Wallace, C. J.

2. The next point made, and upon which a new trial was moved for and denied, is that the jury received evidence out of Court other than that resulting from a view of the place where the offense was alleged to have been committed. It is claimed that when the jury were sent by the Court to view the premises at which the killing took place, one Butler, a witness for the prosecution, conversed with the jury, or some one or more of the jurors, upon the facts of the case, or the evidence which had been given before them. A careful examination, however, of the affidavits presented upon either side, and of the evidence of Bolton and that of the Deputy Sheriff, Boyd, given in the presence of the Court upon the hearing of the motion, satisfies us that this ground is without support in point of fact, and that no such irregularity or misconduct occurred.

3. Another, and the only remaining ground upon which a new trial was asked is that of newly discovered evidence. The newly discovered evidence is set forth in the affidavits of Doyle and Gudinaki. Generally speaking, the matters set forth in these affidavits would be inadmissible as evidence in behalf of the prisoner, even were a new trial granted him. If some portions of the statements there made might be received in a case exceptional in its circumstances, it is not disclosed by the record here what the circumstances were under which the homicide in question was committed. No portion of the evidence given at the trial is before us, and, in its absence, the intendments go to support the action of the Court below, for error is not to be presumed.

Judgment and order affirmed.

NOTE.—Pages 169 and 170 were left out of the original print by error, and are omitted from this reprint so as to preserve the original paging.

Argument for Appellant.

[No. 2,955.]

**LUDWIG ALTSCHUL v. SAN FRANCISCO CENTRAL
PARK HOMESTEAD ASSOCIATION.**

PAROL TESTIMONY TO EXPLAIN CALLS OF DEED.—In construing doubtful clauses in a deed, it is important to ascertain all the attendant circumstances in order to arrive at the intention of the parties; and whilst it is not competent to alter, enlarge, or vary the instrument by parol, oral testimony is admissible to explain its calls by applying its descriptive portions to the natural objects called for.

EXPLANATION OF DOUBTFUL CALL IN DEED NOT CONTRADICTION OF IT.—

In an action to quiet title to a lot in San Francisco, where it appeared that plaintiff claimed under a deed which described a lot as "commencing at the northeasterly corner of Pacific street and Lone Mountain Cemetery Avenue, as such corner may be established by the city hereafter, whether known as such street or not;" *Held*, that parol evidence showing that there was an open space, known as Cemetery Avenue, which if extended would have crossed Pacific street at the southwesterly corner of the lot in controversy, and that the grantor pointed out the lot in controversy as the one conveyed, did not contradict the deed and was admissible.

APPLICATION OF CALLS IN A DEED.—Where a lot in San Francisco was claimed under a deed which called for a commencement "at the northeasterly corner of Pacific street and Lone Mountain Cemetery Avenue, as such corner may be established by the city hereafter, whether known as such street or not;" and it appeared that there was a space, known as "Cemetery Avenue," which if extended would have crossed Pacific street at the lot claimed; and it further appeared that the grantor had pointed it out as the lot conveyed: *Held*, that the description applied to the lot claimed, and could not be held to apply to a lot in the United States reservation at the corner of Pacific street and an avenue, thereafter established by the city five hundred feet further west, and called "New Cemetery Avenue."

APPEAL from the District Court of the Fifteenth Judicial District, City and County of San Francisco.

The facts are stated in the opinion.
Defendant appealed.

Geo. W. Tyler, for Appellant.

There is no ambiguity in the language of the deed, and oral testimony was incompetent to show that other land, not

Opinion of the Court—Crockett, J.

extended across Pacific street the lot in controversy in this action would have been situated at the northeast corner of said open space thus extended and Pacific street. That at the dates of said deeds from Chart to Travis and from Travis to the plaintiff, Chart pointed out to them the lot in controversy as the one which he proposed to sell, and did sell and convey to Travis; and it was further proved that the defendant had notice of these facts when it took the deed from Chart. The defendant then proved that when Chart conveyed to Travis there was an open street, known as Baker street, running north and south across Pacific street immediately east of the block in which this lot is situated, which street was then officially established; but there was no other street officially established west of Baker street until the year 1869, when a street known as New Cemetery Avenue was established, and which runs across Pacific street about five hundred feet west of the lot in controversy. It further appeared that the land at the northeast corner of Pacific street and New Cemetery Avenue is within the tract reserved by the United States for military purposes. Judgment having been entered for the plaintiff, the defendant appeals, and assigns as error the ruling of the Court in admitting parol evidence to prove the facts above stated. But, in my opinion, the evidence was clearly competent. In construing doubtful clauses in a deed it is important to ascertain all the attending circumstances in order to arrive at the intention of the parties; and whilst it is not competent to alter, enlarge, or vary the instrument by parol, it is well settled that oral testimony is admissible to explain the calls of a deed by applying its descriptive portions to the natural objects called for. When the deed from Chart to Travis was executed no street was officially established west of Baker street; but the parties had a right to presume that the open space then known as Cemetery Avenue would be officially established as a street of the city, and would be extended across Pacific

Opinion of the Court—Crockett, J.

street. But they could not know but that its location might be slightly varied, or that, when officially established, it might not be called by some other name. This contingency was provided for in the deed by describing the land as situate at the northeast corner of Pacific street and the new street which was expected to be established across Pacific street at or near that point, and which might thereafter be called by some other name than Cemetery Avenue, by which it was then known. But it was clearly not within the contemplation of the parties that the new street referred to in the deed was one which might thereafter be established five hundred feet further towards the west and across lands belonging to the United States, where it crossed Pacific street, in which lands Chart did not pretend to have any interest whatsoever. There was nothing in the parol evidence to contradict the deed; but its only office was to explain the circumstances under which the deed was made and to identify the object called for in the deed as Cemetery Avenue. The call in the deed to commence at the northeast corner of Pacific street and Lone Mountain Cemetery Avenue, as such corner may be established by the city hereafter, whether known as such street or not, can by no reasonable intentment be held to apply to a street thereafter established by the city, five hundred feet further west, and called "New Cemetery Avenue." The term *new*, employed to designate this street, would appear to have been used to contradistinguish it from the old street or open space known as Lone Mountain Cemetery Avenue. It was in fact the establishment of another street, at a remote point, and known by a wholly different name from that described in the deed and contemplated by the parties. The defendant's case would have been quite as strong if the new street had been located at a distance of a mile, and had been called "Oak street" instead of "New Cemetery Avenue."

Opinion of the Court — WALLACE, J.

I think the evidence was clearly competent, and that the judgment should be affirmed.

So ordered.

Mr. Chief Justice SPRAGUE did not participate in the foregoing decision.

[No. 8,141.]

THE PEOPLE OF THE STATE OF CALIFORNIA v.
THOMAS WOODS.

RECORD TO CONTAIN THE EVIDENCE.—Where, in a criminal case, a motion for a new trial is based upon the ground, among others, that the evidence is insufficient to justify the verdict, and it is granted by an order of the Court in general terms, without specifying any particular ground upon which the Court proceeded, the Supreme Court will not undertake to review the order, unless the record sets forth all the evidence given at the trial.

RECORDS OF THE SUPREME COURT.—The records filed in the Supreme Court are not merely *prima facie*, but are conclusive in their character.

NOTES OF PHONOGRAPHIC REPORTER.—The notes of evidence taken by the Phonographic Reporter of a Court are *prima facie* evidence only in the Court below, and cannot be considered in the Supreme Court.

APPEAL from the County Court of Sonoma County.

The defendant was convicted of the crime of arson in the second degree.

The other facts are stated in the opinion.

Attorney General Jo Hamilton, for Appellant.

George Pearce and E. S. Lippitt, for Respondent.

By the Court, WALLACE, J.:

This is an appeal taken by the people from an order granting the defendant a new trial.

The grounds upon which the motion was made were

Opinion of the Court—Wallace, J.

numerous, and among the others, that the evidence is insufficient to justify the verdict.

The order was, in general terms, that a new trial be granted, without specifying any particular ground upon which the Court proceeded.

As we held in *The People v. McAuslan*, ante, p. 55, we cannot undertake to review such an order in any case, unless the record set forth all the evidence given at the trial—and we may here add, that even then it would probably but rarely be disturbed here—for the views of the Court below as to the sufficiency of the evidence, formed, as they are, upon a personal observation of the manner and general demeanor of the witnesses who testified at the trial, are entitled here to the utmost consideration and deference.

In the record before us no statement of the evidence is contained in an authentic form. It is true that the notes of evidence taken by the Phonographic Reporter are embodied in the transcript, and the certificate of the Reporter is appended to the effect that they constitute a correct statement of the evidence, to the best of his knowledge and belief. But the Act of 1867-8, p. 425, provides that the Reporter's notes shall be taken as *prima facie* evidence only—that is, of course, that wherever presented they are open to question and possible correction. This provision evidently refers to the proceedings to be had in the Court below upon settlement of statements, allowance of bills of exceptions, etc. The records filed in this Court, and upon which we proceed here, however, are not merely *prima facie*, but are conclusive in their character, and we have no means of correcting the notes of the Reporter of the Court below, or of entertaining an inquiry into their conformity with the facts actually occurring in that Court.

It results that the Reporter's notes cannot be considered

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in this Court; and the order appealed from must be affirmed, and it is so ordered.

[No. 2,573.]

THOMAS H. HANSON v. JAMES S. MCCOUR.

PETITION FOR REHEARING.—The filing of a petition for rehearing is not a matter of right, but a privilege given by the Court, and governed and limited entirely by its rules.

RULES OF COURT.—The Court, equally with suitors, is bound by its rules, and they must be construed as statutes would be construed.

LOSS OF PETITION FOR REHEARING BEFORE IT REACHES THE CLERK.—If a petition for rehearing is placed in the office of an express company, addressed to the Clerk, in time to have reached him within the time allowed by the rules to file one, and that is the customary and most reliable means of transmission, and the petition fails to reach the Clerk, without fault of counsel, the petition is, in contemplation of law, in the hands of the Clerk within the time limited by the rule, and if lost, may be supplied as other documents lost from the files of the Court may be supplied.

RECALLING REMITTITUR.—When a remittitur is improperly issued, the Court still retains jurisdiction of the case, and the remittitur will be recalled.

This case is reported in 42 Cal. 303.

The facts are stated in the opinion.

John W. Dwinelle, for the Motion.

E. B. Mahon, Contra.

By the Court, NILES, J.:

A decision in this case was rendered on the 31st of October, 1871.

On the 24th of November following, the respondent's counsel deposited in the express office of Wells, Fargo & Co., at San Francisco, a package addressed to the Clerk of this Court, and containing a printed petition for rehearing and the required number of copies. This package, from

Opinion of the Court—NILES, J.

some unknown cause, did not reach the Clerk. Upon the 27th of November, the Clerk issued the remittitur under the provisions of Rule Twenty-one of this Court.

Upon these facts, sufficiently shown, respondent moves that the remittitur be recalled, and that he have leave now to file his petition for rehearing. The propriety of granting this motion depends upon the construction of Rule Twenty of this Court. This rule requires that the petition for rehearing "must be filed within twenty-five days after the judgment has been rendered;" and, further, that "the time herein prescribed shall not be extended by the Court, and the Clerk shall not file a petition after such time has expired."

These plain and positive provisions cannot be avoided upon the ground of accident or excusable neglect. The filing of a petition for a rehearing is not a matter of right. It is a privilege given by the Court, governed and limited entirely by its rules. The power to make these rules is given and controlled by the statute. The Court, equally with the suitor, is bound by them, until they are abrogated. We must construe them as statutory provisions would be construed. We can conceive of no case in which the time for filing a petition for rehearing can be enlarged, or the failure to file excused, under the positive prohibition of the rule.

Another question, however, is presented in this case. It seems that the counsel for respondent deposited his petition for rehearing in the office of the express company, in ample time to reach the Clerk of this Court within the period allowed by the rule for filing the petition, in the ordinary courses of the business of the company. It also appears that this was the customary and most reliable means of transmission. Here, then, was no negligence on the part of counsel. He had performed fully, and in due time, all that he could be required to do in ordinary cases, and in the absence of

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notice that the petition had failed to arrive at its place of destination. He had dispatched it by the ordinary and best method; and we think that when counsel have fully completed their duties and have parted with the possession of the petition in the manner described, and within ample time for its conveyance to the Court within the period limited by the rule, it should be construed to be thenceforward in the possession of the officer of the Court to whom it was addressed. In contemplation of law, the petition was in the hands of the Clerk within the time limited by the rule, and if lost, may be supplied as other documents lost from the files of the Court may be supplied.

The petition being deemed to have been filed in time, the remittitur issued improperly. This was not through personal fault of the Clerk, but was error in contemplation of law.

In such case this Court still retains jurisdiction of the case, and may order the remittitur to be recalled.

Ordered, that the remittitur heretofore issued be recalled, and that respondent have leave to file his petition for rehearing.

[No. 2,709.]

THE NEVADA COUNTY AND SACRAMENTO
CANAL COMPANY v. GEORGE W. KIDD, JAMES
WHARTENBY, CHARLES MARSH, JOHN DUNN,
AND JOHN JENKINS.

APPEAL — ORDER STRIKING OUT PARTS OF PLEADING.—An order striking out portions of a pleading is no part of the judgment roll, and cannot be reviewed on appeal from the judgment, unless it be supported by a statement on appeal.

DEMURRER — UNITING SEVERAL CAUSES OF ACTION IN ONE COUNT.—A complaint setting up in one and the same count ownership in, and ouster from, a certain water right, and also a site for a dam, and the land on which a dam is built, and praying for restitution, is demurrable, for improperly uniting several causes of action.

Statement of Facts.

APPEAL from the District Court of the Fourteenth Judicial District, Nevada County.

The complaint averred "that on the 18th day of July, 1867, plaintiff was the owner of and entitled to the possession of a certain water right, known as the water flowing down the South Yuba River, situated, lying, and being in the County of Nevada, State of California, at a point about four hundred and twenty rods above the summit of the gap which divides the waters of the South Yuba River from Bear River, at the point where a large pine or fir tree lay across said river in the year 1855, said point lying and being in Washington Township, in said county; and at the same point where plaintiff, in the year 1855, commenced to construct a dam, and where a certain dam now claimed by defendants is now located. Plaintiff avers that plaintiff is now the owner and entitled to the possession of said water right. Plaintiff avers that plaintiff is the owner of and entitled to the possession of the site for a dam at said point in said Yuba River, and the dam constructed, and the land on which the same is built, and also the canal or flume leading from said point, dug or made down the easterly side of said river a distance of four hundred and twenty rods, and has so been the owner since said 18th day of July, 1867. Plaintiff further avers that defendants, and those through whom they claim, wrongfully, unlawfully, and without plaintiff's consent, on said 18th day of July, 1867, entered upon said water right and the dam of plaintiff, and the canal and land where the same are located, and deprived plaintiff of the possession thereof, and now still continue to deprive plaintiff of the possession of the same, by reason of which wrongful act of defendants plaintiff is wholly prevented from using and enjoying said water right, and the said dam and canal." The prayer was for restitution and an injunc-

Argument for Appellant.

tion to restrain defendants from interfering with the water right, and for general relief.

The defendants moved to strike out the averments in reference to the water right, on the ground that ejectment would not lie to recover it; that the allegations were not material to the cause of action set forth, and that no property, or right of property, in plaintiff, was averred in that portion of the complaint. They also demurred on the ground that several causes of action were improperly united in the same count, to wit: a cause of action arising from alleged expulsion, and a motion of plaintiff by defendants from, and wrongful detention by defendants of, a specific parcel of real property, with a cause of action arising from alleged expulsion, and a motion of plaintiff from, and wrongful detention by defendants of, a water right.

The Court below granted the motion to strike out and sustained the demurrer, and gave the plaintiff thirty days to amend. The plaintiff, having declined to amend, and his complaint having been dismissed, appealed from the judgment.

W. H. Bullock, for Appellant.

This is not an action of ejectment, as assumed by defendants. It is an action for an injunction and for general relief. The common law definition of actions is abolished by our Practice Act; and it makes no difference what the action would be called at common law. It is true that by the common law an action of ejectment would not lie for running water. But the gravamen here is the water right. The site for a dam, the dam itself, and the flume, are merely appurtenant to it, and would be worthless without it. A water right is property, and has been recognized as such by repeated decisions of this Court. (*Hill v. Neuman*, 5 Cal. 445; *Kidd v. Laird*, 15 Cal. 162; *Hoffman v. Stone*, 7 Cal. 47.)

In this State a water right is something more than a mere easement or incorporeal hereditament; and if a party is ousted an action will lie to recover it by its true name of water right. (37 Cal. 326.)

A. C. Niles and Niles Searles, for Respondents.

As there is no statement on appeal or bill of exceptions, this case comes up on the judgment roll alone. The motion and order to strike out are no part of the judgment roll, and therefore cannot be considered on this appeal. (*Sutter v. San Francisco*, 36 Cal. 114; *Wetherbee v. Carroll*, 33 Cal. 552; *Harper v. Minor*, 27 Cal. 109; *Gates v. Walker*, 35 Cal. 290.)

The demurrer was properly sustained. It was interposed, to the whole complaint, and must be construed in relation to the entire pleading. The water right — supposing we could enter upon and take possession of such a thing — is not dependent, nor is it averred to be dependent upon or appurtenant to the dam and canal afterwards mentioned in the complaint. Though the water right could not exist without some dam, or ditch, or other contrivance for its diversion or use, yet it might very well exist without the dam or ditch mentioned. We might be entirely willing to yield to plaintiff the possession of the dam, and canal, and flume, and yet contest its claim to the use of the waters of the Yuba. We may have other ditches, above or below upon the stream, by which we would be entitled to divert every drop of the water. We could make numerous issues as to the water right, such as abandonment, purchase of right from prior appropriators, etc., which would be entirely consistent with plaintiff's ownership of the dam and canal. We are entitled to have the several causes of action so stated that we can demur, or take other issue upon each — that we can admit the one and deny the other, as the facts of the case may warrant.

Opinion of the Court — WALLACE, C. J.

This question was fully argued and determined in the case of *Nevada County and Sacramento Canal Co. v. Kidd*, 37 Cal. 309; and there are reasons why the decision in that case — the parties, property, and cause of action being the same as in this — should be considered as *res adjudicata* — the law of this case.

By the Court, WALLACE, C. J.:

First — Upon motion of the defendants, an order was entered striking out a portion of the complaint. The appeal is taken from the judgment and from an order sustaining a demurrer to the complaint. That an order striking out a portion of a pleading may be reviewed here upon appeal from the judgment is true; but it is no less true that such an order, being in itself no part of the judgment roll (section two hundred and three), cannot be so reviewed except it be supported by a statement on appeal; and here there is none.

Second — The Court sustained a demurrer to the complaint, with leave to the plaintiff to amend, and no amendment having been made, rendered judgment dismissing the action.

It is clear that several causes of action have been improperly united — mingled together — in the complaint. The entry upon the "*site for a dam*" — the "*dam constructed*" — the "*land on which the same is built*," etc. (as was said here in *N. C. and S. C. Co. v. Kidd*, 37 Cal. 282), "may perhaps be regarded as a single cause of action;" but, as was then said also, "the water right * * * is a different thing." The complaint, containing as it does but a single cause of action, and counting upon an invasion of all these in that count, is clearly obnoxious to the demurrer interposed under subdivision five, section forty, of the Practice Act.

Judgment affirmed.

Mr. Justice NILES, having been of counsel in the Court below, did not sit in this case.

Points decided.

[No. 2,169.]

ALFRED WOOD, ADMINISTRATOR WITH THE WILL ANNEXED OF THE ESTATE OF H. F. WOOD, DECEASED, v. M. J. GOODFELLOW AND THE KEYSTONE QUARTZ MINING COMPANY.

STATUTE OF LIMITATIONS SUSPENDED BY CONSENT OF MORTGAGOR.—So long as a mortgagor holds the equity of redemption, and no other rights intervene by reason of subsequent liens or incumbrances, he has the power by written stipulation under the statute, or by absenting himself from the State, to suspend the running of the Statute of Limitations.

MORTGAGOR CANNOT AFFECT SUBSEQUENT INCUMBRANCE.—As against subsequent incumbrancers or a subsequent holder of the equity of redemption, the mortgagor has no power by stipulation to prolong the time of payment, or in any manner to increase the burdens of the mortgaged premises.

CASES COMMENTED ON.—*Lord v. Morris*, 18 Cal. 482; *McCarty v. White*, 21 Cal. 495; *Lent v. Morrill*, 25 Cal. 500; *Low v. Allen*, 26 Cal. 141; *Lent v. Shear*, 26 Cal. 361; *Barber v. Babel*, 36 Cal. 11; *Stichel v. Carrillo*, 42 Cal. 493, commented on.

STATUTE OF LIMITATIONS WHERE THIRD PERSONS BECOME INTERESTED SUBSEQUENT TO MORTGAGE.—When third persons have acquired interests in mortgaged property subsequent to the mortgage, they may invoke the aid of the Statute of Limitations as against the mortgage, even though the mortgagor, as between himself and the mortgagee, may have waived its protection.

NO DIFFERENCE BETWEEN SUSPENSION BY WAIVER AND BY ABSENCE.—There is no difference in principle between the suspension of the running of the Statute of Limitations resulting from an express waiver and one caused by voluntary act in absenting oneself from the State.

RELATION BETWEEN THE MORTGAGOR AND THE SUCCESSOR OF THE MORTGAGOR.—When the mortgagor has parted with his title to the property and ceased to have any interest therein, those who have succeeded to his rights stand in the same relation to the mortgage as if they had originally made the mortgage on their own property to secure the debt of the mortgagor.

ACTION UPON MORTGAGE BARRED AFTER FOUR YEARS.—Where a mortgagor transfers his interest in the mortgaged premises to a third person, the mortgage, as contradistinguished from the mortgage debt, is to be deemed a contract in writing in the sense of the statute on which an action must be brought within four years from the time when the action would lie, in order to avoid the bar of the Statute of Limitations.

Opinion of the Court — CROCKETT, J.

APPEAL from the District Court of the Tenth Judicial District, Sierra County.

The facts are stated in the opinion.

P. Vanchief, D. H. Couden, and James Galloway, for Appellant.

Barslow & Garber, for Respondents.

By the Court, CROCKETT, J.:

This is an action to foreclose a mortgage made by Goodfellow in June, 1860, on his undivided interest in the Keystone mine and mill. The mortgage was duly recorded about the time it was executed. Subsequently, in October, 1860, and May, 1862, two other mortgages were made upon the whole property by Goodfellow and the other joint owners, which two last named mortgages, in October, 1862, were duly assigned to Harris & McCarthy, who immediately commenced an action to foreclose them, but failed to make Wood, the holder of the first mortgage, a party to the action. On the 3d day of November, 1862, they obtained a decree of foreclosure, under which the entire property was sold on the 6th day of December, 1862, to Harris & McCarthy, who entered into possession on the 12th day of the same month. There having been no redemption, they obtained the Sheriff's deed on the 8th day of June, 1863, and on the 30th day of March, 1864, conveyed the whole property, by absolute deed, to the defendant, the Keystone Quartz Mining Company, which has thenceforth continued in possession.

It appears from the findings, that Goodfellow left this State on the 15th of November, 1862, and has never returned to it; and that Wood, the holder of the first mortgage — for the foreclosure of which this action is brought — had actual notice on the 3d day of January, 1863, of the two subsequent mortgages and of their registration, and of the sale to Harris &

Opinion of the Court—Crockett, J.

McCarthy under the decree of foreclosure; and that they were then in possession. Wood died on the 4th day of March, 1868, and this action was brought by his administrator on the 11th day of May, 1868. The chief defense relied upon by the Keystone Quartz Mining Company is the Statute of Limitations, and this defense having been sustained by the District Court, the plaintiff has appealed.

In a very able and ingenious printed argument the counsel for the plaintiff insists that the action is not barred, because, as he claims: First, the mortgage is but a collateral security for the debt, and is only an incident to it; and that if the debt, which the mortgage was made to secure, is not barred, the mortgage cannot be; second, the mortgage debt in this case is not barred, for the reason that the mortgagor, Goodfellow, left the State in November, 1862, and has never returned, and that by the express terms of section twenty-two of the Statute of Limitations "the time of his absence shall not be part of the time limited for the commencement of the action." The argument would be impregnable if it were conceded that the Keystone Quartz Mining Company, which has succeeded to and now holds the equity of redemption of the mortgagor, Goodfellow, occupied precisely his status under the statute. If Goodfellow still held the equity of redemption, and if the action was against him alone, it is evident his absence from the State would afford a sufficient answer to the plea of the Statute of Limitations. So long as he retained the equity of redemption, and no other rights had intervened, by reason of subsequent liens or incumbrances, he had the power, by written stipulation under the statute, to extend the time within which the debt should not be barred, or he might suspend the running of the statute by his absence from the State. So long as his rights only were to be effected, it was within his power to suspend the operation of the statute, either by written stipulation or by absenting himself from the State. But this Court has

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repeatedly decided that as against subsequent incumbrances, or a subsequent holder of the equity of redemption, the mortgagor has no power, by stipulation, to prolong the time of payment, or in any manner increase the burdens on the mortgaged premises. (*Lord v. Morris*, 18 Cal. 482; *McCarty v. White*, 21 Cal. 495; *Lent v. Morrill*, 25 Cal. 500; *Low v. Allen*, 26 Cal. 141; *Lent v. Shear*, 26 Cal. 361; *Barber v. Babel*, 36 Cal. 11; *Sichel v. Carrillo*, 42 Cal. 493.)

In *Belloc v. Davis*, 38 Cal. 242, we held that as against subsequent incumbrances the mortgagor had no power, by stipulation, to convert the debt from a currency demand into one payable in gold coin. These cases proceed on the theory that those who acquire interests in the mortgaged property, whether by conveyance or lien, subsequent to the mortgage, may stand upon their rights as they were when they acquired them; and that it is not in the power of the mortgagor, by any act of his, to change, restrict, modify, or abridge them. He has no power, by stipulation, to defer or suspend the running of the Statute of Limitations. We do not understand counsel to controvert this proposition. But his argument is, that by the very terms of the law itself, and not by reason of any stipulation on the part of Goodfellow, the statute ceased to run when he left the State, and that no additional burden has been imposed upon the property, except that which the law itself imposed; and that when third persons subsequently acquired an interest in it, they must be held to have done so subject and in subordination to the power of the mortgagor to suspend the running of the statute, by absenting himself from the State, as he had the right to do. The argument assumes that a subsequent holder of the equity of redemption, or a subsequent incumbrancer, stands in the shoes of the mortgagor, and cannot invoke the aid of the statute in the given case, because he could not. But it is the settled doctrine of this Court, as will be seen from the authorities above cited, that when

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third person have subsequently acquired interests in the mortgaged property they may invoke the aid of the statute as against the mortgage, even though the mortgagor, as between himself and the mortgagee, may have waived its protection; and we see no difference in principle between a suspension of the running of the statute resulting from an express waiver, and one caused by his voluntary act in absenting himself from the State. In either case it is the sole act of the mortgagor, performed at a time when he had lost his rightful control over the property, and when other interests had intervened, which ought not to be dependent for their protection on the conduct of the mortgagor. When the mortgagor has parted with his title to the property, and ceased to have any interest therein, those who have succeeded to his rights stand in the same relation to the mortgagee as if they had originally made the mortgage on their own property to secure the debt of the mortgagor. The mortgagor has no interest in the property, nor are they under obligation to pay his debt. Their property, however, is bound as collateral security for its payment, under the mortgage, which is a contract in writing, by which the property is pledged as a security for the debt. The mortgage, in such a case, has the same effect in law as if it had been originally made, as a separate instrument, by the parties succeeding to the rights of the mortgagor to secure his debt. If A. make a mortgage on his own property to B. to secure a debt owing from C., the action to foreclose the mortgage must be brought within four years from the time when the debt became due. The time could not be prolonged by any stipulation between B. and C. to which A. was not privy. But when the four years were about to expire, could C., under our law, indefinitely postpone the bar of the statute, and render it nugatory as to A., by absenting himself from the State, and never returning? The argument of the plaintiff's counsel necessarily leads to this re-

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sult. But we have not, heretofore, so interpreted the statute. On the contrary, we have uniformly held in analogous cases that the mortgage, as contradistinguished from the mortgage debt, in such cases is to be deemed a contract in writing in the sense of the statute, on which the action must be brought within four years from the time when the action would lie, in order to avoid the bar of the statute. If we had any doubt, on reason or authority, whether the rule is proper, it has been too long established in this State to be now disturbed.

Judgment affirmed.

Mr. Chief Justice RHODES dissented.

[The foregoing opinion was rendered at the October Term, 1870. After a rehearing the following decision was made at the January Term, 1872.—REPORTER]:

By the Court, CROCKETT, J.:

After a careful reëxamination of the printed arguments on behalf of the appellant, we adhere to the views expressed in the opinion heretofore delivered in this cause, which will, therefore, stand as the opinion of the Court.

Judgment affirmed.

Mr. Justice RHODES did not express an opinion.

Statement of Facts.

[No. 2,672.]

CATHARINE SLATTERY, ADMINISTRATRIX OF THE ESTATE OF MICHAEL SLATTERY, DECEASED, v. HENRY HALL, ANDREW MILLS, EDWARD C. HINSHAW, ORTON HUBBELL, THOMAS McCUNE, AND JOHN SHARON.

QUESTION OF ADEQUACY NOT RAISED ON GENERAL DEMURRER FOR WANT OF FACTS.—Under a general demurrer that a complaint does not state facts sufficient to constitute a cause of action, an objection cannot be taken that it is merely ambiguous.

TRUST IN FAVOR OF SETTLERS IN POSSESSION.—QUESTION OF DISPUTE AS TO POSSESSION.—Where a number of settlers on a Mexican grant decided their claims and contributed money to trustees, under an agreement that the trustees were to buy up the grant title, and afterwards deed to each settler the land in his possession, and there was a dispute between two of the settlers as to the right to a deed of a particular piece: *held*, that though the extent of one's possession would generally be indicated by his fences, it was the fact of actual possession, with or without a fence, which would entitle the possessor to a deed.

APPEAL from the District Court of the Seventh Judicial District, Sonoma County.

The complaint, after setting forth the death of Michael Slattery, and the appointment and qualification of the plaintiff as his administratrix, and the possession of the deceased, and of the plaintiff, as his administratrix, of a portion (some two hundred and twenty acres) of the Blucher Rancho, in Sonoma County, describing it, proceeded to allege that while said plaintiff, and a great many other settlers, possessing other portions of the rancho, were so settled, and had such possession, it was ascertained that the land was claimed and held by a valid title then outstanding, and adverse to the said settlers; that thereupon, November 18th, 1866, said settlers, including plaintiff, appointed a committee, consisting of defendants Hall, Mills, Hinshaw, Hubbell, and McCune, "with an agreement and understanding that said committee would purchase and procure, for the benefit and

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use of said settlers, including the plaintiff, and in a trust for them, and each of them, including the plaintiff, any and all outstanding title, or titles, in said Blucher Rancho, held adversely to them and to each of them;" that said committee accepted the trust, and promised and agreed to execute the same; that "it was mutually agreed by said settlers, and by said committee, that the parcels of lands possessed by them, and each of them, respectively, should be assessed as to the value of each tract separately, taking in the estimate quantity and quality of each parcel or tract of land possessed by each settler, and the value of each tract to be in such manner ascertained; that said assessment was made of all of said tracts of land, including the land of the plaintiff, in accordance with said agreement; that said assessment was to be made in reference to the amount said committee might have to pay for the whole of said Blucher Rancho; that the land above described was assessed to the plaintiff at the price of seven dollars per acre; that for the purpose of facilitating the action of said committee, and the better enabling them to carry out said agreement between said settlers and said committee, said settlers, including this plaintiff, did, on November 18th, 1865, make, execute, and deliver to said committee their joint deed in writing, whereby the said settlers, and each of them, including the plaintiff, conveyed to said committee, as joint tenants, and not as tenants in common, all the right and title owned and claimed by each of said settlers of, in, and to, said Blucher Rancho," which said deed was duly recorded; that said committee purchased all the outstanding titles to said rancho; that in accordance with said agreement, the plaintiff paid the entire assessment on the said tract of land claimed by Michael Slattery in his lifetime, being the tract before described; that after said payment, and before the commencement of suit, plaintiff demanded of said committee a proper deed to her, as such administratrix, which

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she presented to them for execution; but that they had refused, and still refused, to execute or deliver the same, or in any manner to comply with their agreement with her, to her damage five hundred dollars."

The complaint proceeded to allege that the defendant Sharon pretended to some right or interest in a portion (twenty-four acres) of said land of plaintiff; that said pretended claim was without foundation, and had been set up to prevent the said committee from executing the deed to her; and prayed that Sharon might be compelled to set forth the claim "which he pretends to have to said portion of said land by him claimed, and detained, and withheld, and from which said Sharon has kept the plaintiff ousted since November 18th, 1865, to her damage three hundred dollars." The complaint closed with a prayer for damages as alleged; for an order compelling the trustees to execute a deed to her; for a writ of restitution compelling Sharon to deliver up the portion of said land claimed by him, and for general relief.

The defendants interposed a general demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, which was overruled. They then answered, and set up that defendant Sharon was, and had been since 1861, in the continuous, open, notorious, adverse, and exclusive possession of the twenty-four acres of land in controversy; that Sharon was one of the settlers, and possessed other land; that all his lands, including the twenty-four acres, were, and had been since 1861, inclosed by his fences; that he, and not the plaintiff, was entitled to the deed to the twenty-four acres piece; that a proper deed had been tendered to the plaintiff of all the land claimed by her, except said piece, and that she had refused it.

The cause was tried by the Court, and after much testi-

Argument for Respondent.

mony as to possession of the twenty-four acres piece, conflicting in its character, resulted in a judgment for the plaintiff as prayed, but without damages. The defendants moved for a new trial, which being denied, they appealed from the judgment and order.

F. D. Colton, for Appellants.

I. The complaint does not state facts sufficient to constitute a cause of action, and is insufficient to sustain the judgment rendered, in this: that there is no allegation in said complaint as to the manner in which the defendants Hall, Mills, Hinshaw, Hubbell, and McCune were to execute the alleged trust, nor as to whom they were to convey the lands purchased, nor as to what particular lands they were to convey to the plaintiff; and further, if it be held that they were to convey an undivided interest, the judgment requiring them to convey a specific tract by metes and bounds is erroneous.

II. A new trial should be granted, upon the ground that the testimony shows that the terms of the trust under which said defendants Hall, Mills, Hinshaw, Hubbell, and McCune received the deed from the settlers, and purchased the title to the Blucher Rancho, were that said defendants, trustees, were to deed to each of the settlers, for whom they held in trust, that portion of the Blucher Rancho included within the fences of such settler, and that the land in controversy was not included within the fences of said plaintiff at any time, but was at time of suit brought, and for more than six years next preceding had been, included within the fences of defendant, John Sharon.

William Ross and O. W. Langdon, for Respondent.

It sufficiently appears from the averments of the complaint what the duty of the trustees was. It is plain that it was their duty to purchase the title opposed to the rights of the

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settlers. For whose benefit? Certainly for the benefit of the settlers. To what extent was this outstanding title opposed to the rights of the settlers? Certainly to the full extent, which to them pertained, had not such outstanding title existed. The doctrine taught in 2 Story's Eq. Jur., Sec. 1210, applies to this case; and from the facts stated there is a clear and definite conclusion of law in respect to the relation of the trustees to the settlers, and each of them. If the facts stated legally constitute a trust, it is sufficient. Here the plaintiff avers that she was in possession of a certain tract of land, which she describes; that she understood that another person had a valid title to it; that she ascertained it would require one thousand nine hundred and seven dollars and forty-five cents to purchase the title; that they received the money under an agreement to purchase it, and did with that money purchase it. Now, would it not be absurd to interpret such averments to mean that she expected them to purchase other, less, or more land than what she claimed by her description? What sufficiently appears in the pleading without a formal allegation, need not be expressly averred. (Co. Litt. 303; Yelv. 176, and note 2 N. Rep. 77. See, also, Practice Act, Sec. 70.)

As to the testimony, it was clearly shown that it was possession, and not merely inclosures by fences, that was to indicate the rights of the respective settlers. As to the facts of possession, the testimony of Sharon was contradicted in every important particular by a number of witnesses. The decisions, that a judgment will not under such circumstances be disturbed, are so numerous that it is unnecessary to recite them.

By the Court, WALLACE, J.:

The demurrer to the complaint was properly overruled; it was general — that the complaint did not state facts suffi-

Points decided.

cient to constitute a cause of action. Under such a demurrer objection cannot be taken that the complaint is merely ambiguous. We think, too, that the nature of the trust, and the manner in which it was to be executed, sufficiently appears by the complaint.

The evident purpose of the parties was, that upon contributing a proportionate share of the purchase money expended in acquiring the outstanding title to the general tract, each of the settlers was to receive a conveyance of the premises in his possession—and while the extent of these several possessions would generally be indicated by fences marking their respective limits, it was, nevertheless, the fact of actual possession of a particular tract, with or without a fence, which would entitle the possessor to receive a deed from the trustees.

Upon the question of possession involved between the plaintiff and the defendant, Sharon, the evidence was not only substantially conflicting, within the general rule, but pointedly and to an unusual degree contradictory

Judgment and order affirmed.

Mr. Chief Justice SPRAGUE did not participate in the foregoing decision.

[No. 3,075.]

THE PEOPLE OF THE STATE OF CALIFORNIA v.
JOSE AVILA.

SUFFICIENT CHARGE IN INDICTMENT FOR RECEIVING STOLEN PROPERTY.

A charge in an indictment, which alleges that the defendant received certain stolen property for his own gain, knowing that it was stolen property, is sufficient, without alleging that he received it both for his own gain and to prevent the owner from again possessing his property.

CONSTRUCTION OF STATUTE AS TO RECEIVING STOLEN PROPERTY.—It was intended by section sixty-three of the Act concerning crimes and punishments, to provide for the punishment of the receivers of stolen

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goods, in the cases in which it might be impossible to identify with certainty the thieves, as in cases of professional receivers of stolen goods.

SAME — ALLEGATION OF NAME OF THIEF UNNECESSARY.— In an indictment for receiving stolen property, the allegation of the name of the person who stole the goods, or that his name is unknown to the Grand Jury, is unnecessary and immaterial.

APPEAL from the County Court of Placer County.

The indictment against the defendant was as follows:

“Hosea Avila, alias Portuguese Joe, and Cataline Massalina, are accused by the Grand Jury of the County of Placer, in the State of California, by this indictment, of the crime of having for their own gain received certain personal property previously stolen, knowing the same to have been so obtained. The said Hosea Avila, alias Portuguese Joe, and Cataline Massalina, on or about the 29th day of January, A. D. 1871, at a place called Lyon’s Bridge, in the County of Placer, and State of California, one bob-tailed Texas red steer, with a dewlap, and of the value of forty dollars, and also one black steer, of the value of forty dollars; and all of said property being of the value of eighty dollars, and which said personal property was then and there the personal property of another, to wit: the personal property of S. S. Funk, E. H. Brooks, and L. Brooks, and which said personal property had been previously stolen by some person or persons to the Grand Jurors unknown, from the said S. S. Funk, E. H. Brooks, and L. Brooks; and the said Hosea Avila, alias Portuguese Joe, and Cataline Massalina, knowing the same to have been previously stolen and to so have been obtained, did then and there willfully and feloniously, for their own gain, receive said stolen property, knowing that the same was stolen property, and knowing that it had been previously stolen, and had been so obtained by the person or persons (whose names are unknown to the Grand Jury) from whom they received it, contrary,” etc.

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The defendant demurred to the complaint, and the demurrer was overruled. At the trial, one Cornber testified that, as an officer, he had arrested one Trinidad Rodriguez in Placer County for stealing the cattle; that he was a witness against him on his trial in Marysville, and that Rodriguez was convicted. The defendant moved to dismiss the indictment, on the ground of variance between this testimony and the averment in the indictment that the name of the person who stole the property was unknown. The motion was denied. The defendant was convicted, and appealed from the judgment and from an order denying his motion for a new trial.

W. H. Bullock, for Appellant, argued that the demurrer should have been sustained, because the indictment does not state that the defendant received the stolen property with intent to deprive the true owner of his property therein. (*Hurill v. The State*, 5 Humph. 68; *Pelts v. The State*, 3 Blackf. 28; Wheaton's Cr. Law, Sec. 1899.) He also argued that the Court erred in overruling the motion to dismiss the indictment, and cited *Reed v. The State*, 16 Ark. 499; 13 Ark. 712.

Attorney General Jo Hamilton, for Respondent.

The indictment charges the offense in the language of the statute, and that has always been held sufficient. (*People v. Dolan*, 9 Cal. 576; *People v. Cronin*, 34 Cal. 191; *People v. Rodriguez*, 10 Cal. 50; *People v. Thompson*, 4 Cal. 238; *People v. White*, 34 Cal. 183.)

By the Court, RHODES, J.:

The indictment charges the defendant with having feloniously received certain property, for his own gain, knowing that it was stolen property, etc. Section sixty-three of the Act concerning crimes and punishments provides that

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“Every person who, for his own gain, or to prevent the owner from again possessing his property, shall buy or receive stolen goods, * * * knowing the same to have been so obtained, shall, upon conviction, be imprisoned,” etc. The indictment charges the offense in the words of the statute; and according to the numerous authorities in this Court — some of which are cited by the Attorney General — that is a sufficient description of the offense. It is unnecessary to allege that the defendant received the stolen property both for his own gain and to prevent the owner from again possessing his property. The allegation of either intent is, under the statute, sufficient.

The indictment states that the property had been stolen by some person or persons to the Grand Jury unknown; and it was proven at the trial that the person who stole the property had been convicted of the larceny before the indictment in this case was found. The defendant makes the point that there was a variance between the allegation and proof. The authorities cited by the Attorney General are to the point that an allegation of the character above mentioned is sufficient; but it is difficult to see how they have any application to the point presented by the defendant. Without discussing the question whether there was a variance, the point is disposed of by the rules of pleading in criminal cases. There is nothing in the section defining the crime, which, by necessary implication, requires that the name of the thief shall be alleged in the indictment, and it is, therefore unnecessary. It was obviously intended by the statute to provide for the punishment of the receivers of stolen goods in the numerous cases in which it might be impossible to identify, with certainty, the thieves — in cases of professional receivers of stolen goods. The allegation of the name of the person who stole the goods is, therefore, unnecessary and immaterial; and the allegation that his name is unknown to the Grand Jury is equally immaterial.

Points decided.

This is the rule laid down in all the cases which we have been able to find after a diligent search. (*Commonwealth v. State*, 11 Gray, 60; *People v. Caswell*, 21 Wend. 86; *State v. Murphy*, 9 Ala. 845; *Rex v. Bush*, Rus. & Ry. Cr. Cas. 372; *Rex v. Jervis*, 6 Car. & P. 156; 2 Bish. Crim. Proc. Sec. 927.)

The other points presented by the defendant are not well taken, and do not require any particular notice.

Judgment affirmed.

[No. 3,043.]

IN THE MATTER OF THE ESTATE OF DANIEL UTZ, DECEASED.

WILL—OMISSION TO MENTION CHILDREN OF DECEASED CHILD.—Where a testator, in disposing of his property, used the expression, "to my children," and proceeded to name them, and the portion devised to each, but omitted any special mention of a devise to the children of a deceased daughter: *held*, that the use of the word "children" did not indicate a deliberate purpose to exclude the children of his deceased daughter, and that, under section seventeen of the Statute of Wills, they were entitled to a full share of the estate, as if the deceased had died intestate.

DEVISE "TO MY DAUGHTER AND TO HER CHILDREN" GIVES ESTATE IN COMMON.—Where a devise was made, "To my youngest daughter, Margaret Utz, and to her children:" *held*, that Margaret's children became devisees as well as herself, and that the devise passed an estate in common to all.

RULE IN SHELLEY'S CASE NOT APPLICABLE TO A DEVISE TO A MOTHER AND HER CHILDREN.—The "rule in *Shelley's Case*," when applied to wills, is confined to cases in which, after a freehold is devised to one, the remainder is to go in terms to the "heirs" of the first taker, and does not apply to a devise to a mother and to her "children."

DEVISE TO "MARGARET UTZ AND TO HER CHILDREN," ON CONDITION THAT
• **MARGARET TAKE CARE OF TESTATOR.**—Where a devise was made "to Margaret Utz and to her children," on condition that Margaret would take care of the testator during his lifetime, which she did: *held*, that there was nothing in the condition to show an intention on the part of the testator that Margaret alone should have the benefit of the devise.

Argument for Appellant.

APPEAL from the Probate Court of Santa Clara County.

This was an appeal by Margaret Hartman, the daughter of Daniel Utz, deceased, from a decree of the Probate Court, distributing his estate. Her objections to it were, that the children of her deceased sister, Mrs. Harwig, were admitted to share in the estate, and that her own children were declared tenants in common with herself under the will.

The other facts are stated in the opinion.

J. Alexander Yoell, for Appellant.

It appears by the will itself that the omission to provide for the Harwigs was intentional, because in the introductory clause the testator declares his intention to give his property to his "children" only, and then specially charges his daughter Margaret, with the care of his person until his death, for which consideration she is to receive her devise; and she having fulfilled the condition, the estate vested in her absolutely in fee upon the death of the testator. This view is not in conflict with the law laid down in *Estate of Garraud*, 35 Cal. 336.

The devise to Margaret created not a tenancy in common with her children, but an estate in fee in her. The question is, was the word "children" used as a word of limitation or as a word of purchase. The introductory clause shows that it was the intention of the testator to give his property to his "children," without mentioning his grandchildren. The whole idea of the devise was to Margaret upon the condition of her rendering him services which her children could not do, and if she should have many children before her father's death it would result in her getting a miserably small amount of property — grossly inadequate to the value of her services. The testator used no apt words indicating an intention to create a tenancy in common. If the wording

Argument for Respondents.

had been to "Margaret and to her children, provided they (instead of she) will take care of me, share and share alike," or other apt words, then undoubtedly they would share as tenants in common; but there are no words importing, nor from a careful spelling of each word in the will can an intent be inferred, that they were to share alike.

The words "and to her children" were intended to refer to Margaret's "heirs," and to be words of limitation and not of purchase. (See 6 Coke, 16; 3 Wend. 511; *Wood v. Baron*, 1 East, 135; *Schoonmaker v. Sheehy*, 3 Hill, 165; *Jackson v. Babcock*, 12 Johns. 393; *Helmer v. Shoemaker*, 22 Wend. 136.)

The rule in *Shelly's Case*, that the words "children" are words of limitation, is the rule in this State. It has been so expressly declared. (*Norris v. Hensley*, 27 Cal. 439.)

Bodley & Rankin, for Respondents Harwig.

We have no interest in that portion of the estate set apart to Margaret Hartman and her children, whether it goes to the mother alone, or to the mother and her children as tenants in common. As to the interest set apart to the Harwig children, whom we do represent, the action of the Court below was clearly correct under section seventeen of the Statute of Wills. It does not appear from the will that the omission to name the issue of the deceased daughter of testator was with the intention of excluding them; nor does it appear that he intended to exclude them. The section of the Statute of Wills referred to has been discussed and construed by this Court in the matter of the *Estate of Garraud*, 35 Cal. 336, and a different construction and meaning given it than that claimed for it by appellant; and it would be a work of supererogation for us to attempt further to discuss it.

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By the Court, WALLACE, J.:

The material portions of the will of the deceased are as follows:

"I will give, and bequeath, and order my executors to give after my death to my children the following property, to wit: To my eldest daughter, Elizabeth Utz, * * * the sum of fifty dollars * * *;" to my son, Daniel Utz, the sum of five dollars; and to my youngest daughter, Margaret Utz, and to her children, I will and bequeath * * * all my property, moneys, lands, furniture, etc., that will be left after my death," etc.

The testator had another daughter, who was deceased at the time he published his will, leaving two children, the Harwigs, surviving her, and also surviving their grandfather, the testator.

The latter omitted in his will to provide for these grandchildren, nor are they in anywise mentioned therein.

First — The Court below held, and we think correctly, that the Harwig infants were together entitled to the one fourth of the estate after the payment of the specific legacies, etc., being the same share which they would have received had the deceased died generally intestate. There is nothing in the point that the testator in the outset having mentioned his "*children*" as the intended recipients of his bounty should, therefore, be considered as intending the exclusion of these *grandchildren*. The Statute of Wills (section seventeen) enacts that in case the testator shall have omitted to provide for his child, or for the issue of his deceased child, such omitted child or issue shall have the same share in his estate as in case of general intestacy, "*unless it shall appear that such omission was intentional.*"

We think that it would be attributing an unwarranted degree of significance to the, perhaps, fortuitous expression "*children*," used in the introductory clause of the will,

Opinion of the Court — Wallace, J.

should we infer therefrom the existence of a deliberate purpose, actually in the mind of the testator to wholly exclude the children of his deceased daughter from a share of his estate.

Second — The other question involved concerns the devise to Margaret and her children. Its language has been given already, and it is argued that, by construction of law, the estate which passed thereunder vested solely in the mother. This view is based in the main upon the rule of law known as the rule in *Shelly's Case*. But that rule, when applied to wills, is confined to cases in which after a freehold interest is devised to one, the remainder is to go in terms to the *heirs* of the first taker. In such cases the word "heirs" is considered as importing a limitation upon the estate of the first taker only, and not as denoting that the latter are themselves to take as purchasers. Here, however, the devise is to Margaret and her "*children*," and neither the reason upon which the rule itself was founded, nor the adjudged cases which support it embrace such a case as this. The word "issue" has, indeed, been sometimes held to operate in this respect like the word "heirs," but only in those cases in which it is used as synonymous with the latter word. If, therefore, by "issue" it appear that the testator meant "children," then the rule has no application. (*Genet v. Lynn*, 31 Penn. St. R. 94.)

A devise of real estate to one and his children operated at common law to vest in the devisees a joint estate (*Oates v. Jackson*, 2 Strange, 1171), and under our statute (Acts 1855, 171), it vests an estate in common in the devisees.

Third — But reliance is placed in the fact that the devise to Margaret and her children was upon condition that she would take care of the testator and would stay with him during his lifetime, which she did. It is argued that as the condition only mentioned her and not the children, and as she alone could and did perform it, the intention of the tes-

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tator must have been that she alone should have the benefit of the devise.

It has not been suggested that any rule of law forbids a devise to three persons upon condition to be performed by one of them only, or even by a stranger; and we have seen already that the devise here was in terms *to her children* as well as to herself, and dependent upon the performance of the same condition as to all. That performance, it is true, was to be by her alone; so the testator had directed. Upon her failure in that respect the children must have been excluded. It is argued now that the same result must befall them, because she did perform. In case of her non-performance, the interest intended for them would have remained in the estate of the testator for purposes of distribution; by the very fact of performance, however, that interest is now claimed to be vested solely in the mother, and to be disposed of as her own. Thus, between the directions of the will on the one hand, and the position of the counsel for the appellant, if it be maintained, on the other, the children would receive nothing in any event, and they might as well have been omitted by the testator altogether. We think, however, that such a construction of the devise would violate the intention of the testator.

We are of opinion that the judgment must be affirmed, and it is so ordered.

Mr. Chief Justice SPRAGUE did not participate in the foregoing decision.

Statement of Facts.

[No. 3,034.]

CHARLES MAIN, E. H. WINCHESTER, AND THOMAS
R. HAYES v. J. TAPPENER AND J. R. HOWARD.

BOTH SERVICE AND FILING OF ATTACHMENT NECESSARY.—To complete the service of an attachment of real property, under section one hundred and twenty-five of the Practice Act, both the service of the attachment on the occupant, or posting on the premises, and the filing of it with the County Recorder, are essential.

SERVICE OF ATTACHMENT TO PRECEDE FILING.—The service of posting of the attachment must precede the filing of it.

DEFECTIVE ATTACHMENT WILL NOT OVERREACH CONVEYANCE TO PURCHASER IN GOOD FAITH.—An attachment of real property, if served by first filing with the Recorder, will not overreach a conveyance made by the owner to a purchaser in good faith, and for a valuable consideration, intermediate the filing of the attachment and the service of a copy on the occupant, although the service be made with all reasonable dispatch.

RELATION WILL NOT CURE DEFECTIVE ATTACHMENT.—Where a writ of attachment of real property was filed with the County Recorder, and was served a few hours afterwards: *held*, that the doctrine of relation would not apply to make the attachment date from the filing.

APPEAL from the District Court of the Fifteenth Judicial District, Contra Costa County.

The premises in controversy were, on and prior to the 13th of April, 1869, owned by Thomas Parr, and were standing on the records of Contra Costa County in his name. On that day the plaintiffs in this action commenced a suit against Parr for merchandise furnished him, and caused a writ of attachment of the premises to be placed in the hands of the Sheriff. On the 14th of April, 1869, at nine o'clock A. M., the Sheriff filed a copy of the writ with the County Recorder, with his certificate that the premises had been attached by him; and on the same day he proceeded to the premises, twenty-five miles distant from the Recorder's office, and at half-past twelve o'clock posted a copy of the attachment on the premises, and at the same time served the writ on Parr by delivering him a copy. At eleven o'clock of the same day Parr executed and delivered a deed

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of the property to J. R. Howard, the defendant here. In the action against Parr, judgment by default was taken, and under an execution issued April 30th, 1869, the Sheriff sold the premises to the plaintiffs here. The property was not redeemed, and on the 5th of January, 1870, it was deeded to the plaintiffs by the Sheriff. They brought this action to recover the possession. On the trial it appeared that the defendant Howard purchased the property in good faith, paying four hundred dollars for it. Judgment was rendered for the defendants, and the plaintiffs appealed.

Thomas A. Brown, for Appellants.

The filing by the Sheriff in the Recorder's office of a copy of the writ of attachment in the action of *Main & Winchester v. Parr*, with a description of the property attached, was sufficient to operate as notice to third parties of the lien of the attachment, and the defendant Howard's deed was taken with this notice. (Hitt. 6072; Sec. 125 Practice Act; *Messick v. Sunderland*, 6 Cal. 297; *Chamberlain v. Bell*, 7 Cal. 292; *Ritter v. Scannel*, 11 Cal. 249; *Wheaton v. Neville*, 19 Cal. 44; *Page v. Rogers*, 31 Cal. 301; *Johnson v. Stagg*, 2 Johnson, opinion by Kent, Ch. J. 522, 524; *Porkist v. Alexander et al.*, 1 Johnson Ch. Reports, 398.)

The appellants contend that the doctrine of relation applies to the acts done by an officer in levying an attachment on real estate, and that the attachment of *Main et als. v. Parr*, under consideration, was levied at nine o'clock A. M. on the fourteenth of April, the time when the Sheriff filed a copy of the writ, together with a description of the property attached, with the Recorder. That the other acts done by the Sheriff in completing the levy of the writ, to wit: serving a copy of the writ on Parr, the occupant, and posting a copy on the premises at thirty minutes past twelve o'clock, in judgment of law, are considered as having been done at the time the first act was done. (*Lark v. Borner*, 4

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Cal. 418; Viner's Abridgment, 290; 3 Cow. 80; 3 Denio, 79; 15 Johns. 309; 20 Cal. 160; 17 Cal. 259; 18 Cal. 570; 10 How. U. S. 373.)

P. B. Ladd, for Respondent.

As to the question of the doctrine of relation, the facts of the case show that there is nothing to relate to, and that if, as they claim, they had one act required by statute performed before defendants' deed was made and delivered, the doctrine of relation does not apply to the prejudice of strangers or third parties having any right without notice. In the cases of *Jackson v. Bard*, 4 Johnson, 230, and *Heath v. Ross*, 12 Johnson, 140, the Court distinctly say that the doctrine of relation being a fiction of law for the furtherance of justice, is not admitted to the prejudice of third persons, not parties or privies having any right.

By the Court, CROCKETT, J.:

The only question on this appeal is, whether an attachment of real property, standing on the records of the county in the name of defendant, and which was served by first filing a copy of it with the County Recorder, together with a description of the property attached, and by afterwards, with all reasonable dispatch, serving a copy on the occupant of the premises, will overreach a conveyance, made by the defendant to a purchaser in good faith, and for a valuable consideration, intermediate the filing of the copy with the Recorder and the service of a copy on the occupant. Section one hundred and twenty-five of the code provides that an attachment of real property standing on the records of the county in the name of the defendant shall be served "by leaving a copy of the writ with an occupant thereof, or, if there be no occupant, by posting a copy in a conspicuous place thereon, and filing a copy, together with a description

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of the property attached, with the Recorder of the county." To complete the service and create a lien, both the acts required by the statute must be performed. Neither the filing with the Recorder, without the service or posting of a copy, nor the performance of the latter acts without the filing will amount to a service of the attachment and create a lien on the property. The performance of both acts is essential to create the lien. (*Wheaton v. Neville*, 19 Cal. 44.) But in addition to this the requisite acts must be performed in the order in which they are named in the statute — that is to say, the service on the occupant or the posting on the premises must precede the filing of a copy with the Recorder, which latter act was intended to give notice to third persons dealing with the property that it had been attached. It was only then for the first time that it had in fact been attached; and if the copy be first filed with the Recorder, and a copy be afterwards served on the occupant or posted on the premises if there be no occupant, it is clear that during the interval which elapsed between the filing and a service of a copy on the occupant or the posting, as the case may be, the filing of the copy could not impart notice of a fact which did not exist, to wit: that the property *had* been attached; for it could not be, in fact, attached in any case until after the service on the occupant or the posting on the premises. It is obvious, therefore, that the statute intended that the service or posting of the copy should precede the filing of a copy with the Recorder, "together with a description of the property *attached*." The property was then for the first time attached; and this was the fact of which the filing was intended to give notice. I am, therefore, of opinion that the purchaser from the defendant in the attachment suit took the title free from the alleged lien.

The doctrine of relation invoked by the plaintiffs has no application to the question involved here; for, as we have

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already seen, the filing of the copy with the Recorder could, in no event, operate as a constructive notice to Howard unless preceded by the delivery of a copy of the writ to the occupant or the posting of the notice upon the premises, if unoccupied.

Judgment affirmed.

[No. 2,676.]

JOHN C. BYERS v. CHARLES H. NEAL.

RECOVERY IN EJECTMENT AGAINST PRE-EMPTIONER AFTER PAYMENT—

PATENT NOT A NEW TITLE.—Where Neal, being in possession of public land, made proof and payment therefor under the United States preemption laws; and thereafter Tallmadge brought an ejectment suit against him, and recovered judgment on the merits, and was placed in possession; and afterwards Neal obtained the United States patent for the land: *Held*, that the patent did not constitute a new title in Neal, but was merely a formal assurance of the estate he had already acquired by proof and payment, and that the effect of the recovery by Tallmadge was to estop Neal from denying that Tallmadge had the better title.

EJECTMENT ON SHERIFF'S DEED—WANT OF OFFICIAL AUTHORITY AS

LEGAL DEFENSE.—In ejectment on a Sheriff's deed, where the general issue is well pleaded, the fact that the deed was executed after the Sheriff's authority had terminated, would be a good legal defense, for the reason that the existence of official authority in the officer to execute the deed is of the very substance of the plaintiff's case; but if such defense for any reason be not made and judgment go against defendant, there is an estoppel thereby created against him, which as long as the judgment itself remains undisturbed, must continue as one of its inseparable consequences.

JUDGMENT IN EJECTMENT AS ESTOPPEL.—A judgment for plaintiff in ejectment, when the title has been brought directly in issue, concludes the defendant against setting up in a subsequent proceeding any mere legal defense which he might have made in such suit, and among others a defense that plaintiff's title there rested upon a Sheriff's deed, made after the Sheriff's authority had terminated, of which fact defendant was then ignorant.

'**APPEAL** from the District Court of the Fifth Judicial District, County of San Joaquin.

Argument for Appellant.

This was an action to have the defendant adjudged to hold the legal title of one hundred and thirty-seven acres of land in San Joaquin County, acquired under a patent of the United States, in trust for the plaintiff; to compel him to convey the same to plaintiff; to enjoin defendant from conveying or transferring to any other person; to quiet plaintiff's title; and for general relief. Defendant, among other defenses set up, by way of cross-complaint, that plaintiff had been let into possession under a judgment in ejectment founded upon a Sheriff's deed; that such deed was executed after the Sheriff's authority to make it had terminated; that he was ignorant of such want of authority at the time the ejectment case was tried, and praying that said deed might be set aside and declared null and void.

The cross-complaint was dismissed; there was a judgment for plaintiff as prayed; and defendant's motion for a new trial having been overruled, he appealed from the judgment and order.

J. H. Budd, for Appellant.

The title of defendant, acquired under the patent from the United States, could not have been acquired by the purchaser at a Sheriff's sale of the land, made before the issuing of the patent. A right acquired under the United States pre-emption laws cannot be assigned or transferred prior to the issuing of a patent. (Act of 1841, Sec. 12.) The primary disposition of the public lands is in the United States. (*Mahoney v. Van Winkle*, 33 Cal. 488.) A Sheriff cannot be the agent of a person to convey title, which the party himself had no legal title to convey.

The record in *Tallmadge v. Neal* was not conclusive as to Neal's rights as against the deed under which plaintiff claims. A record is not conclusive as to the truth of any allegation not directly in issue. (1 Greenl. Ev., Sec. 528; *Holland v. Croft*, 8 Gray, 162; *Arnold v. Arnold*, 17 Pick. 7; *Vose v.*

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Morton, 4 Cush. 27; *Manny v. Harris*, 2 Johns. 24.) A judgment in ejectment is not an estoppel as to new matters occurring after its rendition, which give the defendant a title. (*Mahony v. Van Winkle*, 33 Cal. 488.) A deed improperly given by a Sheriff may be set aside on motion or bill in equity. (7 Wend. 83.) Plaintiff's grantor was a party to the fraud of the Sheriff in executing the second conveyance, and plaintiff took the claim tainted with the fraud. Defendant is not estopped from claiming against plaintiff, the same relief from this fraud, that he would have been entitled to against Tallmadge, in case no conveyance to plaintiff had been made.

Hall & Montgomery, for Respondent.

The record in *Tallmadge v. Neal* was conclusive evidence against defendant of all the facts therein adjudicated, and among them that the Sheriff levied upon and sold the land in controversy, and conveyed it to the plaintiff's grantor. An inspection of that record renders it perfectly clear that the judgment, execution, and sale thereunder were facts directly in issue; for, as no other deraignment of title appears, there could not have been a recovery if the proof had failed upon these points. The judgment was founded on affirmative answers to the issues presented, and had no support without them. (*Satterlee v. Bliss*, 36 Cal. 490; *Marshall v. Shafter*, 32 Cal. 176; *Coit v. Tracy*, 8 Conn. 207.) These facts are not the less conclusively established against the defendant by the former judgment, even though he did not choose to litigate them in that action. If he might then have controverted them, and did not, he is still estopped from proving to the contrary now. The rule is that the judgment is not only final as to the subject matter thereby determined, but also as to every other matter which the parties might have litigated in the cause, and which they might have had decided. (*Gray v. Dougherty*, 25 Cal. 266.)

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As to Neal's position to the land, after his proof and payment as a preëmtor, the Government held the naked legal title in trust for him, and he had an assignable and vendible interest in the land. (*Hutton v. Frisbie*, 37 Cal. 475; *Thredgill v. Pintard*, 12 How. 24.) By the sale and conveyance to Tallmadge the latter was substituted to and acquired all the right, title, interest, and claim of Neal, and the right to the legal title to be derived by and through the patent. The deed of the Sheriff was equivalent to a conveyance by Neal himself of all his right, title, interest, and claim, and substituted the grantee for himself in his then relation to the land, and the legal title outstanding in the Government. (*Landes v. Brant*, 10 How. 348; *Bludworth v. Lake*, 88 Cal. 255.) On receiving the patent Neal became the trustee of the title conveyed thereby for the use and benefit of plaintiff.

[The following opinion was rendered at the October Term, 1871.]

By the Court, WALLACE, J.:

The fact that Neal was in the possession of the premises in controversy, as a preëmtor, when they were sold and conveyed by the Sheriff, under the judgment rendered against him, will not defeat the title of the purchaser at the Sheriff's sale—Neal having already made his full payment to the Government as such preëmtor. Tallmadge, from whom Byers derives his title, was the grantee of the Sheriff, and, before he conveyed to Byers, brought an action against Neal, who was then in possession, for the recovery of the premises, in which action he alleged that he was the owner and entitled to the possession. Upon this allegation issue was taken by Neal, and judgment rendered in favor of Tallmadge for the recovery of the premises, with damages and costs, under which

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judgment Neal was subsequently removed, and Tallmadge placed in possession by the Sheriff.

It will be seen that the title to the premises was thus brought directly in issue; and the judgment then rendered must conclude Neal in favor of Byers, as the privy of Tallmadge, upon that question.

The defenses which Neal now attempts to interpose, though they might have defeated the former action, had they been established then, cannot avail now.

Judgment affirmed.

[A rehearing having been afterwards granted on petition of defendant, the following opinion was rendered at this, the January Term, 1872.]

By the Court, WALLACE, J.:

In November, 1863, Neal was a settler upon certain public lands in San Joaquin County, being the southwest fractional quarter of section thirty-two, township fourth north, range seven east, Mount Diablo base and meridian, and had made proof and payment therefor under the preëmption laws of the United States.

In 1865 Tallmadge brought an action against Neal in the District Court at Stockton, in which he alleged himself to be the owner of these premises, and in that action Neal appeared and pleaded the general issue — the pleadings not being verified — and upon the trial judgment was rendered in favor of Tallmadge, and he was placed in possession of the premises.

1. The effect of the recovery, under the pleadings in that action, is that Neal is thereby estopped to deny that Tallmadge then had the better title to the premises, and this estoppel must preclude him in favor of Tallmadge, and also in favor of Byers, the subsequent vendee of Tallmadge, to

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deny the validity of the title in their hands, until he shall have himself acquired a new title or estate in the premises.

The patent issued to him on the 20th day of May, 1869, by the authorities of the United States, does not constitute a new title in him in that sense. It is merely a formal assurance of the estate which he had already acquired by the proof and payment in November, 1863.

2. Tallmadge was adjudged to be the owner and he recovered in the action he brought against Neal, as having acquired the interest of the latter in the premises through a judgment, execution, levy, and a Sheriff's deed of the premises made to himself on the 14th day of November, 1864. Byers, now in possession of the premises as privy of Tallmadge, having commenced the present action against Neal under section two hundred and fifty-four of the Practice Act, to quiet his title, the latter alleges that this deed of the Sheriff to Tallmadge was void, as having been made without any authority in that officer. He avers in his answer, and offered — but was not permitted — to prove that, in point of fact, the Sheriff levied upon, advertised, sold, gave certificate of purchase, and on the 8th day of August, 1864, delivered a deed to Tallmadge, conveying to the latter the fractional north half of said section thirty-two, and other premises — not being any part of the premises here in controversy — and that the Sheriff's deed of November 14th, 1864, was procured by Tallmadge from that officer several months after his authority had terminated by the delivery of the deed of the preceding August. In this connection he offered to show that he was ignorant of this fact at the trial of the action of Tallmadge against him in 1865.

These matters, showing, as they would, an utter want of authority in the officer to make or deliver the deed of November fourteenth, rendered that deed a nullity — and, under the general issue pleaded in the Tallmadge suit, might have been availed of as a legal defense. This proposition is too clear

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to require argument or illustration in its support. A party who relies upon a Sheriff's deed as a basis of recovery in an action of ejectment must in the first instance make it appear that the officer was clothed with power to sell and convey the premises; this is necessary to the validity of the conveyance in point of law to transfer the title; the existence of the official authority in that respect is of the very substance of the plaintiff's case in such an action, and being necessarily in controversy under the general issue pleaded, the defendant is undoubtedly at liberty to countervail the case of the plaintiff in that respect by showing that the officer never had such authority, or that it had in some way ceased before the delivery of the deed, and is not to be driven to an equitable defense for that purpose.

The judgment in the Tallmadge case concluded Neal upon every mere legal defense which he might have made there, and this defense among them. The applicability of this rule is not affected by the circumstance either that Neal was at the time really ignorant of the fact constituting the defense. How much or how little he knew upon the subject is immaterial in this connection, and would be so even if the defense had involved matters about which he would be less likely to know than the sale of his lands by the officers of the law. Had he subsequently discovered it in time, he might have moved for a new trial under the statute upon the ground of newly discovered evidence, or if discovered too late for that purpose, he might have made it the subject of a bill in equity to obtain a new trial; the motion in the one case, or the bill in the other, would have been aimed directly at the judgment itself, and, if maintained, would have vacated it, and along with it would have gotten rid of the incident estoppel, which, however, so long as the judgment itself remains undisturbed, must continue to be one of its inseparable consequences.

These are the general views we entertained at the first

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hearing of the cause, and the reargument has not changed them in any respect, though we have here given them at greater length than in the former opinion.

Judgment affirmed.

Mr. Chief Justice SPRAGUE, and Mr. Justice CROCKETT, did not participate in the decision on rehearing.

[No. 2,983.]

JOHN BARRY, WESLEY WOOD, HENRY MUTZ,
AND THEODOSIO CARRILLO v. THE COUNTY
OF SONOMA.

EVIDENCE IN EJECTMENT AGAINST A COUNTY FOR LAND CLAIMED TO HAVE BEEN DEDICATED.—In an action against Sonoma County to recover land, claimed by the county to have been dedicated to public use, the plaintiffs offered to prove by C. that he had been employed by the Board of Supervisors to look after the fences and keep them in repair, and was so engaged at the commencement of the action; and that in performing this service he was acting as the servant of the county, employed for that purpose: *Held*, that the evidence was admissible as tending, in some degree, to establish the possession of the county.

APPEAL from the District Court of the Seventh Judicial District, County of Sonoma.

The facts are stated in the opinion.

George W. Tyler, for the Appellants, cited *Mitchell v. Davis*, 20 Cal. 45.

A. P. Overton, District Attorney, and *William McCullough*, for Respondent.

By the Court, CROCKETT, J.:

The action is ejectment to recover a portion of a block of land, which the defendant claims to be a public square,

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dedicated to public use, in the Town of Santa Rosa. At the trial the plaintiffs put one Carrillo on the stand as a witness, and offered to prove by him that before the commencement of this suit the witness was employed by the Board of Supervisors of Sonoma County to take charge of and keep up the fences around the property described in the complaint; that he was so employed to keep the same in repair and look after it for the County of Sonoma; that he was thus employed by the Board of Supervisors of said county as their servant at the commencement of this suit. To the admission of this testimony the defendant objected, on the ground that it was irrelevant and incompetent; and the Court having sustained the objection, the plaintiffs excepted, and this ruling is assigned as error. The plaintiffs introduced no other evidence to prove that the defendant was in possession at the commencement of the action, which fact was put in issue by the answer. Thereupon the Court granted a nonsuit, on the sole ground that the plaintiffs had failed to prove possession in the defendant.

The evidence which was excluded, standing alone, certainly did not establish in a very satisfactory manner the defendant's possession. Nevertheless, it was neither irrelevant nor incompetent, and clearly tended, in some degree, to prove the possession in the defendant. As I understand the offer, it was to show that the witness had been previously employed by the Board of Supervisors to look after the fences and keep them in repair, and was so engaged at the commencement of the action; and that in performing this service he was acting as the servant of the County of Sonoma, employed for that purpose. These acts of dominion, if proved, would have tended, in some degree, to establish the possession, and the evidence should have, therefore, been admitted.

Judgment reversed, and cause remanded for a new trial.

Statement of Facts.

[No. 3,047.]

HENRY B. PLATT v. JOHN JONES, HENRY NEILSON, WILLIAM BIHLER, ANDREW FISK, JOHN C. FISK, M. T. McCLELLAN, ANDREW KNIP, CHRISTIAN STENGLE, M. V. B. MORIN, NELSON MORIN, AND JOSIAH MORIN.

CONSTRUCTION OF DEED—DESCRIPTION.—Where a deed described a portion of the German Rancho "beginning at the distance of one and a fourth leagues, Spanish measure, from the northwest end of said rancho at a point on the shore of the Pacific Ocean; thence running a direct line to the northern boundary of said rancho one league; thence along said northern boundary one league, Spanish measure; thence in a southern direction to the Pacific Ocean, so as to include the improvements and house of said Hugal, and to include a quantity of land equal to one Spanish league;" and all the lines were agreed on except the third call "in a southern direction:" *Held*, that this line must deflect from a right angle with the northern line to such an extent as to include one league, and as much more as might be necessary to include Hugal's improvements, and that parol evidence was not admissible to vary such construction of the deed.

APPEAL from the District Court of the Fourth Judicial District, City and County of San Francisco.

This was an action of ejectment to recover possession of a portion of the German Rancho, in Sonoma County. It was originally commenced in the name of Edson Adams as plaintiff, in the Twelfth District Court, but subsequently Platt was substituted as plaintiff in place of Adams, and the cause was transferred for trial to the Court from which this appeal was taken.

The German Rancho is a tract of about four leagues of land, less than a league wide and more than four leagues long, lying between the Gualala River and the Pacific Ocean, having a general northwest and southeast direction, and being in form nearly a parallelogram. The plaintiff claimed a portion to the southeast of a line commencing on the ocean two leagues and a quarter southeasterly from the northwesterly corner of the ranch, and running thence at right angles

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to the general shore line northeasterly to the Gualala River. The deed under which he claimed was, however, subsequent to a deed from the original owner of the ranch to one Frederick Hugal, containing the description given in the head note above. The line, as claimed by plaintiff, would cut off a portion of the land claimed by defendants to have been conveyed by the deed to Hugal; and the true location of the southerly or southeasterly line therefore became a question. On the trial it appears to have been admitted that the Hugal deed commenced at a point on the ocean shore one league and a quarter southeast of the mouth of the Gualala River and ran thence northeasterly to the river, thence southeasterly along the river one league. From the end of the call along the river the plaintiff claimed that the third call ran at right angles to the general course of the river to the ocean, a location which would make the Hugal land much less than a league; whereas defendants claimed that the call deflected at an obtuse angle and ran to the ocean in such a manner as to include a full league, and all of Hugal's improvements. The Court below seems to have regarded the Hugal deed as containing a latent ambiguity, and admitted parol testimony, against defendant's objections, of conversations at the time of the drawing of the Hugal deed, and tending to show the intention to have been to make such southern line the same as was claimed by plaintiff. There was a judgment for plaintiff as claimed by him; and, a motion for new trial having been overruled, defendants appealed from the judgment and order.

W. H. Patterson and C. H. Sawyer, for Appellants.

There is no ambiguity on the face of the deed to Hugal. The calls are definite, certain, and can be located on the ground from the description. The point of commencement is fixed on the ocean; thence the first call runs in a direct line to the northern boundary of said rancho one league. A

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direct line is the shortest line, and of course it must be at right angles from the starting point, and would take the survey to the river, because that is the boundary opposite to the southern boundary, and it also corresponds in distance, being only one hundred chains less than a league. (*Allen v. Kingsbury*, 16 Pick. 235; *Northrop v. Sumney*, 27 Barb. 196.) The next call is "along the northern boundary one league." The description in terms does not say whether up or down the river, whether to the right or left; but the language following does determine because, after running one league, the survey is to run "in a southern direction to the Pacific Ocean so as to include the improvements and house of said Hugal, and to include a quantity of land equal to one Spanish league." It could only include such improvements and house and such league by running the second call up the river. The third call is also certain, because the quantity of land to be included is as much a part of the deed and calls as Hugal's house and improvements. (See *Doe v. Vallejo*, 29 Cal. 385.) No call is repugnant to another, nor any part ambiguous or doubtful; and in such case all other rules of construction are to be rejected. (*Pratt v. Woodward*, 32 Cal. 219; *Dodge v. Walley*, 22 Cal. 324.) There was, therefore, error in the Court below in admitting parol evidence to explain the deed or show the declarations or intent of the parties, other than as the same is to be gathered from the plain, unambiguous language employed in the deed itself. (3 Washburn on R. P. 347; *Seaman v. Hogeboom*, 21 Barb. 398.)

McCullough & Boyd, and W. W. Crane, Jr., for Respondent.

The description in the Hugal deed, taken alone, could not be located. The vice of the location claimed is that it assumes that the Gualala River, which is on the east, constitutes the northern boundary, and also in assuming that

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the second line must necessarily run southeasterly along the river. But the necessity of introducing parol evidence to locate the improvements of Hugal, demonstrates that there is a latent ambiguity in the description. How is it possible to run the second and third lines without ascertaining, in the first instance, where these improvements were. There is, therefore, enough of doubt to justify the adoption of the rule given by this Court in *Walsh v. Hill*, 38 Cal. 487, and *Stanley v. Green*, 12 Cal. 162; see, also, *Vance v. Fore*, 24 Cal. 436; *Kimball v. Semple*, 25 Cal. 442; *Mulford v. Le Franc*, 26 Cal. 89; *Saunders v. Clark*, 29 Cal. 304; *Reamer v. Nesmith*, 34 Cal. 626; 36 Cal. 122, 607; 38 Cal. 443, 483; *Salmon v. Wilson*, 41 Cal. 595; *Irwin v. Towne*, 42 Cal. 331.

Assuming, then, that there was a latent ambiguity in the deed, as to the location of the Hugal tract, the extrinsic circumstances shown by the testimony clearly demonstrate that the parties intended that the southern boundary should be a line commencing on the shore of the ocean, a little south of Hugal's house, and running thence a straight northeasterly course to the Gualala River. The intention was to convey to him one league in a square form; that is, in a tract, each of whose sides measured a league, one of which sides was the ocean, and one the river, the remaining two being at right angles to the ocean and river; and it was upon this construction that the Court below proceeded.

W. H. Patterson and C. H. Sawyer, for Appellants, in reply.

The fact that parol evidence is necessary to establish the possession of Hugal's improvements, does not make a latent ambiguity. If so, every deed contains a latent ambiguity, for the most definite landmark must be shown to exist as described in the deed. It is plain that the parties intended that Hugal should have a league of land and his house and improvements; but they did not know exactly how wide

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the tract was, and therefore adopted this description. If the tract had proved more than a league wide this line would have been deflected up the coast, and Hugal would have had less than a league on the ocean. So, having proven less than a league in width, it must run down the coast for quantity. But if a latent ambiguity did exist the parol evidence should have been confined to the ambiguous matter, which, in this case, is claimed to be the doubt as to the improvements. This would not justify the admission of parol evidence as to other matters, and did not justify the evidence that this line was intended to run parallel to the first line, instead of so as to include a league of land according to the plain language of the deed.

By the Court, WALLACE, J.:

We are of opinion that the third call in the deed from Rufus to Hugal, in these words: "*Thence in a southern direction to the Pacific Ocean, so as to include the improvements and house of said Hugal, and to include a quantity of land equal to one Spanish league*"—imports that in approaching the ocean, the line must deflect from a right angle to such an extent as, at all events, will include one league of land in superficial area, and so much more than that quantity as may be necessary to include the improvements of Hugal as they existed in September, 1847. This results by construction of the terms of the deed itself, and parol evidence is not admissible to vary it in that respect.

The judgment is reversed, and the cause remanded for a new trial.

RHODES, J., specially concurring:

The first call in the deed from Rufus to Hugal commences at a point on the Pacific Ocean, and runs thence to a boundary of the rancho, called in the deed the northern boundary.

Opinion of Rhodes, J., specially concurring.

The parties agree as to this line; and it accords with the construction it gives to the deed. The boundary line which is intersected by that line is the only boundary line which that line will meet; and it will, therefore, be construed as the boundary line intended by the parties, though it is the northeastern rather than the northern boundary. Both parties agree that the second line runs along the northern boundary line southeasterly, and that its length is required to be exactly one league. I am not prepared to say that that is the true construction of the deed, so far as respects the length of the line; but as the parties agree in their construction, I accept it as correct. The deed requires the third line to be so run as to include within the boundaries of the tract conveyed the improvements of Hugal and one Spanish league of land. That is to say, the lines must include one league, and more than that area, should it be necessary to do so in order to inclose the improvements of Hugal. This is imperatively required by the proper construction of the deed. There is no latent ambiguity in the deed as to the quantity of land conveyed; and parol evidence is not admissible to show that a less quantity was intended to be conveyed, or that the third line should be run so as to inclose an area less than one square league.

I concur in the judgment.

Mr. Chief Justice SPRAGUE did not participate in the foregoing decision.

Argument for Relator.

[No. 3,004.]

THE PEOPLE OF THE STATE OF CALIFORNIA ~~EX~~
REL. JOHN L. GREEN, v. PABLO DE LA GUERRA,
JUDGE OF THE FIRST JUDICIAL DISTRICT.

RIGHT OF A PARTY TO HAVE A CAUSE TRIED.—When two actions are pending at the same time, and between the same parties, to recover possession of the same tract of land, and in the absence of the plaintiff one is tried and judgment rendered for the defendant, and the defendant then pleads the judgment as a bar in the other action, the plaintiff is still entitled to have the other action tried.

REFUSAL TO TRY A CAUSE.—An order made by the Court, in a cause, refusing to try the same, is not a judgment from which an appeal will lie.

WRIT OF MANDATE.—A writ of mandate will be issued to compel a judge to proceed and try a cause, when he refuses to do so.

THIS was an application to the Supreme Court for a writ of mandate.

The facts are stated in the opinion.

B. S. Brooks, for Relator.

John L. Green brought his action of ejectment against Jarvis Swift for land in Santa Barbara. Defendant in his answer sets up a former judgment in a suit between the same parties for the same cause of action wherein the defendant had judgment. The issue thus joined, it is undoubtedly the duty of the Court to try and determine and to find the facts in respect thereto, and his conclusions of law (if a finding is requested), and thereupon to render judgment as to him shall appear in accordance with law. We moved that the Court proceed to the trial of this issue then or at some future day, but the Court refused to try it at all. The answer in this case admits the fact that the Court did refuse to try it and admits the reason assigned by us, that is—because he knew the answer was true—"believed it would be a waste of time and a hardship to the defendant to go through the

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useless ceremony of another trial of the same cause of action while the said judgment existed therein." That may be a good reason for filing a finding and rendering judgment against the plaintiff, but clearly is no reason for refusing to try the cause. Until he does try it and render final judgment we cannot file our statement and bring before this Court, on appeal, the question whether the alleged judgment is a bar. We merely desire that the Judge be directed to go on to a trial of the cause.

By the Court, CROCKETT, J.:

This is an application by the plaintiff for a peremptory *mandate* to be directed to the Judge of the First Judicial District, in and for the County of Santa Barbara, to compel him to proceed to hear and determine the action of *Green v. Swift*, alleged to be pending in that Court. The following facts are disclosed by the petition and answer, viz: That Green commenced an action against Swift, in the usual form, in the District Court for Santa Barbara County, to recover the possession of a parcel of land in that county, in which action issue was regularly joined; that another action of a similar character and to recover the possession of the same land, was commenced by Green against Swift, and was pending at the same time in the District Court of the Fourth Judicial District in and for the City and County of San Francisco; and when the action pending in Santa Barbara County was called for trial an application was made in behalf of the plaintiff to continue the cause for the term, on an affidavit of the attorney of record for the plaintiff, to the effect that he resided at San Francisco, and was so occupied with other professional engagements as to prevent his attendance on the Court at Santa Barbara, the application being made by another attorney, who appeared for that purpose only at the request of the attorney of record; that the application to

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continue the cause for the term was denied; but the Court postponed the trial until a later day in the term, for the purpose of affording an opportunity to the plaintiff's attorney to be present at the trial; that on the appointed day the cause was again called for trial, and the plaintiff's attorney being still absent, the attorney who had represented him on the former motion moved to dismiss the action; but the Court denied the motion, except on the condition that the plaintiff paid the costs on or before a subsequent hour of the same day; that the costs were not paid, and the cause was tried before a jury, in the absence of the plaintiff's attorney; and no witnesses or proofs being introduced for the plaintiff, a verdict and judgment was rendered for the defendant; that the judgment erroneously recited that the plaintiff had appeared and introduced evidence at the trial; that the action which was pending in the Fourth District Court was subsequently transferred to Santa Barbara County for trial; that one of the defenses set up in the action as a bar was the former recovery by the defendant in the other action; that, for the purpose of avoiding this bar, the plaintiff filed a supplemental complaint setting forth that the judgment in the former action falsely recited that the plaintiff had appeared and introduced evidence in support of his cause of action; that the plaintiff and his attorney of record were ignorant of these false recitals in the judgment until long after the term had elapsed and until it was too late to correct the same on motion or by a statement on appeal; that the attorney of record was also ignorant that the Court had refused to allow the cause to be dismissed, and supposed it had been dismissed until after it was too late to obtain relief in either of the methods above indicated; that the Court first proceeded to hear and determine the equitable matter set up in the supplemental complaint, and on the trial found as facts that the plaintiff and his attorney of record were ignorant of the false recitals in the judgment, and of the

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fact that the cause was not dismissed until more than five months had elapsed from the entry of the judgment, and thereupon the Court made a decree correcting the false recitals in the judgment, but refused any other relief under the supplemental complaint; that the plaintiff then moved the Court to proceed to try the action at law, on the original complaint; the Court denied the motion and refused to proceed further in the trial, alleging that nothing remained to be tried — the decree under the supplemental complaint having disposed of the cause. This is an application to compel him to hear and determine the action at law upon the issues joined under the original complaint. One of those issues was on the bar by the former recovery set up in the answer, and the object of the supplemental complaint was to reform the judgment, so as to make it conform to the facts. To that extent the plaintiff obtained the relief which he desired; and whatever other equitable relief he demanded was denied. The result of these proceedings was to leave the action at law under the original complaint still pending and undetermined. The decree which was entered under the supplemental complaint does not enjoin the plaintiff from proceeding in the action at law, nor purport to determine the ultimate rights of the parties. It simply reforms the judgment, and denies any other equitable relief to the plaintiff, but does not attempt otherwise to interfere with the action at law. It may be that the bar of former recovery set up in the answer will prove to be a valid defense, even under the judgment as modified; but the plaintiff has a right to have the action tried and determined, so as to enable him to take an appeal, if he sees proper, in the event that the judgment is against him. At present there is no judgment in the action at law from which he could appeal. It is therefore ordered that the writ issue as prayed for.

Statement of Facts.

[No. 3,163.]

G. R. MINOR v. CHARLES A. KIDDER.

ELECTION CONTEST—ALLEGATION BY CONTESTANT THAT HE "IS" AN ELECTOR.—Under the statute of March 23d, 1850, providing for the contesting of elections of county officers (Stats. 1850, p. 101, Sec. 56), it is sufficient for the contestant to allege that he is, at the time he files the written statement of contest, a qualified elector of the county, without alleging that he was so at the time of the election.

STATEMENT OF CAUSE OF ELECTION CONTEST.—The degree of certainty required in a statement of the cause of contest in an election case is not the highest degree of certainty known in pleading, but only such as will suffice to inform the defendant of the particular proceeding or cause upon which the contest is founded. Such statement need not detail the particular means or measures resorted to for the purpose of accomplishing a miscount, but only the ultimate facts.

ELECTION CONTESTS OF PUBLIC CONCERN.—An election contest, being an investigation in which the public at large are deeply concerned, is not an ordinary adversary proceeding; for, as against the high public interest involved, there can be no recognized adversary.

AMENDMENTS OF STATEMENT OF CAUSE OF ELECTION CONTEST.—In a contested election case, if the statement of the cause of contest lack the clearness and distinctness of allegation desirable in judicial proceedings, it should not for that reason be peremptorily dismissed, but an opportunity afforded to amend.

APPEAL from the County Court of Solano County.

This was one of eight cases, similar in general character, which were submitted and considered together, and known as the "Solano County Election Cases." The contestant was the same in all. The defendants in the others were as follows:

No. 3,164—E. D. Perkins, declared elected County Treasurer.

No. 3,165—George C. McKinley, declared elected County Recorder.

No. 3,166—Joseph Hoyt, declared elected County Assessor.

No. 3,167—Hazen Hoyt, declared elected Public Administrator.

Argument for Defendant.

No. 3,168 — W. H. Fry, declared elected ———.

No. 3,169 — J. F. Wendell, declared elected District Attorney.

No. 3,170 — Joseph Jacobs, declared elected ———.

The election took place on September 6th, 1871. There were substantially the same judicial proceedings in all the cases; and those last named were all decided in the same way as, and upon the authority of the decision of, this case.

The material facts are stated in the opinion.

Plaintiff appealed from the orders of the County Court dismissing the proceedings.

G. A. Lamont and *Creed Haymond*, for Contestants, contended that the statement of the cause of contest was sufficient in form and substance, citing Hitt. Gen. Laws, 2470 to 2490, and that, therefore, the action of the Court below in dismissing the proceedings was error.

L. B. Miener, for Defendant.

The statement was insufficient in form and substance. (Hitt. Gen. Laws, 2475, 2476, 2477, and 2478.) It did not appear that contestant was an elector of the county at the time of the malconduct alleged; nor was the particular cause or causes of contest alleged with such certainty as would sufficiently advise the defendant of the particular proceedings for which his election was contested.

Again, it appears that the election of defendant was certified to by the Board of Election, canvassed by the Board of Supervisors, and a certificate of election issued to him, without any protest or opposition; nor was there ever any list of alleged illegal votes served upon him, as required by law. (Hitt. Gen. Laws, 2476.)

By the Court, WALLACE, C. J.:

This is an appeal taken from an order of the County Judge of the County of Solano, made at a special term of the Court appointed and held by him to determine a contest made against the right of the respondent Kidder to the office of County Clerk of that county. The order entered was one dismissing the proceedings.

The contest was made under the provisions of section two thousand four hundred and seventy, *et seq.* (Hitt. Gen. Laws), by Minor, who alleges in his written statement filed that he is a qualified elector of the County of Solano.

I. The respondent insists that the statement is insufficient in that, though stating that the contestant is a qualified elector of the county, it fails to state that he *was* such elector when the election contested was held. It is a sufficient answer, however, to this position, to say that the statute applicable to this case nowhere requires the contestant to allege anything further upon that point that he *is* — at the time he files the written statement of contest — a qualified elector of the county. Had it required him to state at what point of time, with reference to the time at which the election was held, he became such elector, it would have then, of course, been incumbent upon him to have done so. But he has strictly complied with the requirement of the statute in his statement on that point.

II. It is next objected that the statement of contest was properly dismissed "for the reason that the particular cause or causes of contest were not alleged with such certainty as would sufficiently advise" the respondent Kidder, "of the particular proceedings" upon which his election was contested.

It is provided by the statute (Sec. 2477) that "no statement of the cause of contest shall be rejected, nor the proceedings thereon dismissed by any Court before which such

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contest may be brought for trial for want of form, if the particular cause or causes of contest shall be alleged with such certainty as will sufficiently advise the defendant of the particular proceeding or cause for which (his) election is contested." Does the written statement here sufficiently advise the defendant of the particular cause for which his election is contested?

It is clear that the certainty of allegation required by the statute is not the highest degree of certainty known in pleading—not that certainty to a certain intent in particular exacted by the rule in averring matter not favored in law—such as an estoppel, alien enemy, etc. Such a degree of technical precision in averment if required would generally defeat the very investigation which it was the main purpose of the statute to invite, and would besides illy comport with the provision already cited expressly dispensing with mere form in pleading in such case as this one. Certainty is required, it is true, but to no greater degree than will suffice to inform the defendant of the particular proceeding or cause upon which the contest is founded. The words used in the statement of contest are to be understood in their ordinary meaning—the purpose being merely to inform the understanding of the opposite party of the substance of the alleged fact or facts relied upon to defeat his claim. We proceed to inquire, therefore, whether, under this rule, the statement presented be substantially sufficient or insufficient upon that point.

It alleges that a general election for State and county officers was held in the County of Solano on the 8th day of September, 1871; that on the first Monday after the election the Board of Supervisors of the county met and canvassed the returns; that at that canvass the returns from each precinct of the county where polls had been opened were before, and were canvassed by, the Board; that A. H. Hawley and the respondent, Kidder, were the only persons voted for at said election as candidates for the office of County Clerk;

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that the returns canvassed by the Board showed that the respondent, Kidder, had received two thousand three hundred and forty-six votes, and Hawley one thousand six hundred and ninety-three votes, for that office; that the returns from the First, Second, and Third Precincts of Vallejo Township showed that Kidder had received one thousand four hundred and eighty-two votes, and Hawley five hundred and seventy-nine votes, and that the count was so made by the Board; that in point of fact, however, there were cast for Kidder in these three precincts only one hundred and thirty-two votes — *i. e.*, sixty-two votes at the First Precinct, fifty at the Second, and twenty at the Third, while there were cast at those three precincts five hundred and seventy-nine legal votes for Hawley — *i. e.*, in the First Precinct, two hundred and forty-nine votes; in the Second, two hundred and seventy-seven; and in the Third, fifty-three votes.

The statement further sets forth that in the entire county Kidder received only nine hundred and ninety-six votes against one thousand six hundred and ninety-three cast for Hawley for the office of County Clerk, and that Hawley was thereby duly elected, but the Board, upon canvassing the votes, declared Kidder to have been elected to the office.

The statement further sets forth that the Board of Judges in the First Precinct of Vallejo Township counted and included in the returns to the Board of Supervisors "*six hundred and fifty more votes than there were ballots voted or received, or votes cast or given at said election in said precinct;*" that there was the like excess of six hundred and fifty votes in the return from the Second Precinct, and an excess of fifty votes from the Third, and that in the canvass by the Board of Supervisors *these thirteen hundred and fifty votes* — which, it is alleged, were never in fact thrown, and for which

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no ballots were in fact voted or received at the polls — were returned by the Boards of Judges, and were canvassed and counted by the Board of Supervisors *as that many votes in favor of Kidder.*

It is easily to be seen from these averments that the majority which the canvass by the Board of Supervisors awarded to Kidder over Hawley was six hundred and thirty-three votes; whereas had that canvass excluded the one thousand three hundred and fifty votes improperly returned and counted for him from the First, Second, and Third Precincts of Vallejo Township, Hawley must have been declared elected by a majority of six hundred and ninety-seven votes. The particular cause of contest then is that Kidder's asserted majority of six hundred and thirty-three votes is produced by counting for him one thousand three hundred and fifty votes, not one of which were cast in point of fact, and that these fictitious votes purported to have been thrown entirely in Vallejo Township — six hundred and fifty of them at the First Precinct, the like number at the Second, and the number of fifty at the Third. It can hardly be supposed that the respondent, Kidder, was not sufficiently advised, by these alleged facts and figures, of *the particular cause* for which his election was contested. But it is argued that the statement of contest should have detailed the particular means or measures resorted to for the purpose of accomplishing this miscount. Had it undertaken to do so, another and much more serious objection would doubtless have been started — i. e., that it assumed to state the evidence by which the ultimate fact was to be established instead of alleging that fact.

It is clear that the misconduct here charged referred to the returns from these three precincts, which were transmitted to the Board of Canvassers. It is alleged that these returns did not accord with the facts, and that the difference was so great as to alter the general result of the election

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for this office. Those returns consisted of the duplicate poll lists and tallies, and the certificate of the Board of Judges annexed thereto, and transmitted to the Board of Supervisors, stating the number of votes each of these persons had received, and also the file of ballots — which ballots, however, it should be observed, are not required to be counted by the Board of Canvassers, unless upon the opening of the returns some person appear and demand a recount of the vote — in which case the canvass is to include the recount of the ballots also. (Sec. 2455.) There does not appear to have been any such demand for a recount in this instance, and the canvass by the Board of Supervisors was, of course, confined to an inspection of the duplicate poll list, tally, and certificate of the Board of Judges, for these practically constituted the entire return in the absence of a demand for a recount of the ballots. The statement of the contestant, then, when considered by the light of the statute, is that such a return was made — that is, that such a poll list, tally list, and certificate were sent in by the Board of Judges to the Board of Canvassers; that it was made to appear thereby that one thousand three hundred and fifty votes had been received by Kidder more than had in fact been thrown for him, and that number more than there were ballots actually cast or given at those three precincts. It is for this excess, then, in the number of votes counted for him by the Board of Judges in those precincts over the number of votes actually thrown for him there that his election is contested; for, if the excess be shown to have occurred in those precincts, it is clear upon the other allegations contained in the statement as to the general vote for this office in the county at large, that Kidder was not really elected. We are unable to discover in the statement of the grounds of contest a lack of that degree of certainty required by the statute in a proceeding of this nature. It seems to us that to have gone further (as it is claimed the contest

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should have done), and to have stated in detail by what particular agencies, or means this incorrect result was brought about, would have been to have violated the established rule of pleading by entering into the field of the mere evidence to be adduced in the case. It would have been immaterial, and might have been seriously objectionable, to have alleged, for instance, that a mistake was made by the Board of Judges of the first Precinct in adding up the number of votes cast there; or that the tally list returned to the Board of Canvassers had been fraudulently altered by the addition of names of persons as voting, but who had not, in fact, voted there; or that in preparing the certificate annexed to, and made part of, the returns to the Board of Supervisors a particular mistake or designated fraud had intervened. It is obvious that if the contestant is held to this degree, of details of the ground upon which he intends to rely, he may be compelled upon the same rule to go further, and allege even the particular times, places, and persons involved in the several transactions which he intends to show forth in evidence, and the motives, considerations, and purposes actuating the persons so engaged.

“The office of a complaint is to aver the material issuable facts which constitute the cause of action, and not the evidence to prove those facts.” (*Racouillat v. Reni*, 32 Cal. 456, and cases there cited.)

We are of the opinion, therefore, that the statement of grounds of contest filed was sufficient in substance, and that it should not have been dismissed upon the objection of the respondent.

It is the wholesome purpose of the statute to invite inquiry into the conduct of popular elections. Its aim is to secure that fair expression of the popular will in the selection of public officers, without which we can scarcely hope to maintain the integrity of the political system under

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which we live. With this view it has provided the means of contesting the claims of persons asserting themselves to have been chosen to office by the people. It has not authorized every citizen or member of the body politic at large to institute proceedings for that purpose, but has limited the authority in that respect to those who are themselves electors, and it has required the statement of the grounds of contest in every instance to be verified by the oath of the contestant. When such statement is presented by an elector to the tribunal whose duty it is to investigate its merits, it should not be received in a spirit of captiousness, nor put aside upon mere technical objections designed to defeat the very search after truth which the statute intended to invite.

The investigation proposed is one in which the public at large are deeply concerned. It necessarily involves a question of broader import than the mere individual claim of a designated person to enjoy the honors and emoluments of the particular office brought directly in contest. The inquiry must be as to whether or not the popular will in the selection of officers to administer the public affairs has been, in a given instance, or is about to be, defeated or thwarted by mistake happened or fraud concocted. It is, therefore, not an ordinary adversary proceeding; for, as against this high public interest concerned, there can be no recognized adversary.

Even, therefore, if the statement of contest, as filed in the first instance, lack the clearness and distinctness of allegation always desirable in judicial proceedings, it should not for that reason be peremptorily dismissed; but an opportunity to amend it should be afforded, and by this means the controverted points may be developed for determination, and the contest disposed of on its merits, if it have any. It is hardly necessary to add that in such cases, too, it may become the duty of the Court, in the progress of the inves-

Points decided.

tigation, to protect the respondent from suffering a surprise; and should the line of proof adduced against him turn out to be one which he might not reasonably have anticipated or foreseen, and of which he is, therefore, unprepared, a reasonable opportunity should be always afforded him to meet the case on the merits. The public interest imperatively require that the ultimate determination of the contest should in every instance, if possible, reach the very right of the case.

Judgment reversed, and cause remanded for further proceedings.

Mr. Justice RHODES did not participate in the foregoing decision.

[No. 8,076.]**GERMAIN SERVANTI v. A. LUSK AND P. BERGER.**

PERSONAL PROPERTY EXEMPT FROM EXECUTION.—Personal property which is exempt from forced sale on execution is none the less exempt because the judgment debtor owns an undivided interest in it in common with a stranger to the judgment.

VIOLATION OF DUTY BY SHERIFF.—Where a Sheriff, on ascertaining that property which has been attached is exempt from execution, refuses to release it, without an undertaking, he exceeds his authority and violates his duty.

UNDERTAKING VOID FOR WANT OF CONSIDERATION.—An undertaking exacted by a Sheriff before releasing property which he has ascertained to be exempt from execution, is void for want of consideration.

UNDERTAKING ILLEGALLY EXACTED BY SHERIFF.—When a Sheriff has attached personal property, a portion of which is exempt from execution, and refuses to release any of the property until an undertaking is given him, the undertaking is void for having been illegally exacted by the Sheriff under color of his office.

PRESUMED FINDING OF FACTS.—All facts within the issues, not expressly found and not inconsistent with the other findings, are presumed to have been found in accordance with the judgment.

APPEAL from the District Court of the Twelfth Judicial District, City and County of San Francisco.

Argument for Respondents.

On the 16th of March, 1869, the plaintiff commenced an action against F. Crochet upon a demand for five hundred and sixty dollars and sixty-seven cents, and procured an attachment which was placed in the Sheriff's hands, who thereupon attached two horses, a set of double harness, and a double wagon, and a leasehold interest in a small tract of land. Crochet claimed the horses, harness, and wagon as exempt from execution, and demanded a return of the same. The Sheriff refused to return the same unless an undertaking was given. Crochet at the time owned an undivided one half of the horses, wagon, and harness in common with another person, a stranger to the execution, and the same were used in carrying vegetables to market from the land. Crochet, in order to obtain possession of the horses, wagon, and harness, gave the required undertaking and the Sheriff delivered them up to him. The plaintiff afterwards recovered judgment against Crochet, and an execution on the judgment having been returned by the Sheriff *nulla bona*, this action was commenced on the undertaking which had been signed by Lusk and Berger. The Court below rendered judgment for the defendants and the plaintiff appealed.

E. D. Sawyer and W. C. Burnett, for Appellant.

Bartlett & Bergin, for Respondents.

That duress of goods is a good plea to a bond given to procure the release thereof under hard and pressing circumstances, we refer the Court to the elaborate and well considered case of *Collins v. Westbury*, 2 Bay's Rep. 211; also, *Crawford v. Cota*, 22 Georgia, 594. That a bond obtained under color of office is absolutely void, and of no avail either against principal or sureties, we refer to the following cases: *The United States v. Tingey*, 5 Peters, 128, 129; *United States v. Pennington*, 1 Peters C. C. R. 113. That a bond

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taken by an officer without authority of law is void. (*Benedict v. Bray*, 2 Cal. 251; *McQueen v. The Ship Russell*, 1 Cal. 165; *Homan v. Brinkerhoff*, 1 Denio, 184.)

An action cannot be maintained on a bond given to obtain the liberation of property illegally taken by a Sheriff. (*Homan v. Brinkerhoff*, 1 Denio, 184; *McQueen v. The Ship Russell*, 1 Cal. 165.) In *Perry v. Hensley*, 14 B. Monroe, Ky. 474, it was held that the Sheriff, having made a levy on property exempt from execution, the execution of a bond to him for its release was not a recognition of the right to levy, nor a waiver of the illegality thereof, and that the sureties on such void instrument were entitled to judgment in their favor.

If any part of the consideration is illegal the whole consideration is void, etc. (1 *Parsons on Contracts*, 380, 1st ed. 1853; *Burt v. Place*, 6 Cow. 431; *Homan v. Brinkerhoff*, 1 Denio, 185; *Pennington v. Townsend*, 7 Wend. 279.)

By the Court, CROCKETT, J.:

The wagon, horses, and harness seized under the plaintiff's attachment, were exempt from execution, and were none the less so because the defendant in the attachment owned them, and used them in common with a stranger to the action. The Sheriff violated his duty in refusing to release them from the attachment on the demand of the defendant therein, after being informed and having ascertained that they were exempt from execution. In exacting the undertaking sued upon as a condition on which he would release the property from the attachment, he exceeded his authority and violated his duty. So far as the undertaking was founded upon the release of the wagon, horses, and harness, it was without consideration and void, inasmuch as it was the duty of the Sheriff to release them without an undertaking. But it is said that a leasehold

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interest of the defendant in the attachment in a parcel of land was also attached, and that this also was released on receiving the undertaking, and it is claimed that this was a sufficient consideration to support it.

It is conceded, however, that a portion of the consideration for the undertaking was the release of the wagon, horses, and harness, and the Sheriff having exacted the undertaking as a condition on which he would release any of the property, we must presume, in support of the judgment, that the undertaking was exacted by the Sheriff under color of his office, and in violation of law, before he would consent to release the wagon, horses and harness. This fact was distinctly averred in the answer, and an issue tendered upon it, and though there is no distinct finding on this point, it is well settled in this Court that all facts within the issues not expressly found, and not inconsistent with the other findings, are presumed to have been found in accordance with the judgment. Assuming the implied findings on this point to have been in accordance with the averments of the answer, it would appear that the Sheriff, with the consent and approval of the plaintiff, illegally and fraudulently exacted the undertaking, under color of his office, as a condition upon which he would release the wagon, horses, and harness, well knowing that they were not subject to execution. If these be the facts, as we must assume they were, the undertaking is void.

Judgment affirmed.

Mr. Chief Justice SPRAGUE and Mr. Justice WALLACE did not participate in this decision.

Statement of Facts.

[No. 2,602.]

**EBEN JOHNSON v. J. W. SIMONTON, G. K. FITCH,
AND L. PICKERING.**

"SWILL-MILK ORDINANCE" OF SAN FRANCISCO.—CONSTITUTIONALITY OF HEALTH REGULATIONS.—The statute of April 25th, 1868, conferring authority upon the Supervisors of San Francisco "to make all regulations which may be necessary or expedient for the preservation of the public health" (Stats. 1868, p. 540), was within the constitutional power of the Legislature to enact; and under it the Supervisors had authority to enact the ordinance (No. 730) against feeding cows on still slops, and vending the milk of cows so fed.

ALLEGED LIBEL ON VENDOR OF "SWILL MILK"—QUESTION OF WHOLESOMENESS OF SUCH MILK.—In an action of libel for charging a person with selling "swill milk" and thereby poisoning the people of San Francisco, where it appeared that the alleged libels were only in respect of the unlawful business carried on by plaintiff, in violation of a city ordinance against the vending of the milk of cows fed on still slops, and defendant justified under such ordinance, and there was judgment for defendant: *Held*, on appeal from the judgment, that the scientific correctness of the determination by the Supervisors of the unwholesomeness of such milk was not open to inquiry in the Supreme Court.

PENALTY FOR ACT AMOUNTS TO PROHIBITION OF ACT.—A city ordinance, duly authorized, imposing a penalty for feeding still slops to cows, and also for vending the milk of cows so fed, amounts to an authoritative prohibition in both respects; and the prohibited act becomes thereby unlawful.

NO LIBEL IN TRULY CHARGING CARRYING ON OF UNLAWFUL BUSINESS.—Where an alleged libel is only in respect to an unlawful business carried on by plaintiff, the action cannot be maintained. The illegality of the business is an answer to the complaint.

APPEAL from the District Court of the Fifteenth Judicial District, City and County of San Francisco.

The facts are stated in the opinion; but it may be added that when the defendants offered Ordinance No. 730 in evidence, their counsel stated that it was offered, not in mitigation of damages, but as a bar to the plaintiff's right to recover in the action. Plaintiff objected, on the grounds that it was irrelevant and incompetent, immaterial, and no justification of the publications; that the ordinance was illegal and void for want of authority in the Supervisors to

Argument for Appellant.

pass it; and that, if admissible at all, it was only admissible in mitigation of damages, and not in bar of the action.

There having been judgment for defendants, the plaintiff appealed therefrom, and assigned as errors the admission of the ordinance in evidence as a bar to the action, and alleged error in rendering judgment for defendants for costs.

George W. Tyler, for Appellant.

If the Supervisors of San Francisco had authority to pass Order 730, a violation of it by plaintiff subjected him to the penalty provided, but was no justification of the libels. (*Rex v. Robinson*, 2 Burr. 800; *People v. Stevens*, 13 Wend. 341; *Brown v. Buffalo & S. L. R. R.*, 22 Smith, 191; *Behan v. People*, 17 N. Y. 516.)

But the Legislature would have no authority to pass an Act to prohibit an individual from feeding his stock upon any particular kind of food. It would be an unwarrantable interference with the liberty of the citizen. If the Legislature can prohibit individuals from feeding their animals with one kind of food, it may another; and they may go so far as to prescribe what kinds of food shall be fed, and in what quantity, which, we claim, would be an unwarrantable interference on the part of the Legislature.

There is nothing in the chemical composition of distillers' wash that would have a tendency to produce diseased milk.

Again, even though the Legislature had power to pass such a law, it did not delegate authority to do so upon the Supervisors of San Francisco; and without such delegation of power the Supervisors certainly could not exercise it. If any such delegation was made, it must have been by the Consolidation Act, which is a private statute, and not being pleaded, no notice of it can be taken.

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Barnes & Bowie, for Respondents.

The Supervisors had power to pass the order. (Stats. 1863, p. 540; *Ex Parte Andrews*, 18 Cal. 678; *Cohen v. Wright*, 22 Cal. 321; *Jackson v. Shawl*, 29 Cal. 271; *Ex Parte Shrader*, 33 Cal. 280.)

It was unnecessary to plead or offer the statute, for the reason that the Court took judicial notice of it. (*Pierce v. Kimball*, 9 Greenl. 54; *Bismon v. Tugnot*, 5 Sandf. 154; *Ex Parte Shrader*, 33 Cal. 280.)

The order having imposed a penalty upon any one who should feed cows on still slops, such feeding became unlawful, though not in terms declared illegal. (*Griffith v. Wells*, 8 Denio, 226; *Jackson v. Shawl*, 29 Cal. 272.)

The plaintiff, having been engaged in an illegal business, cannot recover damages for a libel in reference to such business. (Towns. Libel & SL 197; 1 Hilliard, Torts, 278; *Manning v. Clement*, 7 Bing. 368; *Hunt v. Bell*, 7 Moore, 212; *Spall v. Massey*, 2 Stark, 559; *Foulger v. Newcomb*, Law Rep. 2 Ex. 330; *Yrisarri v. Clement*, 2 Car & P. 538; 3 Bing. 432; 2 Bos. & P. 284; 28 N. Y. 332; 9 Paige, 586.)

By the Court, WALLACE, C. J.:

This was an action brought against the defendants, proprietors and publishers of the *Daily Evening Bulletin*, a newspaper published in the City and County of San Francisco, to recover damages for the publication in said newspaper of two alleged libels upon the plaintiff. The plaintiff alleges that at the time of the publishing of the libels complained of he was engaged in the business of keeping cows, near Black Point, in that city and county, and feeding them upon hay and the slops of a distillery, and selling the milk of these cows for human food.

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The alleged libels complained of (omitting the innuendoes) are respectively as follows:

“ A week ago officer Stone was detailed by Chief Burke to watch the Black Point milk ranches. He found on E. Johnson's ranch about one hundred and twenty cows feeding on a thin, sour slop, coming by flumes from the distillery tank. The men in the shed denied that they were feeding swill, and said his cows were fed on hay, etc. By the advice of Prosecuting Attorney Louderback a close watch was kept on the place all the week, and yesterday the officer entered the shed and found the cows snorting like hogs, and their heads in troughs filled with thick, sour swill. The men in charge of the place, James Clark and M. T. Chase, no longer denied that they were feeding on swill, but said it was by Mr. Johnson's orders, and that he expected to be arrested, and that if they came after him he would give himself up. Warrants have been taken out by Mr. Louderback against E. Johnson and his two employes, and are now in officer Stone's hands. In a few days, therefore, we shall see whether a practice that is as deadly as the assassin's steel or lead to the infants who suffer from it, can be carried on with impunity.

“ For some time past the *Bulletin* and other journals of this city have endeavored to warn the people of the danger incurred by using milk furnished by cows fed upon distillery refuse. Full grown persons can stand a certain amount of poison mixed with their food for a time, but there is little doubt that deleterious compounds, if steadily used, in the end will break down the strongest constitutions and shorten life many years. In cities individuals are liable to be deceived in the purchase of food, and it is sometimes the case, even in exercising the utmost care, that unhealthy animals will be slaughtered and offered for sale. Men may in good faith vend an article injurious to health, but all ad-

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mit the necessity of severe punishment in case of an attempt to palm upon the community a commodity known to be diseased. Should cattle be slaughtered and habitually sold in our markets, known to the vendor to have been diseased previous to being killed, the entire community would demand the punishment of the offenders. Tampering with life in the way suggested would not be tolerated, yet we permit the sale of milk, which is quite as dangerous.

"In San Francisco it has been shown that the practice has been introduced of feeding cows from the refuse of distilleries, and that this refuse is not only fed in the neighborhood of the city, but is carted into the country and fed to cows whose milk is brought here and sold. This milk the community should know is unfit to be used. It in truth contains a poisonous quality. It will destroy life, if given steadily to children for much length of time, and there is little doubt that it undermines the health of those who habitually use it.

"Dr. Rowell, in a lecture at Dashaway Hall, gave it as his opinion that one death per day was caused by the use of this milk alone.

"Medical authority agrees that milk produced by cows fed upon the slops of distilleries is most injurious, and does destroy life.

"Neither grown persons nor children can use it for much length of time without the most pernicious results.

"There is no dispute as to the properties of milk obtained from such a source.

"There is danger in its use. Even animals are killed by it when fed steadily to them.

"The Board of Supervisors, knowing its deleterious qualities, have passed an ordinance forbidding the feeding of cows with distillery refuse, and the vending of milk produced elsewhere by the feeding of such refuse.

"There has been sufficient notice given to stop a traffic which strikes at the health and lives of our citizens. There

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is no excuse for men who send such milk to this market — ignorance can no longer be pleaded in extenuation of a crime. Cows are fed upon the poisonous compound because it costs little, and money can be made from the traffic.

“Every man arrested hereafter, who may be caught in feeding this article to animals whose milk is sought to be sold in this city, should be punished to the utmost extent of the law; and it should be the business of the Health Officer, or some other competent person, to test milk brought to market for sale, and every person who vends diseased milk should be prosecuted.

“It would be criminal to trifle with a subject which is so important to the public. No man has a right to bring an article to market injurious to the health of our citizens, and which destroys, according to accepted testimony, one person a day. Not another quart of poisonous milk should be permitted to be sold in San Francisco. Will those whose duty it is see that no more lives be sacrificed to the lust of gain which has prompted dealing in milk that destroys human life?”

The defendants in their answer, admitted the publication alleged, but denied that the articles were published with the intent to injure the plaintiff in his business or good name, or that the articles published were defamatory or malicious, and alleged that they contained a fair and true statement of facts, which were of public notoriety, and that the facts stated in these articles, with reference to the deleterious character of cows so fed, were true. They also pleaded that the business of the plaintiff, in vending the milk of cows fed upon still slops, was illegal and in violation of a certain order of the Board of Supervisors of said city and county, being Order No. 730, entitled an order “to prohibit the feeding of milch cows on still slops, and the sale of milk from cows fed on still slops, and from sick or diseased cows,” approved September 18th, 1866.

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At the trial, it being admitted that the articles published were published of and concerning the plaintiff only in respect of his business of feeding cows upon still slops and vending their milk, and that he had sustained damage in respect of the profits of that business in a named sum, the plaintiff rested.

The defendants then offered in evidence said Order No. 730, which is as follows:

"ORDER No. 730.

"To Prohibit the Feeding of Milch Cows on Still Slops, and the Sale of Milk from Cows Fed on Still Slops, and from Sick or Diseased Cows. Approved September 18th, 1866.

The People of the City and County of San Francisco do ordain as follows:

"Section 1. No person shall feed, or cause to be fed, to any milch cow, any still slops, or other food calculated to render the milk of such cow unwholesome or unsuitable for human food.

"Sec. 2. No person shall sell, deliver, supply, or furnish to any person any milk from any cow fed, in whole or in part, upon still slops or other food calculated to render the milk of such cows unwholesome or unsuitable for human food; and no person shall sell, deliver, or supply to any person any milk from any sick or diseased cow.

"Sec. 3. Any person who shall violate any of the provisions of this order shall be deemed guilty of misdemeanor, and on conviction thereof shall be punished by a fine of not less than twenty-five dollars nor more than five hundred dollars, or by imprisonment in the County Jail not less than ten nor more than one hundred days."

This ordinance was offered for the purpose of showing that the business of vending the milk of cows fed on still

slops, in which the plaintiff was engaged, was an unlawful business or pursuit, and as constituting a bar to the action. The plaintiff objected to the evidence upon several grounds, which will be noticed hereafter, but the objections were overruled and the ordinance admitted in evidence. Judgment was thereupon rendered in favor of the defendants, from which judgment this appeal is taken.

1. It is objected that the ordinance was one beyond the authority of the Board to enact. The statute of April 25th, 1863 (p. 540), confers authority upon the Board "to make all regulations which may be necessary or expedient for the preservation of the public health," etc.; and upon the authority of *Ex Parte Shrader*, 33 Cal. 279, and upon principle as well, we think, that statute to be one within the constitutional power of the Legislature to enact.

If it indeed be a fact that the milk of cows, fed in whole or in part upon still slops, is unwholesome as human food, there can be no doubt of either the authority or the duty of the Board to enact the ordinance in question, and the scientific correctness of the determination by the Board of the matter of fact involved is not open to inquiry here.

2. The ordinance imposing a penalty for the feeding of the slops to cows, as well as for vending the milk of cows so fed, amounted to an authoritative prohibition in both respects. (*Jackson v. Shawl*, 29 Cal. 267.) Besides the ordinance here contains express words of prohibition, and the prohibited acts became thereby unlawful acts.

3. And it thus appearing that the alleged libels were only in respect of an unlawful business carried on by the plaintiff, it results that the action cannot be maintained, "for I think (said Best, Ch. J.) that where a man complains of a libel written respecting an illegal transaction in which he is engaged, the illegality of that transaction is an answer to

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his complaints." (8 Bing. 440; see, also, Hilliard on Torts, 278; Townsend on Libel and Slander, 197-8, and cases there cited.)

There is nothing in the other points.

The judgment must be affirmed, and it is so ordered.

Mr. Justice NILES did not participate in the foregoing decision.

[No. 2,984.]

CHARLES GRIMM v. WILLIAM CURLEY, DANIEL MEIKLEHAUGH, ELIZABETH MEIKLEHAUGH, JOHN NICKERSON, AND ELIZA ANN LYONS.

ADVERSE POSSESSION OF LAND OCCUPIED BY MISTAKE.—Where a grantee in taking possession of a lot in San Francisco under his deed, by mistake and in good faith entered into possession of a strip of land adjoining his lot, but not included within its boundaries, and remained in continuous, open, notorious, and adverse possession, claiming to hold adversely to all persons whomsoever: *Held*, that such possession comes fully within the definition of an adverse possession which will set the Statute of Limitations in motion.

LIMITATION TO RECOVER UNDER ALCALDE GRANT.—An adverse possession for five years subsequent to the passage of the Act of April 18th, 1868, amending the Statute of Limitations, will bar a cause of action under an Alcalde grant in San Francisco.

APPEAL from the District Court of the Fifteenth Judicial District, City and County of San Francisco.

The plaintiff deraigned title under a sale by the executors of William A. Woodruff, the original grantee, made by virtue of the following language in Woodruff's will: "It is my will that my executors shall, as soon after my death as they shall deem prudent, for the best interest of my estate, convert the same, real, personal, and mixed, of which I may die seized or possessed, into money."

The sale was made without having first obtained an order

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of the Probate Court. The Court subsequently confirmed it. The defendant had judgment, and the plaintiff appealed.

The other facts are stated in the opinion.

George & Loughborough, for Appellant.

The land in suit is part of lot one thousand four hundred and two, and the defendant entered under deeds purporting to convey specific portions of the adjoining lot, number one thousand three hundred and eighty-one. They never intended to take, and they never claimed to own any land not included in their respective deeds. If they held any portion of the plaintiff's land, their possession originated in and was continued under a mistake as to the true boundary line. Their possession was not hostile until after the discovery of the mistake, and this happened less than five years before the commencement of this action. They, therefore, failed to prove an adverse possession for five years. (*Sharp v. Daugney*, 33 Cal. 505; *Figg v. Mayo*, 39 Cal. 262; *McCracken v. City of San Francisco*, 16 Cal. 636; *Howard v. Reedy*, 29 Georgia R. 152; *Brown v. Cockerill*, 33 Ala. 43; *Gilchrist v. McLaughlin*, 7 Iredell, N. C. R. 310; *Brown v. Gay*, 3 Greenleaf, Me. 118.)

John M. Burnett and *M. G. Cobb*, for Respondents.

Adverse possession is sufficient if it excludes all title in the person against whom it is set up. (*Wicklowl v. Lane*, 37 Barb. 244, and authorities cited.) Defendants certainly excluded all title in plaintiff's grantors when they built on and improved the property in dispute.

The statute runs where parties claim up to a given line and occupy accordingly. (*Burdell v. Burdell*, 11 Mass. 297; *Baldwin v. Brown*, 16 N. Y. 359; *Reed v. Farr*, 35 N. Y. 113; *Pierson v. Mosher*, 30 Barb. 81; *Sneed v. Osborn*, 25 Cal. 619.)

If a grantee in a deed, in taking possession thereunder,

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goes by mistake beyond his proper boundaries, and enters upon, and actually occupies and improves, land not included in his deed, claiming and supposing it to be his, this occupation is deemed adverse, within the meaning of the Statute of Limitations, and, if continued for the proper time, will bar an action by the true owner.

In this case, the defendants entered upon, occupied, and improved the land in suit, claiming and supposing it to be theirs. (*Crary v. Goodman*, 22 N. Y. 170; *Enfield v. Day*, 7 N. H. 457; *Hale v. Glidden*, 10 N. H. 397; *McKinney v. Kenney*, 1 A. K. Marshall, 460; *Hunter v. Chrisman*, 6 B. Mon. 463; *Sneed v. Osborn*, 25 Cal. 626; *City of San Jose v. Trimble*, 40 Cal. 536.)

By the Court, CROCKETT, J.:

The land in controversy is a narrow strip, five or six feet wide, included within the fifty-vara lot numbered one thousand four hundred and two, in the City of San Francisco, and fronts on the dividing line between that lot and the fifty-vara lot numbered one thousand three hundred and eighty-one. The plaintiff derails title under a valid Alcalde grant to that portion of lot one thousand four hundred and two which includes the demanded premises, provided the executors of Woodruff, the original grantee, had power, under his will, to sell and convey said premises without having first obtained an order of sale from the Probate Court; but I deem it unnecessary to pass upon that point, inasmuch as I think the defendants made out a valid defense under the Statute of Limitations. The action was commenced in June, 1869, and it appeared in proof that the defendants entered more than ten years before the commencement of the action, under deeds purporting to convey to them severally portions of lot number one thousand three hundred and eighty-one. It further appears that they entered upon the demanded

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premises in good faith, under the belief that said premises were a portion of lot number one thousand three hundred and eighty-one, and were included within their respective deeds.

It also appears that from the time of their entry they have been in the continuous, open, notorious, and adverse possession, claiming to hold and own the same adversely to all persons whomsoever. A possession of this character comes fully within the definition of an adverse possession, as established by an unbroken current of authorities. Nor can there be any doubt that the plaintiff, or his grantors, might, at any time during said adverse holding, within five years from the commencement thereof, have maintained an action to recover the possession. If the cause of action was not before barred, it was clearly so at the expiration of five years from the time, when the Act of April 18th, 1863, amending the Statute of Limitations, took effect. (*City of San Jose v. Trimble*, 41 Cal. 536.)

Judgment affirmed.

Mr. Chief Justice SPRAGUE and Mr. Justice WALLACE did not participate in this decision.

[No. 1,374.]

JOSEPH R. CORWIN v. JOHN BENSLEY, MANSFIELD COMPTON, FREDERICK MASON, AND FRANCIS DUMARTHERAY.

MOTION TO SET ASIDE A JUDGMENT.—If, under the sixty-eighth section of the Practice Act, authorizing the Court to relieve a party, or his legal representatives, from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect, a motion is made, by persons other than the plaintiff, claiming to be his legal representatives, to set aside a judgment, and to be substituted as plaintiffs, the parties making such motion must show such a state of facts as would have supported such an application by the plaintiff in the judgment.

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IDEM.—Possibly the above rule would not apply in case of an executor or administrator, moving in behalf of creditors, to open a judgment collusively or negligently suffered by the testator or intestate, by which the creditors may be damnified.

LIS PENDENS.—The point not decided, whether a *lis pendens* filed by a plaintiff, in an action to try the title to land, in which the defendants set up title in themselves, and ask for affirmative relief, imparts notice to purchasers from such plaintiff pending the action, of the pendency of the same, and the possible result that his title might be adjudged invalid.

PURCHASERS OF LAND PENDING ACTION TO TRY ITS TITLE.—If such a *lis pendens* is filed in an action to try the title to land as imparts notice to purchasers from a party to the action, during its pendency, such purchasers must apply for leave to protect their interest in the suit.

IDEM.—A person buying land without notice of the pendency of an action to try its title, is not affected by a judgment in the action, and, therefore, cannot support a motion to set aside such judgment, under the sixty-eighth section of the Practice Act.

IDEM.—If, during the pendency of an action to try the title to land, the plaintiff sells, and afterwards stipulates to a judgment in favor of the defendants, his grantees cannot support a motion to set aside the judgment, under the sixty-eighth section of the Practice Act.

APPEAL from the District Court of the Third Judicial District, Alameda County.

The facts are stated in the opinion.

James McM. Shafter, for Appellants.

As to the first point, we deny that a stranger to the record can be permitted to interfere with the judgment upon motion merely.

Before judgment a grantee, pending the action, must petition to be allowed to intervene, and hearing must be had upon this petition, and the right to intervene must be first decided. If affirmatively disposed of, then he becomes a party to the controversy. If the right to thus interpose before judgment is only obtained by force of the statute, how can it be claimed, in absence of such statute, that a stranger can interfere in the action after judgment? It seems that this precise point was decided in *Dimack v. Deringer*, 32 Cal. 488. In that case, a landlord whose

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tenant, "by neglect or design," had been defaulted in ejectment was denied the right to move in his own name to set aside the judgment.

We submit, the only way a stranger to a judgment can attack it in his own name, and on his own behalf, is to treat it like any other fact *in pais*, and enforce his claim — not to set it aside, but to have it declared of no effect as to him, on any ground which may be deemed sufficient. If the claim was sound it could only extend to the affirmative relief, and that portion of the judgment declaratory of title should stand.

The statute gives the power to set aside the judgment, upon the ground of the "mistake," etc., of the party to the record. The application can be made in the name of the party on behalf of "his legal representatives;" but the ground of the application must be "personal" to a party. The relief is from a "judgment, order, or other proceeding taken against him through his mistake," etc. The mistake of Corwin's grantees is of no consequence, except as it may explain their delay in making their application. The mistake must have been that of Corwin himself. No such mistake occurred as to him.

That "legal representative," in section sixty-eight of the Practice Act, was not used by the Legislature as synonymous with assignee, or successor in interest, or grantee, is evident from the fact that they have, *ex industria et in pari materia*, used those particular phrases in this Act, wherein the idea was involved, in their required expression. As to parties to actions, up to section sixteen, there is great care to provide for every contingency, so that "the real party" should appear upon the record. In section sixteen the case of transfer before judgment is provided for, and the grantee is called, not the "legal representative" of a party, but "the person to whom a transfer is made." Up to trial the only thing a "successor in interest" can do relative to the

Argument for Respondent

case is to apply to be made a party. (Sec. 55.) In section sixteen, "In case of death or other disability, the Court may allow the action to be continued by or against his representative or successor in interest." These terms are not used as convertible, but are descriptive of different characters. (Bouv. Law Dict. 357.)

W. W. Cope, for Respondent.

The application was addressed to the sound discretion of the Court below, and unless it can be seen that its discretion has been abused the order will not be reversed on the merits. (*Roland v. Kreyenhagen*, 18 Cal. 455; *Woodward v. Backus*, 20 Cal. 187; *Bailey v. Taaffe*, 29 Cal. 422.)

A party entitled to relief must generally ask it in his own name; and there is nothing in the present case to take it out of this rule. There is no doubt that Stevens and Sweeny are the legal representatives of the plaintiff, within the meaning of the statute; and the statute provides that relief may be granted either to a party or his legal representatives. (Prac. Act, Sec. 68.)

The case of *Dimick v. Deringer*, 32 Cal. 488, was decided on a ground peculiar to the class of cases to which it belongs. The motion there was by a landlord to set aside a judgment in ejectment against his tenant; and it was held that the motion was improper, for the reason that the landlord could not be made a party to the proceedings. The tenant was the only person against whom the action could be maintained, and it was necessary that the defense should be conducted in his name. The landlord could not be substituted in his place, and was not in any sense his legal representative. The motion, therefore, was unauthorized by the statute; and the decision proceeded on a substantial and not on any technical ground. There is nothing in the case giving the slightest support to the objection taken here, and there are several cases which, according to our reading, are

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directly opposed to it. (*People v. Lafarge*, 3 Cal. 130, and cases already cited; see, also, notes to Sec. 68 of Prac. Act, by Parker.)

The statute provides that relief may be granted on the ground of surprise, mistake, or excusable neglect; and the proposition is that these grounds must exist with reference to the party to the record.

We see nothing in the statute requiring such a construction, and it would certainly be in conflict with the spirit and meaning of the provision. (*Montgomery v. Ellis*, 6 How. N. Y. 326.)

By the Court, WALLACE, J.:

Corwin brought an action in the District Court of the Twelfth Judicial District against Bensley, Compton, Mason, and Dumartheray, in June, 1864, filing a *lis pendens*, and alleging himself to be the owner in fee and in possession of certain lands, consisting of several blocks, among the rest block one hundred and two, in the Potrero Nuevo survey, in the City and County of San Francisco, to which lands he alleged that the defendants claimed title adversely to him, etc., and prayed that the claim of title on the part of the defendants be adjudged to be invalid, etc.

The defendants, Bensley, Mason, and Dumartheray, filed an answer, in which they denied the possession of Corwin, and set up title in themselves to the lands in controversy, and demanded judgment for their costs — this answer was filed in July, 1864. In November, 1866, the defendants, under a stipulation they had obtained for that purpose from the attorney of Corwin, filed an amended answer, in which they again denied the possession of Corwin, and set up their own title to the premises, alleged that if Corwin was in possession, he was wrongfully so, and concluded with a prayer

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that the defendants be adjudged to be owners, and that they recover possession of the premises, etc. No notice of *lis pendens* seems to have been filed by the defendants. Upon motion of the defendants the cause was, within a few days after the filing of the amended answer, transferred to the District Court of the Third Judicial District, for the County of Alameda, for trial, in which Court, in March, 1868, in pursuance of a stipulation filed, a judgment was rendered in favor of the defendants, adjudging them to be, and to have been, at the commencement of the action, the owners of the premises, and that they recover the possession thereof without damages and costs. In December, 1865, pending the action, Corwin had conveyed block one hundred and two to one Conway, who subsequently, in August, 1867, conveyed it to Stevens and Sweeny, and these last, being in possession, were turned out on the 2d of April, 1868, under process issued upon the judgment of March, 1868. Stevens and Sweeny thereupon moved the Court below for an order setting aside the judgment as to that block, and allowing them to be substituted as plaintiffs in the action in which it had been rendered, with leave to prosecute it for their own benefit. This motion was granted, and the defendants, Mason and others, bring this appeal from the order.

The motion of the respondent was made upon the provisions of section sixty-eight of the Practice Act, authorizing the Court to *relieve a party, or his legal representatives, from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect*. Supposing, for the purposes of the case, that the respondents, who derive their title mediately from Corwin, are his "legal representatives" in the sense intended by the statute—a proposition to which I am by no means prepared to assent—I am of opinion that such legal representatives must be held to show such a state of facts as would have supported a similar application upon

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the behalf of the party whom they claim to represent — unless, possibly, in a case of an executor or administrator moving in behalf of creditors to open a judgment collusively or negligently suffered by the testator, or intestate, by which the creditors may be damnified. Ordinarily the successor in interest of a party to an action, if he would appear, must, in making his appearance, occupy the position of his predecessor, and, as succeeding him in the case, must be bound to the same extent to which the predecessor would have been bound had the application been made in his behalf. It is unnecessary to determine in this case the effect of the *lis pendens* filed by Corwin — if it is to be considered as imparting notice to his grantees of the pendency of the action he had brought, and of the possible result that his title might be adjudged to be invalid in that action, it would have been the duty of the respondents, in the exercise of ordinary prudence, to have applied for leave to protect their interest during the six months and upwards which actually intervened between the delivery to them of the deed under which they claim, and the entry of the judgment which they now seek to vacate. If, on the other hand, they are to be considered as having purchased without notice of the pendency of the action, it would result that their title, not being affected by the judgment as rendered, they cannot support an application to set it aside, any more than could any other person whose rights were not affected by it. These are considerations, however, which do not arise in the case. I am of opinion that if the vendees of Corwin can be heard at all in such a proceeding as this, in opposition to the judgment, they can be heard only as Corwin himself might have been heard, and that the appellants must be allowed to resist the application upon any ground of which they might have availed themselves had it been made by Corwin. If in such an application the moving party is to be heard upon new grounds of contest arising out of the

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mere conduct of the suit itself, it would be, in effect, the institution of a new suit under the name of a substitution or an intervention into an old one. Such a practice, if permitted, would tend to confuse and seriously embarrass the administration of justice in the Courts, and in my opinion, is not countenanced by the statute referred to. If the respondents have rights in the premises, they can be asserted in an independent action brought for that purpose.

I therefore think that the order should be reversed.

RHODES, J., concurring:

I concur in the judgment, not only on the grounds stated in the foregoing opinion, but also those mentioned in the former opinion in this case.

Mr. Justice CROCKETT dissented.

[The following is the opinion referred to by Mr. Justice RHODES in his concurring opinion. It was delivered by Mr. Justice RHODES at the April Term, 1869, and a rehearing was afterwards granted. Mr. Justice SANDERSON and Mr. Chief Justice SAWYER concurred.—REPORTER]:

The first point of the appellants is fatal to the order setting aside the judgment. Authority for the proceedings, it is claimed, is found in the sixty-eighth section of the Practice Act. The orders therein provided for are such as may be obtained in the usual and regular course of proceedings. They are proceedings in the action, or in the direct line of the judgment, if taken after judgment. No authority is thereby given to any person to intervene and take the proceedings, or the judgment out of the hands of the parties; but there the rule in all actions obtains, that the parties to the action alone are entitled to be heard, and make the motions, and obtain the orders in the cause. The section

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provides that the Court may, "upon such terms as may be just, and upon payment of costs, relieve a party, or his legal representative, from a judgment, or order, or other proceeding, taken against him through his mistake, inadvertence, surprise, or excusable neglect;" and this is relied upon as authorizing persons who have purchased the property in controversy from the plaintiff *pendente lite*, to move, in their own name, to set aside a judgment against the plaintiff. The answer to this position is: the plaintiff is not dead. The "legal representative" mentioned in the section is he who is authorized to take the place of a party in the action, made *vacant* by his death. Assuming that the moving parties had acquired the plaintiff's interest in the premises, the obstacle in the way of their taking any step in the action is the fact that they had not become parties to the action. They could not be substituted for the plaintiff *after judgment* — at least we have never heard of such a case, and no reason occurs to us why a substitution should be allowed at that stage of the action — and until they had become parties to the action, they could not participate in the proceedings.

It is provided by section sixteen that in the case of a transfer of interest, such as is set up in the moving papers, the action may be continued in the name of the original party, or the person to whom the transfer is made may be substituted in the action. In the first case all the proceedings are in the name of the party to the record, but for the benefit of the person in interest, and the latter person, though the proceedings are for his benefit, and though he virtually controls the prosecution or defense of the action, as the case may be, can proceed only in the name of the original party, and he could not refuse his consent to the use of his name for that purpose. Here, however, not only was the action not prosecuted for the benefit of those to whom the title of the plaintiff was transferred, but they did not know, as they allege, of the pendency of the action.

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They might also have intervened in the action had they been apprised of its pendency, and they would have been entitled to be heard as parties, but having failed to intervene during the pendency of the action, are they authorized to intervene after final judgment? This is, in fact, an intervention after final judgment—a proceeding wholly unauthorized by the statute.

If these parties could make the motion, and were entitled to the order granted in this case, then there is no reason why they could not have taken any other step in the action that the plaintiff was authorized to take. Suppose that, instead of this motion, they had moved for a new trial, or had taken an appeal, will it be contended that they could have been heard? We think no one would so assert. If not, then they were not entitled to make this motion. (See *Dimick v. Deringer*, 32 Cal. 488.)

But leaving this question, and coming to the question of merits, it will be seen that the moving parties encounter insuperable obstacles. Judgments bind parties and their privies in representation and estate. The estate in land which is held by the party, against whom the judgment is rendered, and which is affected by the judgment while in his hands, is equally affected and bound, into whosoever hands it thereafter comes. And the law goes one step further, and binds all the estate held by such party at the commencement of the action, which was sold to a third person *pendente lite* with notice of the action. The rule declaring that the *lis pendens* was constructive notice to the purchaser from the *defendant*, and bound the estate in his hands, was borrowed from equity, and, after some changes, was incorporated into the statute. (*Sears v. Hyer*, 1 Paige, 483; *Parks v. Jackson*, 11 Wend. 442; *Stuyvesant v. Hall*, 2 Barb. Ch. 151; 1 Story Eq., Sec. 405; *Bishop of Winchester v. Paine*, 11 Ves. 197.)

Our statute first provided for a notice of *lis pendens* to be

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given by the plaintiff, but in 1862 it was extended to the defendant, when he claimed affirmative relief. (Sec. 27.) The section, also, provides that "from the time of filing only shall the pendency of the action be constructive notice to the purchaser or incumbrancer of the property affected thereby."

The object of the rule in equity, or of that of the statute, was not to restrict the right of alienation of the prevailing party, but to hold the interest of the losing party subservient to the judgment. The party wishing the benefit of the notice must himself give it, and if he is successful he may disregard the alienations of his adversary, made subsequently to the filing of the notice. We do not understand that the defendants filed the notice. Their judgment, therefore, bound only the estate held by the plaintiff at the time of the rendition of the judgment. The inquiry whether the respondent had actual notice is unnecessary, for, by the terms of the statute, the notice filed with the Recorder is the only notice of the pendency of the action that will bind subsequent purchasers or incumbrancers. (*Richardson v. White*, 18 Cal. 102; *Ault v. Gassaway*, id. 205.) The suit not having been prosecuted by the respondents, nor for their benefit, and neither they nor their estate being bound by the judgment, it is impossible to see what right they have to attack it.

Order reversed and remittitur ordered to issue forthwith.

Argument for Appellant.

[No. 2,541.]

**HANS H. BUHNE v. JOSEPH CORBETT, WALTER
OUTLER, AND E. H. PINNEY.**

EJECTMENT—FAILURE TO SHOW POSSESSION IN DEFENDANT GROUND OF NONSUIT.—In an action of ejectment, where defendants in their sworn answer denied being or having been in possession, though in another defense, separately pleaded, they set up that they were in charge of a light-house on the premises as the employes of the United States; and on the trial plaintiff, relying upon the answer to show possession, offered no evidence to show the possession of defendants: *Held*, that a nonsuit for failure to show possession in defendants was correct.

NEITHER OF TWO INCONSISTENT DEFENSES TO BE DISREGARDED.—Though two defenses, separately pleaded under section forty-nine of the Practice Act, may be inconsistent, the plaintiff cannot disregard them, or either of them, on the trial.

SEPARATE DEFENSES MAY BE INCONSISTENT IF ANSWER IS NOT SWORN UNDER OATH.—A separate plea or defense should not contain matters repugnant or inconsistent in themselves; but a defense regarded as an entirety is not to be defeated or disregarded merely because it is inconsistent with some other plea or defense pleaded; and there is no distinction in this respect between verified and unverified pleadings.

APPEAL from the District Court of the Eighth Judicial District, County of Humboldt.

The facts, bearing upon the points decided, are stated in the opinion.

The plaintiff claimed under a location of a school land warrant upon the property and a patent therefor from the State, and appealed from a judgment of nonsuit.

Buck & Stafford and Coffroth & Spaulding, for Appellant.

It is said that we cannot take advantage of an admission in the sworn answer of defendants, without admitting all affirmative matters set up therein in avoidance. We are constrained to deny the truth of the proposition, and consider the reverse of the rule laid down too well established for argument.

That defendants were in possession and claimed a right to

Argument for Respondent.

keep plaintiff out of possession of the premises, and that the answer admits these facts, cannot be questioned, if the English language can be made to say so. The quibble of the defendants is, that the United States, though not a human being nor capable of going on the land in person, is actually in possession by defendants as her servants; that defendants are merely the embodiment of the government. That they were there and that a part of them are there now, keeping plaintiff from taking possession of his property, defendants do not deny. They say, however, that a person in occupation of land is not necessarily in possession; and that ejectment must be brought against the *terre tenant*.

L. D. Latimer, for Respondent.

The plaintiff failed to show possession in the defendants. He relied solely upon what he termed admissions in the answer. I submit that the answer does not admit such possession. But if it be held that it does admit possession, then I say the character of the possession is not such as will authorize the maintenance of the action of ejectment against defendants. It is not disputed that the action of ejectment must be brought against the person in possession; but it does not follow because one is in occupation of land that he is in possession, within the meaning of the term as used in the law of ejectment. A mere servant or employé is not in such possession; his occupation is the possession of his employer. (*Hawkins v. Reichart*, 28 Cal. 537; *Satterlee v. Bliss*, 36 Cal. 514.)

Whatever possession defendants may have is not their possession but that of the United States. And if a judgment should be obtained it would be fruitless — the United States would not be bound by it; and it would, no doubt, be considered her duty, required for the public good, to place

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other keepers in charge should the present ones be removed under a writ of restitution.

By the Court, WALLACE, C. J.

This action was brought to recover the possession of a tract of land situate in the County of Humboldt. The pleadings are verified. The complaint alleges that the plaintiff is the owner in fee of the premises which are described, and that the defendants "on the 2d day of February, 1870, entered into the possession of the demanded premises above described, and have ever since and still do unlawfully withhold the possession thereof from the plaintiff," etc., concluding with the usual prayer for judgment. The answer is as follows:

"Now comes Joseph Corbett, John Doe (Walter Cutler), and Richard Roe (E. H. Pinney), defendants in the above entitled action, and answering the complaint of the plaintiff herein, on their information and belief deny that on the 1st day of February, 1870, or at any other time, the plaintiff was or now is, or ever has been the owner of, or seized in fee, or entitled to the possession of the tract of land described in said complaint, or any part thereof; and deny that on said day, or any other time, the defendants entered into the possession of the same, or any part thereof, or that they ever withheld, or now withhold the possession of the same, or any part thereof from the plaintiff. Further answering, the said defendants aver that from the year A. D. 1848, down to the 23d day of May, A. D. 1867, inclusive, the tract of land described in the plaintiff's complaint, was public land of and belonging to the United States, and that on the day last named, and prior thereto, by orders of the President of the United States, one bearing date of that day and another prior thereto, and in due course of law, the said lands, and the whole thereof, was reserved to the United States for light-

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house purposes, and from thence hitherto have remained, and still do remain so reserved for the purposes aforesaid; and that during all of said time, from the year 1848 hitherto, the United States has been and still is the owner in fee and seized of said land and every part thereof.

“That from the 23d day of May, 1867, hitherto the United States has continuously occupied and possessed said lands for lighthouse purposes aforesaid, and has erected a lighthouse and light, and other improvements thereon, for the protection and safety of ships and other vessels navigating the waters of the Pacific Ocean, at an expense of about one hundred thousand dollars.

“That the said defendants are the keepers of the light and lighthouse aforesaid, employed for that purpose by the said United States at stipulated wages, and that they are, as such keepers, the mere servants and employés of the said United States, subject at any and all times to the orders, directions, and commands of the said United States and certain of the officers thereof, and to be discharged and removed from such service and employment.

“That as such lighthouse keepers, and under and in obedience to the orders, directions, and commands of the said United States and officers, these defendants, as such servants and employés for the year last past, have been and still are in the temporary charge of the light and lighthouse buildings on said land for the sole purpose of keeping the light burning at proper times, and keeping the same said lighthouse building in proper repair, all in performance of and in obedience to the duties of keepers as aforesaid, as the same are regulated and prescribed by the said United States and officers.

“The said defendants further aver that they do not now, nor have they ever claimed or had any interest in said land or improvements, or any part thereof; and that from the time of the reservation aforesaid the United States by and

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through these defendants and other of its servants and employés, has continually been and still is in the sole and exclusive possession and occupation of the said land and improvements, and every part thereof.

"Wherefore the defendants pray that they be hence dismissed, and that they may have judgment against the plaintiff for costs of suit."

At the trial the plaintiff offered no evidence whatever touching the alleged fact of the possession of the defendants, and, on motion of defendants, a judgment of nonsuit was rendered, on the ground "that the plaintiff has not shown the defendants to have been in the possession of the said premises at the commencement of this action, or at any other time;" and from that judgment this appeal is brought.

We are of opinion that the nonsuit was correct upon the pleadings.

The Practice Act (Sec. 49) provides as follows: "The defendant may set forth by answer as many defenses and counterclaims as he may have. They shall each be separately stated, and the several defenses shall refer to the causes of action which they are intended to answer, in a manner by which they may be intelligibly distinguished."

It will be observed that the answer here, in the first defense set forth, distinctly denies "that on said day, or any other time, the defendants entered into the possession of the same, or any part thereof, or that they ever withheld, or now withhold, the possession of the same, or any part thereof, from the plaintiff;" and while it is possible that, under the strict rules applicable to verified answers, an objection might have been made to the sufficiency of this denial in a single particular, none such was, in fact, made below, nor has any been pointed out here.

After this denial the defendants, "further answering," make certain affirmative averments, in the course of which

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they set up that they are in charge of the lighthouse on the premises as the employés of the United States, etc.; and it is upon the effect of these averments in pleading that we understand the plaintiff to claim that he was relieved from the necessity of proving that the defendants were in possession at the time the action was commenced.

1. Assuming that the defenses, as thus pleaded, were inconsistent upon the point of the possession of the defendants, it would not follow that the plaintiff would be at liberty to disregard them, or either of them, at the trial. If he desired to present that question, he should have moved to strike out the one or the other, or applied for an order compelling the defendants to elect as to which particular one of them they would rely upon. (*Klink v. Cohen*, 13 Cal. 623; *Uridias v. Morrill*, 25 Cal. 31.)

2. But even had he by motion presented the question of the supposed inconsistency of the several defenses in the answer, we think that it would not have availed him. A party defendant in pleading may plead as many defenses as he may have. If a plea or defense separately pleaded in an answer contain several matters, these should not be repugnant or inconsistent in themselves. But the plea or defense regarded as an entirety, if it be otherwise sufficient in point of form and substance, is not to be defeated or disregarded merely because it is inconsistent with some other plea or defense pleaded. And there is no distinction in this respect between pleadings verified and pleadings unverified. (*Bell v. Brown*, 22 Cal. 672; *Wilton v. Cleveland*, 30 Cal. 192.)

We are, therefore, of opinion that the judgment must be affirmed, and it is so ordered.

Statement of Facts.

[No. 2,949.]

S. E. ALDEN v. THE COUNTY OF ALAMEDA

ACTION ON JUDGMENT AGAINST COUNTY.— If an action could be maintained in any case on a money judgment against a county, it certainly cannot be without first presenting such a judgment to the Board of Supervisors for allowance.

STATUS OF A MONEY JUDGMENT AGAINST A COUNTY.— The statute relating to Boards of Supervisors, and providing for the disposition of claims against counties (Stats. 1855, p. 51, Sec. 24), contemplates that when a judgment is obtained against a county it shall have the force and effect of an audited demand, in so far that it is no longer open to contestation, and makes it the duty of the Supervisors to allow it as an audited claim, if presented within the proper time.

ENFORCEMENT OF MONEY JUDGMENT AGAINST A COUNTY.— When a money judgment is recovered against a county, no execution can issue on it; and the only remedy is to present it to the Board of Supervisors for allowance as an audited claim within the time prescribed by law (Stats. 1855, p. 51); and if the Board refuse to perform its duty by allowing it as such, it may be compelled to do so by mandamus.

MONEY JUDGMENT AGAINST COUNTY MUST BE PRESENTED.— The language of the statute of March 20th, 1855, providing that no person shall sue a county in any case, or for any demand, without first presenting the claim to the Board of Supervisors (Stats. 1855, p. 51, Sec. 24), is sufficiently comprehensive to include a cause of action or demand founded on a judgment, which is itself but an adjudicated claim against the county.

APPEAL from the District Court of the Third Judicial District, Alameda County.

This was an action commenced on July 9th, 1869, to recover from the County of Alameda the sum of three thousand four hundred and one dollars and eighty-six cents, with interest thereon from June 2d, 1865. The complaint counted on four judgments recovered against the defendant on the last named day, in the County Court of said county, under section fourteen of "An Act concerning roads and highways in the County of Alameda," approved March 24th, 1862. (Stats. 1862, p. 81.) There was an allegation that the judgments had not been reversed, annulled, or set aside, and that no part of them had been paid or satisfied; but

Argument for Respondent.

there was no allegation of any presentation of them, or either of them, to the Board of Supervisors. The defendant demurred, on the ground that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was sustained; and plaintiff declining to amend, judgment was entered for defendant. The plaintiff appealed.

William H. Patterson, for Appellant.

The Court below erred in sustaining the demurrer, and rendering judgment thereon for defendant. The judgments were recovered in the County Court for damages awarded in proceedings under the Road Act of 1862, and were in full force, and unpaid and unsatisfied. The following authorities are relied on as establishing plaintiff's right to maintain his action: Stats. 1862, p. 81, Sec. 14; *Hookers v. Trustees of Village of Rochester*, 1 Wend. 53; *People ex rel. Green v. Common Council of Syracuse*, 20 How. Pr. 491.

The question of how the judgment shall be enforced is not at all involved. Once a judgment has been awarded and rendered in the County Court it may be sued over *ad libitum*, to save the Statute of Limitations, or for any reason, until it shall be paid and discharged.

S. P. Wright, District Attorney, for Respondent.

The County Government is a part of the State Government, and can only be sued in the manner provided by statute; and when judgment has been obtained it can only be satisfied in the same manner as any other lawful claim against the county. The complaint here does not show that the judgments sued on were ever presented to the Board of Supervisors for allowance, and, therefore, the suit cannot be maintained. (*Hitt. Gen. Laws*, 6993; *Sharp v. Contra Costa County*, 34 Cal. 284; *People v. Lake County*, 33 Cal. 487;

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Price v. Sacramento County, 6 Cal. 254; *McCann v. Sierra County*, 7 Cal. 121; *Crandall v. Amador County*, 2 Cal. 72.)

If a judgment against a county be considered as an "audited claim," as intimated in the case of *Sharp v. Contra Costa County*, then plaintiff's remedy is by mandamus, to compel the Auditor to draw his warrant on the Treasurer, the drawing of the warrant being a ministerial duty. (*Harpending v. Haight*, 39 Cal. 189; *Day v. Callow*, 39 Cal. 593; *Lake Merced Water Co. v. Cowles*, 31 Cal. 215; *Napa Valley R. R. Co. v. Napa Co.*, 30 Cal. 435; *People v. Supervisors*, 28 Cal. 430.)

By the Court, CROCKETT, J.:

The only question on this appeal is whether an action can be maintained on a money judgment against a county in this State, there being no averment that the judgment had been presented to the Board of Supervisors for allowance as a claim against the county before the commencement of the action. The judgment itself has the force and effect of an audited claim against the county. It is conclusive evidence that the county owes the money for which the judgment was rendered. The Board of Supervisors has no discretion to exercise in respect to the justice or legality of the demand; nevertheless, the statute appears to contemplate that, after the judgment is obtained, it shall be presented to the Board of Supervisors, to be placed on file amongst the audited demands against the county. By section twenty-four of the Act of March 20th, 1855 (Stats. 1855, p. 51), providing for the organization of Boards of Supervisors in the counties of this State, it is provided that "no person shall sue a county in any case, or for any demand, unless he or she shall first present his or her claim or demand to the Board of Supervisors for allowance, and if they fail or refuse to allow the same, or some part thereof, the party feeling

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aggrieved may sue the county; and if the party suing recover in the action more than said Board allowed, or offered to allow, said Board shall allow the amount of the said judgment and costs as a just claim against the county; but if the party suing shall not recover more than the Board shall have offered to allow him or her, then costs shall be recovered against him or her by the county." In providing that no person shall sue a county in *any case*, or for any demand, without first presenting his claim for allowance, and that after it has been rejected, and he has obtained a judgment therefor, the judgment shall be *allowed* by the Board of Supervisors as an audited claim against the county, the statute evidently contemplates that when the judgment is obtained it shall have the force and effect of an audited demand, in so far that it is no longer open to contestation, and it is made the duty of the Board of Supervisors to *allow* it as an audited claim. If the Board refuses to allow it on presentation within the proper time, it can be compelled by mandamus to perform its duty in this respect. It has no discretion in the premises; and after the judgment is thus allowed, it stands upon precisely the same footing with all other audited demands against the county, and is thenceforth subject to all the conditions and limitations applicable to other audited demands, and payment may be enforced in the same manner, and not otherwise. No execution against the county can issue on the judgment, the only office of which is to establish the demand in so conclusive a manner that it can no longer be contested. It is equally clear that when the status of the claim is thus established the only remedy for enforcing it is to present the judgment to the Board for allowance as an audited claim within the time prescribed by law. No useful end whatever could be subserved by permitting the recovery of a second judgment,

Points decided.

founded on the first; and if it were permissible in any case of this character, it is clear that the action could not be maintained without first presenting the judgment to the Board for allowance. When the statute declares that no person shall sue a county *in any case*, or for any demand, without first presenting the claim to the Board, the language is sufficiently comprehensive to include a cause of action or demand founded on a judgment, which is itself but an adjudicated claim against the county. The provision is founded in wisdom, and was intended to prevent the county from being harrassed by needless and expensive litigation.

Judgment affirmed.

Mr. Chief Justice SPRAGUE did not participate in the foregoing decision.

[No. 2,286.]

H. P. LIVERMORE AND JULIUS CHESTER v. P. A. STINE.

OBJECTION TO AMOUNT OF VERDICT MUST BE PARTICULARLY SPECIFIED.—

On appeal from an order denying a new trial, a point that the verdict is for too small a sum cannot be considered in the Supreme Court, if it be not particularly specified as a ground of objection in the statement.

CONFLICT OF EVIDENCE.—A verdict will not be disturbed as against evidence where there is a substantial conflict of evidence.

OBJECTION TO EVIDENCE OF CONTRACT AS INCOMPETENT SHOULD BE MADE WHEN TESTIMONY OFFERED.—

If a party claiming under a contract, required by the Statute of Frauds to be in writing, be permitted without objection to prove a contract by parol, and a motion be afterwards made to strike out the testimony on the ground that the contract was not in writing, the fact that the evidence is already before the jury, without objection, is a sufficient answer to such motion.

DEFECTIVE INSTRUCTION HELPED OUT BY ANOTHER INSTRUCTION.—Where an instruction given at the request of one party was open to criticism as omitting an important element, but the point in which it was deficient was distinctly enunciated in an instruction given at the request of the other party: *Held*, that the jury had not been misled.

Statement of Facts.

APPEAL from the District Court of the Sixteenth Judicial District, Kern County.

This was an action for five hundred and sixty-nine dollars and sixty-eight cents on promissory notes and book account. The defendant answered, denying any greater indebtedness than sixty-nine dollars and sixty-eight cents in the first count, and in the second setting up a counterclaim for five hundred dollars, for bricks made for plaintiffs, and praying that such amount might be allowed as an offset to plaintiffs' demand.

There was testimony tending to show that the plaintiffs, by their agent, George B. Chester, made a contract with defendant to make fifty thousand bricks for them, and that he made them. After considerable testimony had been heard on the subject of the contract, the defendant, being recalled, testified that the contract was not in writing. Plaintiffs then moved to strike out all the testimony in relation to the contract, on the ground that such contract was invalid, under section thirteen of the Statute of Frauds, because it was not in writing. The motion was denied, and plaintiffs excepted.

The second instruction, asked by the defendant and given by the Court to the jury, was as follows: "If the jury believe from the evidence that defendant agreed with George B. Chester to make fifty thousand bricks for the sum of five hundred dollars, and that George B. Chester was agent of plaintiffs, they will allow the defendant an offset of five hundred dollars."

The Court also gave the following instruction asked by the plaintiffs: "If the jury believe from the evidence that the defendant and George Chester entered into a contract by which the defendant was to make fifty thousand bricks and the plaintiffs were to pay him five hundred dollars therefor, that in order to bind the plaintiffs by such contract then it

Argument for Appellants.

must be shown that the plaintiffs assented thereto or authorized George Chester to make such a contract in order to bind the plaintiffs thereby."

The trial, being before a jury, resulted in a verdict and judgment in favor of plaintiffs for sixty-nine dollars and sixty-eight cents. Plaintiffs moved for a new trial, assigning as error, among other things, that the evidence was insufficient to justify the verdict, and that the same was against law, but not particularly specifying that the amount of their recovery was too small. The motion having been overruled, plaintiffs appealed from the order.

Clark & Carpenter, for Appellants.

The alleged sale of bricks was for five hundred dollars, and not in writing, nor was there any memorandum thereof, or partial payment, or any delivery or acceptance. Under these circumstances the Court below erred in refusing to strike out the testimony given in support of the sale. (Hitt. Dig. 457; *Stevens v. Steward*, 3 Cal. 143; *Malone v. Plato*, 22 Cal. 104; 1 Greenleaf on Ev., Sec. 267; 3 Parsons on Con. 335; 1 Den. 48; 1 Comst. 261; 2 Kent, 666; Smith on Con. 327; 3 Bouv. Ins. 19; 12 Pick. 82; 13 Pick. 183; *Haskell v. McHenry*, 4 Cal. 411.)

The second instruction given for defendant was erroneous for the reason that the right of defendant to his counterclaim did not depend alone upon the facts that George B. Chester made a contract with defendant, and that George B. Chester was the agent of plaintiffs, as indicated by the instruction; but it would have been necessary to show further that in making the contract he was acting as agent and made such contract for the plaintiffs. The form of this instruction is such that the jury, if they found the existence of those two facts set forth in the instruction, were not called upon to, and probably did not, consider the other instructions of

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the Court. (See *Gallagher v. Williamson*, 23 Cal. 334; *Pearson v. Snodgrass*, 5 Cal. 479.)

Coffroth & Spaulding and *J. W. Freeman*, for Respondent.

The first point made by appellants is first made in this Court; we are, therefore, not called upon to pay any attention to it.

The rule that a verdict will not be disturbed as against evidence, when there is a conflict in the evidence, as there is here, was adopted in the first volume of our Reports, in *Gunter v. Sanchez*, 1 Cal. 49, and has been steadily adhered to ever since, inclusive of the last volume.

The contract did not come within the Statute of Frauds. It was simply to make fifty thousand bricks for plaintiffs, and there was nothing provided about a delivery. There was no contract for delivery, nor was the property susceptible of delivery. As soon as the bricks were burned they became unconditionally the property of plaintiffs. The defendant had no further interest in them. The obligations of the contract were concluded.

The instructions given to the jury were correct; by them the jury were allowed to pass upon the question of the contract.

By the Court, WALLACE, C. J.:

This is an appeal from an order denying the motion of the plaintiff for a new trial.

First — The point made that the verdict is for too small a sum of money cannot be considered here, inasmuch as it was not specified in the statement filed in support of the motion with the particularity required by the statute.

Second — The evidence in relation to the subject of the counterclaim was substantially conflicting, and the verdict will, therefore, not be disturbed here.

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Third — The counterclaim does not purport to be a contract for the sale or delivery of chattels; but one for the performance of labor. If it had been otherwise, however, the defendant was permitted, without objection, to prove it by other evidence than that required by the Statute of Frauds, and an objection on that point cannot be made now. It is true that at a subsequent stage of the trial a motion was made to strike out the evidence of the contract, because it was not in writing, which motion was denied by the Court; but the fact that the evidence was already before the jury, without objection, was a sufficient answer to the motion. The supposed incompetency of the evidence appeared on its face, and the objection should have been made when it was offered.

Fourth — The second instruction given at the instance of the defendant is somewhat open to criticism, in the respect that the question of the authority of George B. Chester to enter into the contract was not adverted to in that instruction; but in the first instruction given, upon request of the plaintiffs, the jury were distinctly told "that, in order to bind the plaintiffs by such contract, it must be shown that the plaintiffs assented thereto or authorized George Chester to make such a contract, in order to bind the plaintiffs thereby." In view of this distinct enunciation upon the point the jury could hardly have been misled by the omission occurring in the other instruction.

The order denying new trial is affirmed.

Argument for Appellant.

[No. 2,908.]

E. S. UTTER AND M. E. CALDEN v. TRUMAN F. CHAPMAN.**BREACH OF CONTRACT TO FURNISH FREIGHT—MEASURE OF DAMAGES.—**

Where a contract was made to furnish a steamboat with five hundred tons of freight, at two dollars a ton, and the freight was not furnished: *Held*, that the measure of damages for such breach was not the difference between the freight money and what the boat actually earned during the time it would have taken to perform the contract, but the difference between the net *profits* that would have been made under the contract and the net *profits* which were or might, with reasonable diligence, have been made during such time.

BURDEN OF PROOF TO REDUCE DAMAGES FOR BREACH OF CONTRACT.—In an action for breach of contract to furnish freight to a steamboat, the plaintiff is entitled to recover only the actual loss suffered from the breach; but to show that such loss was less than the profits that would have been made under the contract, the burden of proof is on the defendant.

ELEMENTS OF DAMAGE FOR FAILURE TO DELIVER FREIGHT.—A person who contracts to deliver freight to a steamboat, and fails to do so, is liable in damages for the actual loss thereby sustained by the steamboat; but he does not become a guarantor against any further loss, such as the boat may sustain by reason of fruitless efforts to procure profitable employment.

APPEAL from the District Court of the Fifth Judicial District, County of San Joaquin.

This was an action to recover damages for breach of a contract, by which defendant agreed to furnish plaintiffs, who were owners of the steamboat "Lark" and her barge, with five hundred tons of grain, as freight, to be transported from Paradise City, in Stanislaus County, to Stockton, at two dollars per ton. A former appeal of the same cause will be found reported in 38 Cal. 659. The material facts, as found by the Court below, are stated in the opinion. Defendant appealed.

George A. Nourse, for Appellant.

The Court below treated the case as if defendant had guaranteed plaintiffs a certain amount of profit from running

Argument for Appellant.

their boat and barge a certain time. That is not the contract. Even if defendant had actually chartered plaintiffs' boat and barge for the three weeks, no such rule of damages could be adopted. The rule upon which the judgment of the Court below is based amounts to this: that if one agrees to furnish freight to a carrier, to be transported at a given rate, and fails so to do, and the carrier has a steamboat, on which he could have carried the freight, then the one contracting to furnish freight has that boat on his hands during the time it would have been carrying his freight, and must pay the same freight money as if he had actually had the freight carried for him, less only what such steamboat may happen to earn during such time. This will not do. What the steamboat may actually do in such case, during such time, is only important to reduce, in certain contingencies, the damages assessed under the rules of law.

The true measure of damages, as we understand it, is ordinarily the excess of the price to be paid under a contract for carrying freight over and above the cost of carriage, subject, however, to the qualification laid down in the former appeal in this action, that the freighter must, in case of such breach of contract, get other freight, if he can, and that the price received on such other freight must be deducted from the amount otherwise due as damages. But where, as in this case, there was a market price or ruling rate of freight, the measure of damages would be the excess of the contract price over the market price. (*Hale v. Trout*, 35 Cal. 229.) The market price or ruling rate, at the time defendant's grain was to have been transported, was two dollars and a half per ton, so that plaintiffs, instead of suing defendant for damages, ought to have been grateful to him for preventing them from carrying freight at less than market rates.

Opinion of the Court — CROCKETT, J.

Terry & Carr, for Respondents.

The trial of this case in the Court below was, as we contend, in exact conformity with the opinion of this Court, rendered on the former appeal. After the breach of contract by the defendant, the plaintiffs used every effort to procure employment from others. In order to procure such employment it was necessary to go with their boat to places where freight was, and it was necessary to keep the usual number of hands on the boat, so as to be able to transport such freight as offered, and to incur the reasonable expenditure required for this purpose; and when freight was offered, it was plaintiff's duty to receive and transport it; and the Court below found that the necessary expenses were the same that they would have been in performing the contract.

The true measure of damages was that adopted — the actual loss sustained by plaintiffs by reason of defendant's breach of contract, which is the difference between the actual earnings of plaintiffs' boat for the time required to perform the contract and what it would have earned if defendant had complied with his agreement.

By the Court, CROCKETT, J.:

The only question on this appeal relates to the measure of damages for the breach of a contract between the plaintiffs and defendant, whereby the latter agreed to furnish the former five hundred tons of grain, to be transported as freight, at the rate of two dollars per ton, by way of the river, from Paradise City to Stockton. The plaintiffs were the owners of a steamboat and barge, whereon the grain was intended to be shipped; and they applied to the defendant for the grain in due time, and offered to perform the contract on their part; but the defendant refused to deliver

Opinion of the Court — Crockett, J.

any of the grain, except eight tons. The Court finds that after their failure to obtain the grain, the plaintiffs employed their boat and barge in navigating the San Joaquin River and its tributaries during the time which would have been required to perform the contract with the defendant, and during that interval used all reasonable effort to procure employment for said boat and barge, but succeeded in obtaining freights to the value of only three hundred and forty-one dollars and eighty-four cents; and that, whilst so endeavoring to obtain freights, the expenses of the boat and barge were the same that they would have been in performing the contract with the defendant, if it had been performed.

When this case was here on a former appeal we endeavored to lay down a proper rule for the measure of damages on the new trial, which was ordered. On the second trial the Court below decided the measure of damages to be the contract price, to wit: one thousand dollars, less the earnings of the boat and barge, during the time which would have been required to perform the contract. Deducting the three hundred and forty-one dollars and eighty-four cents, earned by the boat and barge, from the one thousand dollars, it entered a judgment for the plaintiff for the remainder.

On the former appeal we held that the proper measure of damages was the difference between the contract price and what it would have cost the plaintiffs to perform the contract, less what the boat and barge actually earned, or might have earned, with reasonable diligence, during the time which would have been consumed in performing the contract. The Court finds that it would have required three weeks time to perform the contract, and that during that period the expenses of the boat and barge would have been forty dollars per day when running, and twenty-eight dollars per day when lying at the dock, taking in or discharging

Opinion of the Court — Crockett, J.

cargo. It is clear, therefore, if the contract had been performed that the plaintiffs' profits would have been the difference between the contract price of one thousand dollars and the expense of forty dollars per day when running, and twenty-eight dollars per day when lying at the dock. The findings further show if the contract had been performed the boat and barge, while so employed, would have been running about three fourths of the time, and would have been lying at the dock, whilst taking in and discharging cargo, about one fourth of the time. Calculating the cost of performing the contract at this rate, it would have amounted to seven hundred and seventy-seven dollars, leaving as profit, on a full performance of the contract, the sum of two hundred and twenty-three dollars. But, as we held on the former appeal, there must be deducted from this sum whatever amount the boat and barge actually earned, or might, with reasonable diligence, have earned, during the time required to perform the contract. It appears from the findings that they, in fact, earned three hundred and forty-one dollars and eighty-four cents; but in earning this sum, and in a reasonable effort to earn other sums (which efforts, as we have heretofore decided, it was their duty to make), the plaintiffs have incurred an expense of seven hundred and seventy-seven dollars. Deducting the sum earned from the expenses, and it leaves an excess of expenses over earnings of four hundred and thirty-five dollars and sixteen cents. The only serious question in the case is whether the defendant should be charged with this excess of expenses over the earnings of the boat and barge. If this question be answered in the affirmative, the judgment ought to have been for this sum, and for two hundred and twenty-three dollars, the profit which the plaintiffs would have made by performing the contract, making in the aggregate the sum of six hundred and fifty-eight dollars and sixteen cents. On the other hand, if the defendant is not liable

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for these expenses, the judgment should have been for the profits only (two hundred and twenty-three dollars). The correct interpretation of our decision on the former appeal is that the plaintiffs are entitled to recover only the actual loss which they suffered from the breach of the contract; and if it appeared that during the space of time which would have been requisite for the performance of the contract by them they had, or by the use of reasonable diligence might have realized a profit from the use of the boat and barge equal to or exceeding the profit which they would have made by performing the contract, in that event they would have suffered no loss, and would have been entitled to nominal damages only. The burden of proof was on the defendant to show that the boat and barge had, or might have realized a profit, and if the net earnings did not equal or exceed the profit which the plaintiffs would have made by performing the contract, then such net earnings would reduce, *pro tanto*, the amount of plaintiffs' loss.

But we did not decide, nor intend to intimate, that the defendant stood in the relation of a guarantor, incurring the hazard of whatever loss the plaintiffs might sustain by reason of a fruitless effort to obtain a profitable employment for the boat and barge. It was incumbent on the defendant to show, if he could, that a profit had been or might have been realized by the boat and barge; and, failing in this, the only result would have been that the plaintiffs would have recovered the difference between the contract price and the cost of performing the contract. But if a person should charter a ship for a number of months, or for a long voyage, and should, immediately thereafter, repudiate the contract and refuse to perform it, no one, I apprehend, would seriously contend that the owner could send the vessel on a long and expensive voyage, in a fruitless effort to obtain profitable employment for her during the term of the charter party, without the consent of the charterer, and thereby fasten

Points decided.

upon the latter the whole expense of the voyage. In such a case the proper measure of damages would be the difference between the contract price and the cost which the owner would have incurred if the contract had been performed, subject only to such a reduction as the charterer would have been entitled to on his proving affirmatively that the ship had, or might by a reasonable effort have earned a *profit* during the term of the charter party. I am, therefore, of opinion, that the defendant is not chargeable with the loss incurred by the plaintiffs whilst seeking for employment for the boat and barge, and that that the plaintiffs are entitled to recover only the profits they would have realized by performing the contract, viz: the sum of two hundred and twenty-three dollars in gold coin.

Judgment reversed and cause remanded, with an order to the Court below to enter judgment for the plaintiffs for two hundred and twenty-three dollars in United States gold coin.

Mr. Justice WALLACE dissented.

Mr. Chief Justice SPRAGUE did not participate in the foregoing decision.

[No. 2,251.]

FRANCISCO SABICHI v. MEREJILDO AGUILAR,
JOSE LA SUZ VALENZUELA, VICENTE RUIZ,
AND GEORGE LEHMAN.

STATUTE OF LIMITATIONS UNDER ACT OF 1855.—The final confirmation of a Mexican grant, so as to set the Statute of Limitations in motion, under the Act of 1855, passed by the Legislature of California, was the issuance of a patent to the grantee.

NOTE.—Under the Act of 1863, amending the Statute of Limitations of 1855 (Laws 1863, p. 827), the final confirmation which set the Statute of Limitations in motion was the final confirmation of a survey by the Courts of the United States provided for in the Act of Congress of June 14th, 1860, or the issuance of a patent.

Argument for Appellant.

Issue.—The approval of a survey of a Mexican grant, by the Surveyor General alone, was not final, so as to set the Statute of Limitations in motion.

APPEAL from the District Court of the Seventeenth Judicial District, County of Los Angeles.

This was an action of ejectment, commenced April 18th, 1868, for a lot in the City of Los Angeles. Defendants answered, setting up the Statute of Limitations and adverse possession thereunder since 1856. The cause was tried, without a jury, in September, 1869, and the Court below found as facts the holding by the plaintiff of the pueblo title, and the various circumstances relating to its confirmation, survey, and approval of survey, as set forth in the opinion of Justice WALLACE, and concluded as follows:

“8. That about the month of July, 1867, an application was made on the part of the authorities of the City of Los Angeles to J. Wilson, United States Commissioner of the General Land Office, at Washington, for the issuance of a patent for said city lands, to which said application he replied: ‘That the Statute does not provide for the issuing of patents for this class of claims, and without authority of law it cannot of course be done. The confirmation under the statute, together with the plat of survey, constitute the evidence of title.’ And he, therefore, declined to issue any patent, and no further proceedings have been taken since.”

As a conclusion of law the Court found that plaintiff's cause of action was barred by the Statute of Limitations, and rendered judgment for defendants. The plaintiff appealed.

Glassell, Chapman & Smith, for Appellant.

This action was commenced within five years from the passage of our Limitation Act of April 18th, 1863. His right to recover was therefore not barred, unless there was

Argument for Appellant.

a final confirmation of the city title previous to the passage of that Act. The statute defines "final confirmation" to be "the patent issued by the Government of the United States, or the final determination of the official survey," under the Act of Congress of June 14th, 1860. The Court below held that the publication of the notice of approval of survey by the United States Surveyor General constituted a "final determination of the official survey," under the Act of 1860, and hence its conclusion that the action was barred. It held that the Act of 1860 was retrospective in its operation, and required the Surveyor General to publish notice of his approval of all surveys in his office—as well those already made and approved, as those thereafter to be made. And thus this survey, although already finally determined under the Act of 1851, became again finally determined under the Act of 1860. Such a construction is plainly erroneous. The Act of 1860, with the exceptions specified in section five, did not apply to surveys made and approved before its passage. (12 U. S. Stats. at Large, 33; *United States v. Sepulveda*, 1 Wall. 104.) The Surveyor General was neither required nor authorized by it to take any steps whatever in regard to such surveys. His proceedings under it, in regard to the survey in question, were therefore simply null and void, and the case stands precisely as if no such proceedings had been taken.

The Court below seemed to attach some importance to the opinion of the Commissioner of the Land Office, that, in the class of cases to which this belongs, the law gave him no authority to issue a patent. If this were so, it would only prove that under the law there could never be a "final confirmation" of the lands of the city. It would not alter the statute which provides that the time should only commence running from the final confirmation, or the date of the statute. It is plain, however, that the Commissioner was mistaken, as the law required him to issue a patent in every case. (1

Argument for Respondents.

Brightly's Dig. 118, Sec. 46; 12 U. S. Stats. at Large, 33, Sec. 5.) And this view of the case, we understand, has been finally adopted by the Land Office.

Howard & Sepulveda, for Respondents.

There is nothing in the case to show that the action of the Surveyor General in the approval of the survey was final, prior to the passage of the Act of 1860. Inasmuch as he acted on the survey under the law of 1860, the presumption is that it remained among the unfinished surveys and business when that Act went into operation. It is very probable that, after the indorsement, it remained in his office, on objections, and not remitted to the General Land Office, and came within the operation of the Act of 1860. That is the presumption, and it is not rebutted by the proof of the plaintiff. It was within the jurisdiction of the Surveyor General to decide whether the survey came under the Act of 1860. (12 U. S. Stats. at Large, 35.) His decision cannot be attacked collaterally. (6 Pet. 739.) It binds the government, the city, and those claiming under the city. (*Menard v. Massey*, 8 How. 293.) In order to show that the survey was final, it would be incumbent on the plaintiff to prove that at the date of the passage of the Act of 1860 no further act remained to be performed in relation to the survey. So long, however, as it remained in the office of the Surveyor General it was under his control. It must be held as a then "pending survey," in favor of the presumption created by the act of the officer and the findings of the Court below.

The case of *United States v. Sepulveda*, 1 Wallace, 104, does not apply, because it there appeared affirmatively that the survey was complete under the Act of 1851.

The Commissioner of the General Land Office, to whom the decision of the question was confided by law, held that in this class of claims the decree and survey introduced in evidence was all the patent authorized by law. By the Act

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of July 4th, 1886, that officer has control of "the issuing of patents for all grants of land, under the authority of the Government of the United States, and Spanish grants under the President of the United States. (1 Brightly's Dig. 462; 18 How. 48; 19 How. 202; 9 How. 449.) The decision of the Commissioner, that a patent could not issue in the case, was a valid decision, which could not be attacked collaterally, even if he could be compelled by mandamus to act, which is doubtful, as the case is one in which the officer must exercise discretion. (*Decatur v. Paulding*, 14 Pet. 497; 17 How. 225.) If the decision of the Commissioner is correct that the decree of confirmation and the survey are the patent, and the counsel for plaintiff are correct, that the survey was under the Act of 1851, then the confirmation was final on July 2d, 1859.

The Act of 1860, section five, gives to a survey, approved under the Act, "the same effect and validity in law as if a patent for the land so surveyed had been issued by the United States." It cannot be doubted that it was the intention of this Act, as well as that of the Legislature of 1863, to give to an approved survey all the force of a patent. After the survey there was no reason why the owner should delay his action of ejectment.

By the Court, WALLACE, J.:

The plaintiff derails title to the premises in controversy (a lot in the City of Los Angeles) by grant from the municipal authorities; and the only question presented upon this appeal is the effect of the Statute of Limitations pleaded by the defendant in bar of the action.

The claim of the city as successor of the Pueblo of Los Angeles, including the lot in controversy, was duly confirmed under the Act of Congress of March 8d, 1851, pro-

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viding for the settlement of private land claims in California; but no patent pursuant to such confirmation has been issued by the authorities of the United States. The defendants have been in possession of the premises ever since the year 1856. In September, 1858, a survey in the field was made of the lands confirmed, and in July, 1859, this survey, and the plat thereof, were approved in due form by the Surveyor General of the United States for the time being; and the plat thus approved by him remained in his office, subject to inspection, until the month of November, 1860.

In the meantime, on the 14th day of June, 1860, Congress passed the Act defining and regulating the jurisdiction of the District Courts of the United States in regard to the survey and location of confirmed private land claims in this State (12 U. S. Stats. at Large, 33); and in the months of September and October next succeeding its passage the Surveyor General, *ex mero motu*, and in assumed compliance with its provisions, published in the newspapers a notice of the fact of survey made, and its approval by him, which publication was conducted in the manner prescribed by the first section of the Act. The action having been commenced on the 13th day of April, 1868, and the defendants having pleaded the Statute of Limitations upon the foregoing facts appearing, the Court below rendered judgment in their favor.

The title of the plaintiff is derived from the Mexican Government, and it will be seen by reference to the Statute of Limitations, as amended in 1855, p. 109, that under its provisions he was at liberty to assert that title by an action "commenced within five years from the time of final confirmation of such title by the Government of the United States, or its legally constituted authorities."

Final confirmation within the intent of that statute (until the passage of the Act of Congress of January 14th, 1860, already referred to) was held by this Court to be "the

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issuance of the patent," and not the approval by the Surveyor General of a survey made by himself. (*Johnson v. Van Dyke*, 20 Cal. 225; *Davis v. Davis*, 26 Cal. 46; *Beach v. Gabriel*, 29 Cal. 580.)

This construction of the Act of 1855 necessarily followed upon the views then recently announced by the Supreme Court of the United States in *Castro v. Hendricks*, 23 How. 438, where it was substantially held that over a survey, which had not itself been the subject of judicial proceedings to determine its correctness, but had merely been approved by the Surveyor General, the Commissioner of the General Land Office had supervisory authority. Of course this authority would terminate only with the issuance of the patent itself; for until then the duty of the Commissioner would continue, and his authority to see that the location, as actually made, was in conformity to the decree of confirmation as rendered — and until then the survey, as made and approved by the subordinate, the Surveyor General, so far from being definitely final, must necessarily be *in fieri* merely.

Congress having, however, passed the Act of June 14th, 1860, providing for the final determination of surveys by judicial proceedings before the Courts of the United States, the amendatory Statute of Limitations of the State, passed in 1863 (p. 327, Sec. 7), thereupon enacted that final confirmation should be the *patent*, or the *final determination* of the official survey under the provisions of *that Act of Congress*.

That a survey, if become final through judicial proceedings, under the Act of Congress of 1860, amounted to *final confirmation*, even under the Statute of Limitations of 1855, had been distinctly intimated here, in the year 1862, in the case of *Johnson v. Van Dyke*, *supra*, and the statute of the following year (1863), in this respect only, embodied in terms a rule already practically reached by this Court upon

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construction of the Act of April 11th, 1855. In *Mahoney v. Van Winkle*, 33 Cal. 448, it was held that in all cases in which the survey fell within the provisions of the Act of Congress of 1860, the *final confirmation* mentioned in the statute of 1855 "must be held to be the final judgment of the Courts on the question of location, and the date of such judgment, or the time when it becomes final, must be the *terminus a quo* of the statute period."

But I think it clear that the survey in question was not one of that character. It is found as a fact by the Court below that it was made pursuant to a decree of confirmation, rendered by the Board of United States Land Commissioners, and that the Surveyor General approved it on the 2d day of July, 1859.

As thus approved by that officer it was subject only to the supervision of the Commissioner of the General Land Office at Washington. In *United States v. Sepulveda*, 1 Wallace, 104, it was held by the Supreme Court of the United States that a like survey, approved by the Surveyor General prior to the passage of the Act of June 14th, 1860, was not subject to revision by the District Court of the United States under that Act, unless at the time of the passage of the Act such survey was already returned into the District Court, or proceedings to contest it were already pending there. In that case, upon the suggestion of the District Attorney, to the effect that the survey as made did not conform to the final decree of confirmation rendered by the Board, an order had been made by the District Court of the United States that the Surveyor General return into Court for examination the plat of survey which he had approved. The return was made accordingly, and, upon hearing the objections, it was determined that the survey, as made and approved by the Surveyor General, was erroneous, and thereupon certain corrections, in that respect, were ordered by the Court. Upon appeal, however, the

Opinion of the Court:—Wallace, J.

decree was reversed, and the District Court directed to dismiss the proceedings for want of jurisdiction. That case is, upon all points involved, conclusive of this—even had the District Court here, as there, attempted an adjudication of the survey, which, however, it did not. For in that case, and in this as well, the decree upon which the survey was founded was one rendered by the Board of Land Commissioners, and not by the District Court. The survey itself, there as well as here, had been approved by the Surveyor General at the date of the passage of the Act of Congress, and was not, at that time, already returned into the District Court, nor were any proceedings concerning it then pending before that tribunal. The publication of the notice by the Surveyor General, made in the case at bar, being wholly unauthorized by the Act, was, therefore, nugatory. The purpose of such a notice, when given in a proper case, is merely to initiate judicial proceedings looking to a decree concerning the validity of the particular survey to which the notice refers. It necessarily presupposes a case in which a decree may be rendered definitively determining the survey to be valid, and thereafter not open to question. Here, however, had any party in interest, pursuant to the notice given, sought to intervene for the protection of his supposed interest, the Court could have made no valid order in the premises, except an order dismissing the proceedings for want of jurisdiction to entertain them.

The approval of the official survey in this case was not a determination of its validity had under the Act of Congress of 1860. It was not the judicial determination provided by that Act, but was one made by the Surveyor General in the exercise of the quasi-judicial authority vested in him by the antecedent Acts of Congress, and subject to the Commissioner of the General Land Office at Washington; and the lapse of five years, after the approval so made by the Sur-

Opinion of Rhodes, J., concurring.

veyor General, is ineffectual to bar a recovery by the plaintiff.

The judgment must, therefore, be reversed, and the cause remanded, with directions to render judgment for plaintiff upon the findings.

And it is so ordered.

RHODES, J., concurring:

Ejectment to recover the possession of a lot in the City of Los Angeles. The plaintiff claims title under a grant made by the proper municipal authorities of the city, and such title, it is assumed by both parties, was sufficient to enable the person holding it to maintain ejectment. The title of the city was finally confirmed in 1858. No patent has issued to the city, but the survey was approved by the Surveyor General, July 2d, 1859, and since that time has remained in his office and has not been returned into the District Court, nor have proceedings been initiated to contest it. The defendants and their grantors have been in the adverse possession since 1856. The action was commenced April 13th, 1863. The Court below held that the action was barred by the Statute of Limitations as amended April 18th, 1863.

The statute had not commenced to run in this case when the Act of 1863 took effect. It was held in *Johnson v. Vandyke*, 20 Cal. 295; *Davis v. Davis*, 26 Cal. 46; and *Beach v. Gabriel*, 29 Cal. 580, that "final confirmation," within the meaning of the Act of 1855 amendatory of the Statute of Limitations, was the issuing of the patent. As no patent had issued to the city, the time had not commenced to run under the Act of 1855 against the plaintiff's grantor when the Act of 1863 took effect.

The seventh section of the statute of 1863 defined "final confirmation" for the purposes of that Act alone, and was not intended to have a retroactive effect, so as to set the

Opinion of Rhodes, J., concurring.

statute running by construction. And it may be added that an approval of a survey which became final in any other mode than under the provisions of the Act of Congress of June 14th, 1860, will not come within the provisions of section seven of the Act of 1863.

This action having been commenced less than five years after the Act of 1863 took effect, and no portion of the time provided by the statute of 1855 for the commencement of actions having run when the Act of 1863 took effect, the action was not barred by the Statute of Limitations.

The appeal is taken from the judgment. The findings show that the plaintiff is entitled to recover the possession of the premises in suit.

I am of the opinion that the judgment should be reversed, and cause remanded, with directions to enter judgment, on the findings of fact, for the plaintiff.

Mr. Justice CROCKETT concurred in the opinion of Mr. Justice WALLACE.

Mr. Justice NILES concurred in the opinion of Mr. Justice RHODES.

Mr. Chief Justice SPRAGUE did not participate in the decision of the case.

APRIL TERM, 1872.

1872

THE UNIVERSITY OF CHICAGO

REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

APRIL TERM, 1872.

[No. 2,111.]

**BRODISH JOHNSON, MOSES LAZARUS, AND FRAN-
COIS W. BROOKS v. LOUIS CHELY.**

ACTION AGAINST TENANT FOR HOLDING OVER.—In an action of unlawful detainer, against a tenant for holding over, the mere fact that the defendant has been in the quiet and peaceable possession of the premises for one year before the commencement of the suit, will not defeat the action.

ISSUE.—In such action the relation of landlord and tenant must be shown to exist, otherwise the plaintiff cannot recover, and if that relation is shown to exist, the defendant must be permitted to prove, if he can, that he did not enter under the lease, but, being already in possession, was induced to accept a lease from the plaintiff by fraudulent and false representations that the plaintiff owned the property, when it belonged to another, and, if the tenant can show such state of facts, he is not estopped by the lease.

RULE.—The rule in ejectment, that if the defendant can show that he did not enter under the lease, but, being already in possession, was induced by the plaintiff through false representations that he owned the premises, to accept the lease, that then this state of facts destroys the relation of landlord and tenant and removes the estoppel, is also the rule in an action of unlawful detainer against a tenant for holding over.

Argument for Appellant.

JURISDICTION OF COUNTY COURT.—The County Courts have jurisdiction of actions of unlawful detainer against tenants for holding over.

APPEAL from the County Court of the City and County of San Francisco.

The plaintiffs recovered judgment in the Court below, and the defendant appealed.

The other facts are stated in the opinion.

B. S. Brooks, for Appellant.

The County Court, under the Constitution, had no jurisdiction of the action. It was not intended that the summary proceeding provided for in the Act should be a substitute for the action of ejectment. (*Owen v. Doty*, 27 Cal. 502; *Hodgkins v. Jordan*, 29 Cal. 577.)

The defendant had a right to show that the relations of landlord and tenant did not exist between him and the plaintiff, because the action could only be maintained between those who hold that relation by express contract and directly; and in order to show that, the proof which he offered was pertinent—that is, to show that he did not enter under plaintiff; that being in possession of the property he was induced by fraud and false representations to attorn to the plaintiff and to recognize him as a landlord; but afterwards, finding out the falsity of these representations and the fraud which had been perpetrated upon him, he repudiated the plaintiff and attorned to the true owner. (*Fewksbury v. Magraff*, 33 Cal. 237; *McDevitt v. Sullivan*, 8 Cal. 592; *Walls v. Preston*, 28 Cal. 224; *Connor v. Jones*, 28 Cal. 59; *Henderson v. Allen*, 23 Cal. 519; *Wheelock v. Warshauer*, 34 Cal. 265; *Reay v. Cotter*, 29 Cal. 168.)

In an action of forcible entry and detainer all matters of legal excuse, justification, or avoidance, can be given in evidence under a general denial of the allegations of the complaint. (*Watson v. Whitney*, 23 Cal. 375.)

Argument for Respondent.

Edward J. Pringle, for Respondent.

If the latter part of section three thousand one hundred and thirty-eight (Hittell) refers to the whole Act, and not to cases of force only, it means that the landlord must bring his suit before the expiration of one year from the denial of his title, or from the last payment of rent; any other construction would defeat the main purposes of the remedy. The last rent was paid on November fifteenth, and the suit was brought on September fourth, thereafter.

The facts which the defendant sets up to avoid the lease constitute an equitable defense, if any, and the County Court has no jurisdiction. An equitable defense may be interposed to an action of ejectment, because under our system the same Court has jurisdiction as well of the equitable remedy invoked by the defendant, as of the legal remedy invoked by the plaintiff. When the defendant presents his equitable defense he becomes an actor, and his defense must have all the essentials of a bill in equity. (*Lestrade v. Barth*, 19 Cal. 671.) As such a bill could not be presented by a plaintiff to the County Court, it follows necessarily that the defendant cannot make himself actor or plaintiff by the presentation of such a defense. Such a defense involves the question of title.

In *Reay v. Cotter*, 29 Cal. 170, the Court said: "The Act in question was not intended to apply to any case where the title to the land could be made a question, but only to cases where, from the nature of the relation between the parties, no such question could be made because prohibited by law." * * * "In such case title is not, and cannot be made, a question."

In *Mecham v. McKay*, 37 Cal. 164, the Court says: "But a more valid objection, even than this, to the admissibility of this testimony, may perhaps be found in the fact that it is an attempt to try title in an action for unlawful detainer."

Opinion of the Court — WALLACE, C. J.

What is the appellant's offer in this case, but an attempt to prove that the true title is in Le Roy and not in the respondents?

By the Court, WALLACE, C. J.:

This is an action brought in the County Court of the City and County of San Francisco, under the provisions of the Act of April 27th, 1862 (p. 652), to recover of the defendant the possession of certain tenements as a tenant holding over after demand of rent due under a lease, and failure to pay such rent for the space of three days.

The complaint alleges that in 1867 the plaintiffs, Johnson, Lazarus, and Francis Brooks, as landlords, leased the premises to the defendant, to hold from month to month, at the rent of thirty-five dollars per month, payable in advance; that the defendant entered under said lease, and still occupies said premises; that on the 15th August, 1868, three hundred and fifteen dollars was due for rent; that on August thirtieth thereafter demand was made for a surrender of the possession, and that defendant refused to quit the possession, or to pay the rent due, etc.

The answer denies the making of the lease alleged, or any lease, or that the defendant went into possession thereunder; denies that any rent is due from the defendant to the plaintiffs; alleges that the defendant was in adverse possession in 1862, occupying the premises by himself and tenants for many years; that while so in possession the plaintiffs falsely represented to him that they were the owners in fee of the premises, and had been so adjudged to be by the Supreme Court of the State, and threatened to bring a suit against him unless he would attorn to them, etc. The answer further alleges that the defendant believed these statements of the plaintiffs, and, being induced and deceived thereby, he agreed to become their tenant, and under the influence of such

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belief he did for some time thereafter pay rent to the plaintiffs; but in December, 1867, one Le Roy, who was the true owner of the premises, brought an action against the defendant for their recovery, and the defendant then ascertaining that the representation of the plaintiffs in that respect was false, and that Le Roy was the owner in fee of the premises, renounced and disavowed his tenancy to the plaintiffs, and became and still is the tenant of Le Roy.

At the trial the plaintiffs put in evidence the following agreement:

“ This instrument witnesseth, That I, Louis Chely, have this day hired of George J. Brooks & Co., of the City of San Francisco, all that certain lot of land in said city situate on the westerly side of Battery street, and now known as number eight hundred and fifteen and eight hundred and thirteen Battery street, being thirty-five feet in width, for the term of two years from date, at the monthly rent of forty dollars per month, payable in gold coin every month in advance. And I, Louis Chely, do also agree to pay all assessments levied on said lot during said term, for the keeping of the street and crossings in repair.

“ In witness whereof I have hereunto set my hand and seal, at the City of San Francisco, this 15th day of June, A. D. 1865.

“ LOUIS CHELY.

“ In presence of G. W. H. Faulkner.”

And proved in connection therewith, that at the time it was signed by the defendant the firm of George J. Brooks & Co. was composed of Francis W. Brooks only, and that at the expiration of the term of two years mentioned in that instrument, the defendant not desiring “ to take another written lease,” had agreed with the agent of the plaintiffs that he would continue to occupy the premises at the rent of thirty-five dollars per month, and that under this arrange-

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ment he had paid the rent up to November 1867, making his last payment on that day.

The defendant moved for a nonsuit on several grounds; but the motion was denied, and this presents the first point for our consideration. The first and second grounds of the motion were, that there was a variance between the evidence and the complaint, in that the demise proved was not the one counted upon. But it is obvious that the demise counted upon and proven was that made in 1867, at thirty-five dollars per month, by the witness Howard, as agent for the plaintiffs, at the expiration of the term of two years, mentioned in the writing of date of June 15th, 1865. The third ground of the motion for a nonsuit was, that the evidence showed that the defendant had been in the quiet possession and occupation of the premises for more than one year before the commencement of the action.

The mere fact of the defendant having been in the quiet and peaceable possession for one year before the commencement of the suit would not defeat the action in this case. Such a possession would defeat an action counting upon a detainer by actual force, under section ten of the Act — the action here, however, is for an unlawful detainer — occurring by reason of occupation continued, with non-payment of rent due, though the rent was demanded within one year after it so became due — the proceeding being under sections three and four of the statute. The last ground of the motion was that the County Court had no jurisdiction of the action, but that the District Court alone has cognizance of such a case. This point, however, is answered by the cases of *Caulfield v. Stevens*, 28 Cal. 118; *Brummagim v. Spencer*, 29 Cal. 661, and *Mecham v. McKay*, 37 Cal. 154.

I am, therefore, of opinion that the motion for a nonsuit was properly denied.

Second — The Court below refused to permit the defendant to prove that he was already in possession of the prem-

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ises when he agreed to become the tenant of the plaintiffs, and that they induced him to assume the relation of tenant to them by their fraudulent misrepresentation that they were the owners of the premises.

In this, I think, the Court was in error. In this action the relation of landlord and tenant must be shown to exist, otherwise the plaintiff cannot recover, and if the facts alleged by the defendant in these respects be established, the tenancy set up by the plaintiffs would be disproven.

In an action of ejectment the tenant cannot be permitted to dispute the title of his landlord. That is the general rule. If, however, the defendant in ejectment be able to show that he did not enter under the lease, but that being already in possession he was induced to accept a lease from the plaintiff, through deception and imposition practised upon him by the latter, then he is not estopped to dispute the title of the plaintiff. Such circumstances appearing destroy the relation of landlord and tenant, and so remove the estoppel, which must otherwise conclude the defendant by reason of such a relation existing, and the plaintiff is thus thrown back to establish his title in the ordinary way, if he can. He cannot turn the defendant out by mere force of such a lease.

I think that the same result must follow, so far as the defendant is concerned, in an action of unlawful detainer, in which a lease relied upon to establish the relation of landlord and tenant is shown to have been obtained under such circumstances as would not have estopped the tenant from disputing the title of the landlord in a Court in which the title could be tried. The defense, wherever set up, is of legal and not of merely equitable cognizance; and it is unreasonable that one who might rely upon that defense, if sued for the possession in the District Court, is not to be

Statement of Facts.

heard to do so in the County Court, and is thus to be turned out of possession because his adversary has summoned him to one Court of law instead of to another Court of law.

I am of opinion, therefore, that if the defendant prove his defense in this respect it must defeat the action in the County Court, where a recovery can only be had by establishing the relation of landlord and tenant to be existing between the parties.

Judgment reversed, and cause remanded for a new trial.

[No. 2,456.]**THOMAS PHELAN v. JOHN GARDNER.**

BROKER'S COMMISSION ON SALE OF LAND.—If the owner of land employs another person to sell for him his land, at an agreed rate of commission, and the broker finds a purchaser who is willing to take the land at the price fixed, the owner cannot, by a refusal to sell to him, or by a sale to another, avoid the contract, and escape the payment of the commission.

CONCLUSIVENESS OF JUDGMENT.—A judgment is conclusive only upon questions involved in the action, and upon which it depends, or upon matters which, under the issues, might have been litigated and decided in the suit.

FINDING OF COURT ON MATTERS NOT IN ISSUE.—A finding by the Court, without the issues made, is unnecessary, and is not conclusive on the parties in another action, in which the question upon which the finding was made is in issue.

INTOXICATION AT TIME OF CONTRACTING.—A party may show, in order to defeat a settlement made by him, that, at the time, he was incapable of contracting intelligently, by reason of intoxication, and evidence of the party's condition, as to being intoxicated several hours after the settlement, may be given, as tending to throw light on his condition when the settlement was made.

APPEAL from the District Court of the Fourth Judicial District, City and County of San Francisco.

In August, 1869, the plaintiff in this action brought an action of forcible entry and detainer against the defendant in this action, to recover possession of a lot in San Francisco.

Statement of Facts.

The defendant filed a supplemental answer, in which he set up, that since the commencement of the action he had paid the plaintiff the sum of three hundred dollars, in full satisfaction of the cause of action, and of all other claims which the plaintiff had against the defendant, and particularly of the cause of action in this suit, which was then pending in the Fourth District Court. The Court found that there had been a forcible entry, but found, also, the facts set up in the supplemental answer, and gave judgment for the defendant.

The defendant in this action pleaded said judgment in the County Court as an estoppel.

On the trial of this action the defendant, to show that the cause of action herein had been adjudicated, offered in evidence the judgment roll in the forcible entry case; but the Court ruled it out on the objection of the plaintiff.

The defendant offered in evidence a receipt given by the plaintiff at the time of the alleged settlement, above spoken of.

The Court gave the following instruction to the jury:

"Yet, if you believe from the evidence that the defendant found the plaintiff in an intoxicated condition, on or about the 13th day of May last; that he took him to a saloon for the purpose of plying him with more liquor; if you believe he did take him to a saloon, and plied him with liquor until he got him in a stupefied state, and in such state that he did not know what he was doing, and then pretended to make a settlement with him, and pass over a sum of money to him, and got him to sign a receipt, such a settlement as that is void, and not binding upon the plaintiff; consequently, if you believe that the settlement spoken of is such a settlement as that, and no other, then you will find for the plaintiff the amount that was due him, less the sum of money that was paid him at that time."

The defendant, by his counsel, excepted, on the ground

Argument for Appellant.

"that it is in effect a charge upon the facts and the evidence in the case; that it argues the case in favor of the plaintiff, presenting forcibly to the jury what said plaintiff sought to prove, and claimed to have proved by the evidence; and that to charge upon the legal effect, upon a contract of drunkenness of a party thereto, at the time he entered into such contract, it was not necessary or proper to allude to, nor present to the jury, the matters recited in said charge, but only the charge in general terms as to the effect upon any alleged contract, of the drunkenness of one of the contracting parties at the time of assenting to such contract."

The plaintiff recovered judgment, and the defendant appealed.

The other facts are stated in the opinion.

George A. Nourse, for Appellant.

The Court erred in refusing to admit in evidence the judgment roll in the forcible entry and detainer action. The claim of plaintiff in this action, and the action itself, could be settled by agreement between the parties, by payment of a less sum than that claimed by plaintiff, it not being a liquidated debt. (*Cumber v. Wane*, 1 Smith, Lea. Cases, p. 439,* and cases there cited, by editor in the notes to sixth American edition; *Harper v. Graham*, 20 Ohio, 105; Stata. 1867-8, p. 31.)

The settlement pleaded by the defendant in this action is shown by the judgment roll offered in evidence to have been adjudicated between the same parties in another action, so that it was *res judicata* at the time of the trial in this action. The judgment being pleaded as an estoppel, the judgment roll should have been admitted, and the jury instructed, that by the judgment the plaintiff was estopped to deny the settlement alleged in the answer. (*Duchess of Kingston's Case*, 20 How. St. Tr. 538; *Gahan v. Mainly*, 1 Irish T. R.

Argument for Respondent.

54; *Outram v. Morewood*, 8 East, 345; *Baxter v. N. E. M. Ins. Co.*, 6 Mass. 277.)

The evidence in said action is insufficient to sustain the verdict, in that it fails to show that plaintiff ever became entitled to the commissions for which he sues.

The defendant did not give to plaintiff the exclusive right to sell the land. Not having done so, defendant had the right to sell the land at any time before the plaintiff should bring to him a purchaser able and willing then and there to buy the land on the terms proposed. (*Chilton v. Butler*, 1 E. D. Smith, 150; *Glentworth v. Luther*, 21 Barb. S. C. 145; *Barnes v. Roberts*, 5 Bosworth, 73; *Moses v. Bierling*, 31 N. Y. 462.)

When plaintiff brought Cusheon to defendant, as a purchaser, nothing further was done than for defendant to give Cusheon, without consideration, a promise that he should have fifteen days to complete his search and purchase at a price certain.

The defendant had the right, at any time before the bargain was closed, to recall his offer and sell to another. (1 Parsons on Contracts, 353; *id.* 405.)

B. S. Brooks, for Respondent.

The plea of a former adjudication could not be an answer to this demand. The matter set up is no defense. The question whether the cause of action in this suit was released could not by any possibility be at issue in that suit, nor was that Court competent to determine the question. The rule is well settled in this Court: 1. It must be the judgment of a competent Court. 2. It applies only to matters put in issue on the record, and not to matters which come in question incidentally—that is, it applies to facts in issue as distinguished from facts in controversy. 3. The point must be directly determined by the former judgment. The issue here is whether Phelan's claim for brokerage was paid or

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settled. That question could not possibly be at issue on the record, or tried, or determined by the County Court in the action of forcible entry, though it might become incidentally a fact in controversy; but it did not become even that. (*Fulton v. Hanlon*, 20 Cal. 450; *Hardenbergh v. Bacon*, 33 Cal. 356; *Garwood v. Garwood*, 29 Cal. 514; *Love v. Waltz*, 7 Cal. 250; *Chase v. Swain*, 9 Cal. 130; *Gray v. Dougherty*, 25 Cal. 266; *Boston v. Hayes*, 33 Cal. 31; *People v. Sups. of S. F.*, 27 Cal. 655; *Hobbs v. Duff*, 23 Cal. 596; *Hough v. Waters*, 30 Cal. 309; *Earl v. Bull*, 15 Cal. 421; *Pico v. Webster*, 12 Cal. 140; *Board of Education v. Fowler*, 19 Cal. 11.)

Upon these undisputed facts the defendant owed the plaintiff the precise liquidated sum of one thousand five hundred dollars according to the authorities cited by the defendant's counsel in his brief, and the case in this Court of *Middleton v. Findla*, 25 Cal. 76, and *Blood v. Shannon*, 29 Cal. 359.

There was no error in excluding the judgment roll in the County Court.

By the Court, NILES, J.:

1. The defendant employed the plaintiff as his broker, to sell for him certain land at an agreed commission of five per cent on the amount of the sale. The plaintiff procured and brought to the defendant one Cusheon, who agreed with the defendant, verbally, to purchase the land for the sum of thirty thousand dollars. The defendant gave Cusheon a memorandum in writing, by which he promised to sell to him for the price named, and to give him fifteen days to complete the search and purchase of the land. Before the expiration of the fifteen days, Cusheon tendered to the defendant a performance in accordance with the agreement, and was informed that the land had been sold to another party. The plaintiff brings suit to recover the amount of his commissions.

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It is not contended upon either part that there was a valid and binding contract of sale between Cusheon and the defendant. The defendant claims that for this reason the plaintiff's commission was not earned. This theory is untenable. The plaintiff could do no more than procure a purchaser who was acceptable to the defendant, and willing and able to purchase the land upon terms satisfactory to him. He could not control the will of the defendant or force him to make a binding contract with the purchaser, or prevent him from selling to another. In the absence of an agreement to that effect, the principal cannot refuse to pay the broker's commissions upon the ground that he did not choose to make the sale. He cannot avoid the contract by his voluntary act disabling himself from performance.

2. The judgment roll in the action of forcible entry and detainer was properly excluded. The issue in that case was whether a certain sum of money had been paid by the defendant and received by plaintiff in satisfaction, discharge, and settlement of the cause of action involved in that suit. It was alleged in the answer in that case, and found by the Court, that the money was paid and received in discharge and settlement of this present action as well as of the one then pending. But this was a finding without the issues made, and unnecessary in the decision of that case. It was not necessary that the court should find that the payment to plaintiff was made and received in "satisfaction, discharge, and settlement of every claim, debt, or cause of action," but only of the cause of action then under consideration. At most, the fact of the settlement of this case could be only incidentally in controversy in the County Court. It is even difficult to see how it could be in controversy at all. A judgment is only conclusive upon questions involved in the suit, and upon which it depends, or upon matters which might have been litigated and decided in the suit.

3. It was competent for plaintiff to rebut defendant's evi-

 Points decided.

dence of the settlement and receipt by proof that at the time of the transaction the plaintiff was incapable of contracting intelligently by reason of intoxication. The proof upon this point was conflicting. There was evidence tending to show that the plaintiff was intoxicated when he signed the receipt, and other evidence to the effect that he was then sober, but that the completion of the business was followed by a protracted carouse. The Court permitted the plaintiff's wife to testify that he was brought to his home by the defendant and another person several hours after the time when the receipt was shown to have been signed, and in a state of thorough intoxication. The fact to be arrived at was the mental condition of the plaintiff at the time the business was transacted. We cannot say that under the circumstances of the case the Court erred in holding that his condition a few hours later in the same evening would throw some light upon the question under consideration.

Judgment and order affirmed.

 [No. 2,187.]

SAMUEL YENAWINE v. G. F. W. RICHTER AND P. POLLOCK.

COUNTY COURTS — NEW TRIAL.— County Courts are Courts of superior jurisdiction, and have power to grant new trials.

Idem.— If a County Court grants a new trial in disregard of the statutory method of procedure, it is error; but it cannot be said there is a want of jurisdiction, and that the order is void.

CERTIORARI FROM ORDER GRANTING A NEW TRIAL.— However erroneous the order of a County Court granting a new trial may be, it cannot be brought up for review by a writ of certiorari.

APPEAL from the District Court of the Seventeenth Judicial District, San Diego County.

On the 20th day of March, 1871, the plaintiff Yenawine

Opinion of the Court — Belcher, J.

recovered a judgment in the County Court of San Diego County against the defendants for two hundred and forty-one dollars. On the 16th day of May, 1871, the County Court granted a new trial.

The plaintiff obtained a certiorari from the District Court to bring up the order of the County Court for review. On the hearing the District Court dismissed the writ. The plaintiff appealed from the judgment of the District Court.

The other facts are stated in the opinion.

Louis Branson, for Appellant.

The defendants took the first step, but not the second, or third. Failing to file the statement within five days after the filing of the notice, they lost their right to move for a new trial, and the County Court had no power to restore it, and had no jurisdiction to make the order for a new trial. (Practice Act, Sec. 195; *Adams v. The City of Oakland*, 8 Cal. 510; *Caney v. Silverthorne*, 9 Cal. 67; *Wing v. Owen et al.* 9 Cal. 247; *Munch v. Williams et al.* 24 Cal. 167; *Easterly v. Larco*, 24 Cal. 179; *Bear River and Auburn Water and Mining Co. v. Boles et al.* 24 Cal. 354.)

Stewart & Reed, and *Gatewood & McNealy*, for Respondents.

County Courts have jurisdiction to grant new trials. (*Dickinson v. Van Horn*, 9 Cal. 211.)

By the Court, BELCHER, J.:

The County Court did not exceed its jurisdiction in granting the defendants' motion for a new trial. It had rendered judgment in the case, and had jurisdiction both of the subject matter and of the parties. The power to grant new trials has been considered, from a very early day, to be

Points decided.

inherent in all Courts of superior jurisdiction; and in this State County Courts are declared to be Courts of that character. (Stats. 1863, p. 337, Sec. 37; *Hahn v. Kelly*, 34 Cal. 391.) If Courts grant new trials in disregard of the statutory methods of procedure, it is error; but it cannot be said that for that reason there is a want of jurisdiction, and that their orders are, therefore, void.

In this case the order of the County Court granting the new trial was clearly erroneous. The paper of the 22d of March, which counsel for defendants call a motion and statement for new trial, and on which the order seems to have been made, was not a statement. It, in no respect, meets the statutory requirements. It contains no part of the evidence, nor a reference thereto, nor does it directly state any facts. Moreover, it was never, in any manner, certified to be correct.

But however erroneous the order may have been, it cannot be brought up for review by a writ of certiorari. The District Court was right, therefore, in denying the application for the writ, and its order is affirmed.

[No. 2,124.]

LOUIS JARVIS ET AL. v. GEORGE W. HOFFMAN
ET AL.

HOMESTEAD — PATENT.— Upon the death of a husband, who has taken up and entered a homestead, under the Act of Congress of May 20th, 1862, if the five years have not expired for a patent to issue, the widow, upon performing the remaining conditions, is entitled to a patent, and acquires a title in fee, free from all trust in favor of the children, whether adults or minors.

APPEAL from the District Court of the Sixth Judicial District, Yolo County.

The facts are stated in the opinion.

Argument for Respondents.

C. P. Sprague, for Appellants.

It is the theory of the common law that all property that is descendible is also devisable. (4 Kent, 511.) Is not the reverse of this proposition true? Is not all descendible property also devisable? If this proposition be true, the land in controversy could not descend to the heirs, from the fact that St. Louis, under the statute, could not have disposed of it by will, or otherwise. Our statute appears to sanction the common law rule, with the additional provision that all property devisable is subject to the payment of the debts of deceased persons. The land in dispute not being subject to St. Louis' debts, is neither devisable nor descendible. (Hittell, 7326.)

A State homestead, under our statute, is neither common property, subject to distribution, nor the separate property of either husband or wife, but is a joint tenancy, with the right of survivorship, and vests absolutely in the survivor immediately upon the death of one of the parties. (*Buchanan Estate*, 8 Cal. 507.) This seems clearly to be the intent of the Act of Congress of May 20th, 1862; the widow taking by right of survivorship, which is analogous to "irregular succession" in the civil law, defined to be "that which is established by law in favor of certain persons." (Bouvier's Law Dictionary.)

J. H. McKune, for Respondents.

The questions of law to be determined on this appeal are:

I. Did the plaintiff, Margaret, by the patent from the United States Government, take the legal title in her own right, or as trustee for all the heirs of Colbert St. Louis, deceased?

II. Did Colbert St. Louis take the interest he held in said land by gift, within the meaning of section one of the Act

Opinion of the Court — CROCKETT, J.

passed April 17th, 1850, defining the rights of husband and wife?

To the first point defendants cite: Act of Congress, May 20th, 1862, 2 Lester, 47; *Brenham v. Story*, 39 Cal. 179; *Grover v. Hawley*, 5 Cal. 485; *Soto v. Krader*, 19 Cal. 87; *Bond v. Swerringen*, 1 Hammond, 393; *Rea v. White*, 8 Hammond, 216; *Ancey v. Dufine*, 9 Hammond, 145.

To the second point they cite: Act of Congress, May 20th, 1862; *Scott v. Ward*, 13 Cal. 458; *Wilson v. Castro*, 31 Cal. 433; *Nes v. Card*, 14 Cal. 596; *Hood v. Hamilton*, 33 Cal. 703.

By the Court, CROCKETT, J.:

In 1864 one Colbert St. Louis took up and entered as a homestead, under the Act of Congress of May 20th, 1862 (Stats. 1862, p. 392), a quarter section of the public land of the United States, in Yolo County, and immediately entered upon and continued to occupy and cultivate said tract as a homestead until his death, in 1866. When he entered upon the land as a homestead he had a wife and several children, who resided with him on the tract until his death, after which the widow and children continued to occupy and reside upon it until the year 1867, when she intermarried with one Jarvis, and from thenceforth she and her husband, together with her children, have resided upon and occupied the land until the present time. At the time of his death, St. Louis left several children by a former marriage, all of whom have attained their majority, and also several children by his last marriage, who then were, and yet are, minors. At the expiration of five years from the time when the land was entered by St. Louis as a homestead, the widow, on making the proper proofs, obtained a patent in her own name from the United States, vesting in her the legal title to the premises. This action is brought by the widow and

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her present husband against the adult and minor children of her deceased husband to quiet her title to the land, the fee of which she claims to hold in her own right, and for her own exclusive use, free from any trust for either the adult or minor children. On the other hand, the children, in their answers, claim that she holds the legal title partly, if not wholly, in trust for them, and they pray to have the trust declared, and for a partition according to their respective rights. The Court below decided that the widow was entitled to eight twenty-fourths of the land, and that the children were entitled to the remainder, in certain proportions. From this judgment the widow and her husband have appealed, claiming that she is entitled to the whole. Section two of the Homestead Act provides "that no certificate shall be given, or patent issued therefor, until the expiration of five years from the date of such entry; and if, at the expiration of such time, or at any time within two years thereafter, the person making such entry, or if he be dead, his widow, or, in case of her death, his heir or devisee, or in case of a widow making such entry, her heirs or devisee, in case of her death, shall prove by credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit aforesaid, and shall make affidavit that no part of said land has been alienated, and that he has borne true allegiance to the Government of the United States; then, in such case, he, she, or they, if at that time a citizen of the United States, shall be entitled to a patent; as in other cases provided for by law. And provided further, that in case of the death of both father and mother, leaving an infant child or children under twenty-one years of age, the right and fee shall inure to the benefit of said infant child or children; and the executor, administrator, or guardian may, at any time within two years after the death of the surviving parent, and in accordance with

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the laws of the State in which such children, for the time being, have their domicile, sell said land for the benefit of said infants, but for no other purpose; and the purchaser shall acquire the absolute title by the purchase, and be entitled to a patent from the United States, on payment of the office fees, and sum of money herein specified."

These provisions leave no room for a reasonable doubt that, on the death of the husband, his widow, on performing the remaining conditions of occupation and payment, became entitled to the patent in her own name. The statute so expressly declares, and it is only in the event that there is no widow, or if there be one, then in the event of her death, that the patent shall go to the children. That this was the intention of Congress is made perfectly manifest by the provision that in case of the death of both the father and mother, "the right and fee shall inure to the benefit of said infant child or children; and by the further provision that at any time within two years after the death of the surviving parent the land may be sold for the sole benefit of such minor children, and the purchaser will be entitled to a patent in his own name. But by the very terms of the Act, even the minor children, whose interests are so tenderly regarded, will not be entitled to the right and fee of the land, except in the event of the death of both their parents. The considerations which prompted these provisions doubtless were that on the death of the father, the mother became the head of the family, and would be impelled by her natural affection for her children to use the property for their advantage as well as her own. She was deemed to be the safest depository of the title, as she was the head of the family and the natural guardian of the children, charged with their support and maintenance. It was evidently the intention of Congress that on the death of the father the mother should be subrogated to all his rights in the land; and on performing the remaining conditions, should acquire

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and hold the title precisely as he would have held it if he had lived. But if the father and mother should both die before the conditions were fully performed, leaving minor children, the right and fee of the land would immediately inure to their benefit and might be sold for their use at any time within two years, without the performance of any further conditions, and the purchaser would immediately become entitled to the patent, on payment of the office fees, and such other sum of money as might then remain unpaid to the Government or its officers. But if the father and mother should both die before the conditions were performed, leaving adult children or devisees and no minor children, then such adult children or devisees, on performing the remaining conditions, would be entitled to the patent, and thus acquire a title in fee. But when the widow performs the conditions and obtains the patent the statute attaches to it no trust in favor of either the adult or minor children. As already stated, she takes the title as her deceased husband would have taken it had he lived. In confiding the title to her, Congress trusted to her natural affection for her children as the guaranty that she would use the land judiciously and for their mutual advantage. The law annexes no conditions or trusts to her title, and the Courts have no power to do it. In my opinion the patent vests the widow with an absolute title in fee to the land, and the defendants have no interest therein.

Judgment reversed and cause remanded for a new trial.

Argument for Respondent.

[No. 3,256.]

Z. COTTLE v. A. LEITCH.

NOTICE OF MOTION FOR NEW TRIAL.—An order extending time to prepare and file motion for a new trial, extends the time to prepare and file notice of motion for a new trial.

EXTENDING TIME TO FILE STATEMENT.—An order extending the time in which to file a statement on motion for a new trial, thirty days beyond the time allowed by law, can only have the force of extending such time twenty days.

EXTENDING TIME TO GIVE NOTICE OF MOTION FOR NEW TRIAL.—If an order is made extending the time in which to give notice of a motion to move for a new trial, and the party gives such notice before the statutory time expires, he derives no benefit from the order.

NOTICE OF FILING FINDINGS.—If, after the findings of fact are filed, a notice of motion for a new trial is given, before the service of notice of filing such findings, notice of such filing is rendered unnecessary.

FILING AMENDMENTS TO STATEMENT.—Proposing amendments to a statement is not a waiver of the objection that the statement was not filed in time, if such objection is reserved, and no particular form of reserving the objection is required.

RESERVING OBJECTION TO STATEMENT.—If a statement is not filed in time, and the objection is reserved in filing amendments thereto, and the Court grants a new trial, it will be presumed that the Court overruled the objection, although the objection nowhere appears in the records except in the amendments.

APPEAL from the District Court of the Thirteenth Judicial District, County of Stanislaus.

There was a former appeal in this case, reported in 35 Cal. 484.

The facts are stated in the opinion.

H. P. Barber, for Appellant, cited *Le Roy v. Rassette*, 32 Cal. 171.

John B. Hall, for Respondent, cited *Calderwood v. Peyser*, 42 Cal. 111, and argued that as the record did not show an objection to the statement when the new trial was granted, that the appellant could not now urge it.

Opinion of the Court — Wallace, C. J.

By the Court, WALLACE, C. J.

The appeal here is taken from an order granting the motion of the defendant for a new trial.

The action was tried by the Court without the intervention of a jury. Findings were filed and judgment rendered for the plaintiff on the 25th day of January, 1869. On that day an order was entered which, so far as is material, is as follows:

“On motion of the defendant, it is ordered that all proceedings by the plaintiff on the decision and judgment this day rendered be stayed for thirty days, wherein the defendant may prepare papers on application for a new trial. The time given by statute for preparing and filing and serving on plaintiff's attorney exceptions to the findings herein is extended thirty days, and the defendant is allowed also like thirty days for preparing and filing motion for a new trial and a statement or affidavits, or both, therewith.”

On the twenty-eighth of January the defendant filed and served his notice of intention to move for a new trial, and on the twenty-ninth of January the plaintiff served and filed notice of the filing of the findings. On the twenty-fifth of February the defendant filed the statement in support of the motion for a new trial, and on the sixth day of May following the plaintiff filed his proposed amendments to the statement “without waiving any right to move to deny said motion on the ground that defendant's statement was not filed in time;” and subsequently filed additional proposed amendments.

First—The order of January twenty-fifth extended the time of the defendant to give notice of intention to move for a new trial thirty days. (Practice Act, Sec. 530; *Harper v. Minor*, 27 Cal. 113.) He, however, derived no benefit

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from that extension, because he saw fit to give notice of his intention to move for a new trial on the twenty-eighth of January, which was before he had received notice of the filing of the findings and before even the ten days allowed him by the statute itself had commenced to run.

Second — Looking at the order as one extending the time allowed by statute to file the statement, the most favorable view that can be taken for the defendant is to hold it as an order extending the time twenty days — not thirty, as on its face it purports to do — for the statute forbids any extension greater than twenty (Sec. 195), and section five hundred and thirty has no applicability to the time for filing a statement on motion for a new trial. (*Harper v. Minor*, supra.)

Third — The defendant having, on January twenty-eighth, given notice of his intention to move for a new trial, the subsequent service upon him of the plaintiff's notice of the filing of the findings effected nothing and may be laid out of the case, for its effect could only have been to force the defendant to give the notice of intention to move for a new trial, and that notice he had, by his own election, given already.

Fourth — It resulted, therefore, that the defendant had five days by statute and twenty more by the order of the Court — in all twenty-five days — from January twenty-eighth, in which to file the statement; his time for that purpose expired on the twenty-second day of February, and the statement was filed only on the twenty-fifth day of that month.

Fifth — In the case of *Quivey v. Gambert*, 32 Cal. 309, this Court held that proposing amendments to a statement which had been filed too late would not be a waiver of objection upon that ground, if the objection be at the same time expressly reserved. The views upon this point expressed in that case have ever since been followed here, and the practice theretofore prevailing of moving to strike the statement from the files, because filed too late, has ever since been

Statement of Facts.

repudiated. No particular form of reserving the objection, however, is prescribed; it is enough that it is pointed out as an objection upon which the party intends to rely in resisting the motion for a new trial. The phrase here employed—"without waiving any right to move to deny said motion on the ground that defendant's statement was not filed in time"—though somewhat inartificial in expression must be taken as substantially importing a reservation of the objection that the statement came too late, and the objection as thus pointed out on the record must be considered to have been overruled by the Court below in granting the motion for a new trial.

These views dispose of the case, and the order granting a new trial is reversed.

[No. 2,584.]**SAMUEL POORMAN v. D. O. MILLS & CO.**

LAW OF A CASE.—A decision by the Supreme Court upon the points of a case becomes the law of the case in all subsequent proceedings upon the same state of facts.

FINDINGS — ERRONEOUS JUDGMENT.—Where there are no findings, and the case is brought to the Supreme Court upon the evidence, and the judgment is erroneous, the Supreme Court will not direct the Court below what judgment to enter, but will reverse the judgment, and remand the case for a new trial.

APPEAL from the District Court of the Sixth Judicial District, Sacramento County.

This case was before the Court on two former appeals, as will be seen by reference to 85 Cal. 118, and 39 Cal. 345. At the last trial the evidence was substantially the same as at the one preceding it. The Court rendered judgment for the plaintiff for seven hundred and fifty dollars—the action was upon a certificate of deposit for one thousand five hundred dollars—and the plaintiff appealed.

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The other facts are stated in the reports of the former appeals.

Coffroth & Spaulding, for Appellant.

Robert Robinson, for Respondent.

By the Court, RHODES, J.:

On the two former appeals in this case it was held that the certificate of deposit, on which the action is brought, was a promissory note. (35 Cal. 118; 39 Cal. 345.) It was also held on the last appeal that the certificate of deposit will not be regarded as overdue or dishonored until after the lapse of a reasonable time after its date, and that it having been indorsed on the day of its date, it is to be regarded as indorsed before it was overdue or dishonored. It was further held that the evidence showed that Eli M. Skaggs, the first indorser, was a bona fide holder, for value; that the case did not come within the statute of 1863, to prohibit gaming; and that the alleged mistake in the amount of the certificate could not be set up against the indorsee, nor any subsequent holder. The decision on those points has become the law of the case. The evidence at the last trial was substantially the same as that which was presented in the record on the last appeal; and there is no substantial conflict on either of those points mentioned.

The plaintiff requests this Court to direct the Court below to enter judgment for him for the full amount of the certificate of deposit. There would be no hesitation in doing so if the Court below had expressly found the facts, which, we think, the evidence tends to prove. But as the Court decided for the defendants, it will be implied that one or more of the material facts were found against the plaintiff. It is not the province of this Court, as we have often held,

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to find the facts of a case, but only to correct the errors, if there be any, of the Court below.

Judgment and order reversed, and cause remanded for a new trial.

[No. 3,160.]**CHARLES WITTE v. PIERRE VINCENOT.**

NEGOTIABLE INSTRUMENTS — PASS BOOK WITH BANK.—A by-law of a savings bank, assented to by its depositors, that the pass book of each depositor containing his account shall be transferable to order, does not render such pass book a negotiable instrument, and even if it did make it a negotiable instrument between the parties, it would not be so as to third parties.

GARNISHMENT OF MONEY IN SAVINGS BANK.—A savings bank cannot avoid its liability to pay over the money of a depositor, on a garnishment at the suit of the depositor's creditor, on the ground that its by-laws, assented to by the depositor, make his pass book, in which his account is kept, transferable to order.

PASS BOOK OF BANK.—A pass book of a depositor in a bank in which his account is kept is not a negotiable instrument in a commercial sense, nor can the agreement of the parties make it so.

NEGOTIABLE SECURITY.—The character of a security, as being negotiable or otherwise, must appear, not by force of the stipulation of the parties that it shall be such, but must be implied by law as the result of the form and effect of the security itself.

AGREEMENT BETWEEN PARTIES TO INSTRUMENT.—An agreement between the parties to an instrument, that it may be transferred to order, is not an agreement that it shall become a negotiable instrument.

BANK ACCOUNT NOT NEGOTIABLE.—A mere agreement between a bank and its depositors cannot impart the character of negotiability to a mere deposit account, not of itself a negotiable instrument under the law merchant.

APPEAL from the District Court of the Fourth Judicial District, City and County of San Francisco.

The facts are stated in the opinion.

Gallagher & Pierson, for Appellant.

We think the case falls within all the reasoning of the cases of *McMillan v. Richards*, 9 Cal. 365; *Gregory v. Hig-*

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gins, 10 Cal. 340; *Sheets v. Culver*, 14 La. 449; *Kimball v. Plant*, id. 511; *Denham v. Pogue*, 20 La. An. 195; *Timmins v. Johnson*, 15 Iowa, 7 Wright, 23; *Church v. Simpson*, 25 Iowa, 408; *Weil v. Tyler*, 38 Mo. 558; *Mims v. West*, 38 Ga. 18. It is true that these cases are all based upon the principle that the instrument was a negotiable one; but, under our statute, all instruments that can be assigned are made negotiable. (1 Hitt. Dig. Arts. 371, 372.) Thus bringing this case directly within the principle enumerated in those cases.

George & Loughborough, for Respondent.

The Act of April 20th, 1850, relative to bonds and other unnegotiable instruments (1 Hitt. Dig. Art. 371, et seq.), merely makes assignable certain instruments that are not negotiable, provides how the assignment may be made, and permits an action to be brought in the name of the assignee. The Act not only fails to confer upon unnegotiable instruments the privileges which belong to negotiable paper under the law merchant, but expressly withholds them, and saves to the defendant, in an action brought by the assignee, any defense which he might have had against the assignor before the assignment or notice thereof.

The appellant has no right to legislate for the protection of the assignees of its depositors; and even where similar institutions have bargained for their own protection, by requiring a return of the pass book before the deposit could be withdrawn, the Courts have held them liable as garnishees, though the pass book was not produced, nor any evidence given of its loss. (*Nichols v. Schofield*, 2 Rhode Is. R. 123; *Clapp v. Hancock*, 1 Allen, 394.)

Even if the pass book had been assigned, payment by the garnishee to the Sheriff without notice of the assignment would be a sufficient discharge, and this protection is all that the garnishee can require. (Practice Act, Sec. 5; id.

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Sec. 130; 1 Hit. Dig. 373; Drake on Attachment, Sec. 575; *Nichols v. Schofield*, supra; *Clapp v. Hancock*, supra.)

By the Court, WALLACE, C. J.:

In January, 1871, the plaintiff commenced an action of assumpsit against the defendant, and in the following July obtained judgment against him for some five hundred and fifty dollars, and costs of suit. Upon filing the complaint a writ of attachment was issued, under which writ the Sheriff duly attached all moneys of the defendant in the hands of an incorporated saving and loan society in San Francisco, called "La Societe Francaise d'Epargnes et de Prevoyance Mutuelle," in which bank the defendant was a depositor. Upon the service of the writ of attachment the bank gave answer as follows: "There are six hundred dollars standing to the credit of P. Vincenot on the books of the society, for which he holds a pass book. I do not know if said pass book has been assigned or not. On the presentation of said pass book the amount will be paid to the holder thereof."

Upon rendition of the judgment an execution was issued, and being levied upon the moneys in the hands of the bank, an order was subsequently obtained to examine its manager before the Court Commissioner touching the moneys of the defendant on hand. Upon this examination it was disclosed that by the books of the bank it appeared that some six hundred dollars and upwards remained on hand to the credit of the defendant. It further appeared that among the by-laws of the bank were the following:

"Art. 13. A pass book with a copy of these by-laws annexed is delivered to each depositor at the price of fifty cents, payable into the Sinking Fund. In this pass book is entered to the credit of the depositor all sums deposited by him, and to his debit all sums reimbursed to him. Pass books are transferable to order."

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“Order for Money on Deposit.

“Societe Francaise d'Epargnes et de Prevoyance Mutuelle.

“SAN FRANCISCO, Cal.

“Pay to — or order the sum of — dollars standing to my credit on the books of said Society, and charge the same to my account.

“Dated the — day of —, 187—.”

An order having been subsequently entered by the Court that the bank pay over to the Sheriff such portion of the moneys in its hands standing to the credit of the defendant as would satisfy the judgment and costs, it prosecutes this appeal from the order.

First—It is claimed for the bank that its indebtedness to the defendant, as one of its depositors, shown by the pass book delivered to him, must be considered to be an indebtedness evidenced by a negotiable instrument issued by the bank, and yet outstanding, and that it results that the proceedings had under the attachment were ineffectual. It is said that the by-law which authorized the pass book to be transferred “to order” constituted it a negotiable instrument, and the moneys thereupon appearing to be owing must be considered as moneys owing upon an outstanding negotiable security.

But we are of opinion that this view cannot be supported. Even supposing that the by-laws in question fairly import an attempted agreement to that effect between the bank and each individual depositor, it is clear that such an agreement, if it could operate between the parties, could not defeat the rights of any one not a party to the agreement—as the plaintiff here. The character of a security, as being negotiable or otherwise, must appear not by force of the mere stipulation of the parties that it shall be such, but

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must be implied by law as the result of the form and effect of the security itself. The pass book of the bank here is an account kept between the bank and the depositor—an account acknowledged and certified from time to time, showing the business transactions of the parties with each other at those periods, and carrying upon its face a fluctuating balance. As being such an account it is not of itself a negotiable instrument, nor could any mere agreement of the parties to it have the effect to invest it with that character in a commercial sense. In this respect the account shown in the pass book is not to be distinguished from the account of a merchant or tradesman kept with his customer in the same way, nor would the agreement of the parties to such account, that the account itself might be transferred “to order,” have any more effect upon the rights and remedies of any third party in the one case than in the other.

Second.—But were this otherwise, we see nothing in the by-laws of the bank which imports such an agreement. Counsel claim that the pass book “under the by-laws of the bank was made payable *to order*, or, in other words, *negotiable*.” We are unable to assent to this view.

That a negotiable instrument may be transferred “to order” is clear; but it does not follow that every instrument which may be transferred “to order” thereby necessarily becomes a negotiable instrument. A collateral agreement between the parties that an instrument of writing, not negotiable, might be transferred by the holder to order, would not alter the character of the instrument itself.

That a negotiable instrument may be transferred by indorsement is also a general rule; but that every instrument transferable in that manner is necessarily negotiable in the commercial sense is not true. Non-negotiable instruments are transferable by assignment; but in this State such assignment may be effected by indorsement, “in the same

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manner as bills of exchange are." (Hitt. Gen. Laws, Sec. 372.) The bank here and the depositors might, for their own convenience, and as between themselves, agree upon any method of transfer of deposit books—they might adopt the method usually pursued with reference to negotiable paper, or they might require the transfer to be attested and acknowledged with the formalities and solemnities requisite in a conveyance of real estate—these are mere regulations of their own business transactions *inter sese*; but whatever the method authorized by their by-laws, these cannot impart the character of negotiability to a mere deposit account, or to any other writing not of itself a negotiable instrument under the general law merchant, or by the statutes of the State.

The order is affirmed.

 [No. 2,512.]

THE PEOPLE OF THE STATE OF CALIFORNIA v. WILLIAM M. EDDY.

PURPOSE OF THE ACT TO PREVENT DOUBLE TAXATION.—It was the purpose of the first section of the Acts of April 1st and April 4th, 1870, (Stats. 1869-70, pp. 584, 710), to exempt from taxation solvent debts secured by mortgage upon real estate, and not merely to regulate the duties of Assessors.

POWER OF LEGISLATURE AS TO ASSESSING AND EXEMPTING PROPERTY.—It is within the power and is the duty of the Legislature to prescribe the mode in which all property shall be assessed; but the Legislature cannot, under the pretense of regulating the duties of Assessors, exempt property from taxation which the Constitution requires to be taxed.

A SOLVENT DEBT IS PROPERTY AND CANNOT BE EXEMPTED BY THE LEGISLATURE.—Cases on this point cited with approval: *People v. McCreery*, 34 Cal. 433; *People v. Gerke*, 35 Cal. 677; *People v. Black Diamond O. M. Co.*, 37 Cal. 54; *People v. Whartonby*, 38 Cal. 461.

MEANING OF THE WORD "PROPERTY" IN THE CONSTITUTION.—The word "property" is used in section thirteen of Article XI of the Constitution in its ordinary and popular sense, and includes not only visible and

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tangible property, but also choses in action such as solvent debts secured by mortgage. In no section of the Constitution is the word "property" employed as comprehending only visible and tangible property and excluding choses in action.

CONSTRUCTION OF WORDS AS USED IN CONSTITUTIONS AND STATUTES.

— It is the general rule in the interpretation of Constitutions and statutes that words shall be taken in the ordinary and popular sense, unless the context shows that the words are used in a technical or in some arbitrary sense.

NO PROPERTY TO BE EXEMPT FROM TAXATION.— It was not intended by the framers of the Constitution that the Legislature should have the power to exempt any kind of property from taxation.

LAW EXEMPTING DEBTS FROM TAXATION UNCONSTITUTIONAL.— Where the general revenue law subjects all solvent debts to taxation, any other law which singles out a class of such debts and exempts them from taxation, is repugnant to the clause of the Constitution which provides that taxation shall be equal and uniform throughout the State.

APPEAL from the District Court of the Fourteenth Judicial District, Nevada County.

The assessment was made for the year 1870.

The other facts are stated in the opinion.

A. C. Niles, Dibble & Byrne, for Appellant.

The Assessor exceeded his powers in assessing for taxes the property described, and the assessment is therefore void. (Stats. 1869-70, p. 584; id. 710; *Myers v. English*, 9 Cal. 349; *McKune v. Weller*, 11 Cal. 60; Sedgwick on Const. and Stat. Const. 183-188.)

The statute of 1869 (p. 70) does not purport to exempt any property from taxation. It is merely an exercise of the legislative power over assessors, forbidding them to do a certain thing. Evidently, then, the Assessor was not only without authority for the assessment, but acted in the face of a direct prohibition.

All presumptions are in favor of the constitutionality of an Act of the Legislature. (*Bourland v. Hildreth*, 26 Cal. 183; *People v. McCreery*, 34 Cal. 458; Sedgwick on Const. and Stat. Const. 482, note and cases cited.)

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These views are not inconsistent with the doctrine announced by this Court in former cases. (*People v. McCreery*, 84 Cal. 432; *Att'y Gen. v. Squires*, 14 Cal. 18; *People v. Hastings*, 29 Cal. 451; Art. XI, Sec. 13, Constitution; *People v. Gerke*, 35 Cal. 678; *People v. Black Diamond C. M. Co.*, 37 Cal. 54.)

J. M. Wilson, also for Appellant.

After a very careful and extensive search for authorities and precedents to throw light on the subject of the proper construction of our Constitution in this respect, I find none. where the general words "property," or "real and personal property," or "real and personal estate," have been held to embrace incorporeal hereditaments of any kind, much less mere debts or other *choses in action*. In no Constitution or law have these words been so construed, but choses in action and other incorporeal property are always treated as intentionally omitted, unless specially enumerated. (*Bank of the U. S. v. Huth*, 4 B. Monroe, 449; *Johnson v. City of Lexington*, 14 B. Mon. 657; *City of Covington v. Elliston*, 2 Met. Ky. R. 231; *City of Louisville v. Henning*, 1 Bush Ky. R. 381; *Livingston v. Höllenbeck*, 4 Barb. 11; *City of Buffalo v. Le Couteulx*, 15 N. Y. R. 452-3; *Le Couteulx v. Supervisors of Erie*, 7 Barb. 250; *Boreel v. City of New York*, 2 Sand. Sup. Ct. R. 557; *People v. Board of Supervisors*, 39 N. Y. R. 87; *Mohawk and H. R. R. Co. v. Chute*, 3 Paige, 39; *Dewitt v. Hayes*, 2 Cal. 468; *Fleming v. Brooks*, 1 Sch. and Lef. 318; *Stuart v. Marquis of Bute*, 11 Ves. 657; *Milton v. Race*, 1 Burr, 452; *Chapman v. Hart*, 1 Ves. Sen. 273; *Countess of Alesbury's Case*, id.; *Mr. Wortley's Will*, 5 Bro. Parl. C. 534; *Moore v. Moore*, 1 Bro. C. C. 127; *Mann v. Executors of Mann*, 1 J. C. R. 232.)

Niles Searles, J. I. Caldwell, District Attorney, and Jo Hamilton, Attorney General, for Respondents.

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The Assessor had power to assess for taxes the property in question, and the assessment is therefore valid. (Stata. 1867-8, pp. 674-5; *Minturn v. Hays*, 2 Cal. 590; *People v. McCreery*, 34 Cal. 432; *People v. Gerke*, 35 Cal. 677; *People v. Black Diamond Coal Mining Co.*, 37 Cal. 54; *People v. Whartenby*, 38 Cal. 461.)

The statutes of 1869-70, pp. 584, 710, cited by appellant, are unconstitutional, and therefore void. (See section 13, Art. XI, of the Constitution of the State of California, and the authorities above cited; *Thorne et als. v. San Francisco Co.*, 4 Cal. 127; *Tuolumne Redemption Co. v. Sedgwick*, 15 Cal. 515; *Scarborough v. Dugan*, 10 Cal. 305; *Tims v. The State*, 26 Ala. 165; *People v. Hastings*, 29 Cal. 451; *People v. McCreery*, 34 Cal. 437; *People v. B. D. C. M. Co.*, 37 Cal. 55.)

The prohibitory Act cited above of 1869-70, forbidding the Assessor to list or assess the property in question, is an attempt to exempt it from taxation, and therefore void under the Constitution of this State. (See authorities above cited.)

The legislature of the State of California, acting under the limitations of the Constitution of the State, cannot exempt property from taxation within the State by a prohibitory Act, that it cannot directly exempt. (See authorities above cited.)

The statute cited by appellant of 1869-70, being void, the general revenue laws apply, and having been complied with in all respects, the tax is a valid demand against appellant, and the judgment should be affirmed. (See authorities above cited.)

By the Court, RHODES, J.:


This action was brought for the recovery of the taxes which were assessed upon certain solvent debts due to the defendant upon certain promissory notes, which were secured by mortgages upon real estate. The defendant demurred to

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the complaint, on the grounds that the property was not subject to assessment or taxation under the laws of the State; and that the assessment of such property is prohibited by law. The demurrer was overruled, and the defendant appeals.

The demurrer presents the question of the constitutionality of the Act of April 1st, 1870, entitled "An Act to prevent double taxation." (Stats. 1869-70, p. 584.) The first section of the Act of April 4th, 1870, to relieve owners of incumbered real estate from double taxation (*id.*, p. 710) is identical with the first section of the first mentioned Act. The second section of the latter Act, which purports to make new contracts between borrowers and lenders, and the third section, which provides for the forfeiture to the State, in a certain contingency, of moneys belonging to the borrowers, are not involved in this case. The validity of only the first section of each Act is drawn in question. The section is as follows: "No mortgage or lien given and held upon real estate, or the debts thereby secured, or promissory notes secured by mortgage, shall be assessed upon the books of any Assessor, State, county, or otherwise." That portion of section thirteen, Article XI, of the Constitution, by which the validity of the legislation in question is to be tested, is as follows: "Taxation shall be equal and uniform throughout the State. All property in this State shall be taxed in proportion to its value, to be ascertained as directed by law."

That the purpose of the first section of the Act was to exempt from taxation solvent debts secured by mortgages upon real estate is, we think, beyond all question. An ingenious argument is presented by the appellant to show that such is not the purpose of the Act — that it was merely to regulate the duties of Assessors. It is insisted — and correctly so — that it is within the power and is the duty of the Legislature to prescribe the mode in which all property shall be assessed; and it is claimed that this Act is only a legiti-



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mate exercise of such power. But the argument is merely specious. Looking beyond the mere words of the Act — the shadow — it is seen that the Act, if enforced, effectually prevents the taxation of debts secured by mortgages upon real estate. And this is the direct effect, as we have no doubt it was the purpose, of the Act. If the Constitution requires this property to be taxed, the Legislature, under the guise of regulating the duties of Assessors, can no more exempt it from taxation than they could accomplish the same result by providing that the Collector should return to the taxpayer the amount collected on such property, under the pretense of regulating the duties of Tax Collectors. The manifest purpose of the Act is to exempt such property from taxation. Its true features are quite apparent, notwithstanding its attempted disguise.

The nature and object of the Act having been ascertained, and it having been decided in *People v. McCreery*, 34 Cal. 433, that a solvent debt, whether secured by a mortgage or not, is property within the meaning of the section of the Constitution relating to taxation, already cited, and the doctrine of that case that *all* property in the State is subject to taxation, and cannot be exempted by the Legislature, having been repeatedly affirmed in this Court (*People v. Gerke*, 35 Cal. 677; *People v. Black Diamond C. M. Co.*, 37 Cal. 54; *People v. Whartenby*, 38 Cal. 461), the case might well be left at this point. But as the discussion of some of the questions decided in those cases has been renewed by the defendant, a few of his positions will be noticed. It is insisted that the "property" mentioned in section thirteen of Article XI of the Constitution comprises only real estate and movable property — that it is limited to tangible, visible property, and does not include choses in action. The word "property" is used in that section of the Constitution in its ordinary and popular sense, and this is the general rule in the interpretation of Constitutions and statutes, unless the

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context shows that the words are used in a technical or in some arbitrary sense.

There is no good reason to believe that the word was used in that section in a sense materially differing from that which it has in other sections of that instrument. There is a manifest propriety in giving a word the same definition in each of the sections in which it occurs, unless there is something in the context in one section showing that it has a different meaning there, from what it has in another section. The section following the one under consideration (section fourteen) provides that "All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterwards by gift, devise, or descent, shall be her separate property." It is apparent that the purpose of that section was to abrogate the common law rule in respect to the right which the husband acquires by marriage in the property of the wife. At common law the husband had the right to sue for, recover and reduce to his possession, for his own use, the choses in action of his wife; and in case of her death, before he has reduced them to his possession, he may still proceed, as her administrator, but for his own use, to recover the same. Suppose the wife, at the time of her marriage in this State, had owned Government bonds, shares of stock, certificates of deposit, promissory notes, etc., can the husband, under the provisions of our Constitution, collect the money due thereon for his own use? Had she collected, just previous to her marriage, the amount of one of her bonds in gold, it is admitted that the gold would have remained her separate property, because gold is tangible and visible; and it would require an unusual amount of hardihood to assert that the bond, had she retained it, would not have remained her separate property, merely because it was a chose in action. It would almost

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revolutionize the law regulating the rights of husband and wife to hold that the "all property" in that section, or the sections of the statute in respect to common property, does not comprise choses in action. But the cases in this Court which hold that the choses in action of the wife are her separate property are too numerous to require citation. It may safely be asserted that in no section of the Constitution is the word "property" employed as comprehending only visible and tangible property, and excluding choses in action. In the first section of the declaration of rights it is declared, among other things, that all men have the inalienable right of "acquiring, possessing, and protecting property." Will it be contended, in the face of this declaration, that a man has not the same right to acquire, possess, and protect choses in action as property of any other description?

In the eighth section of the same Article it is provided that no person shall be "deprived of life, liberty, or property, without due process of law;" and that private property shall not be taken for public use without just compensation. Should the Government attempt arbitrarily to seize the debt on which the tax in this case was levied, or to confiscate a State bond, the owner could confidently rely upon those provisions of the Constitution for his protection.

Section nineteen of the same Article declares that "foreigners who are, or may hereafter become, bona fide residents of this State, shall enjoy the same rights in respect to the possession, enjoyment, and inheritance of property as native born citizens." The foreigner who, after having been protected by the Constitution in the enjoyment of his lands, should find that he was liable to be plundered of the bill of exchange which he had received on his sale of the land, because the bill was only a chose in action — only the evidence of a debt — and, therefore, not under the protection of the Constitution, might well conclude that those who

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framed that instrument, instead of being statesmen, as we have been accustomed to regard them, were only savages, whose untutored minds were incapable of entertaining the idea of any property, except such as they could both see and touch.

If legislation of this character can be sustained, why may not the exemption proceed until the whole burden of taxation is cast on one species of property? Debts secured by mortgages have now the benefit of the exemption; but by a change in the tone and temper of the Legislature they might be made to bear the whole burden of the taxes. It was not intended by the framers of the Constitution that the Legislature, whether actuated by honest or corrupt motives, should have the power to exempt any kind of property from taxation. The exercise of the power would be dangerous. The Legislature of this State, even in full view of the unmistakable injunctions of the fundamental law, have repeatedly exempted certain species of property; and it is notorious that for years one kind of property, which during a portion of the time was probably of greater value than that of any other kind, was by the power of a numerical majority exempted altogether from taxation.

There is another and a very serious objection to the Act. Under the provision of the general revenue law solvent debts over and above indebtedness are subject to taxation. It is impossible to conceive of any law which is more imperatively required by the principles of good government and the just rules of political economy to be equal and uniform than a revenue law. That the burdens of taxation should rest equally upon all property within the State ought to be axiomatic, not only in theory but in practice. To enforce this rule the Constitution has provided that "taxation shall be equal and uniform throughout the State." Is any argument needed in order to make it apparent that where the general law subjects all solvent debts to taxation, that

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another law which singles out one class of debts — whether the classification is based on the circumstances that their payment is secured by mortgages, or that they are owing to savings banks, or to a particular bank, corporation, or person, or are owing by a particular person, whether natural or artificial, or a particular class of persons — and exempts such debts from taxation, is repugnant to the Constitution? If this Act, with the manifest inequality which it produces when put in operation along with the general revenue law, can be upheld, no discrimination which the Legislature might devise, for the purpose of relieving a particular species or parcel of property from its proper share of the burdens of taxation, would conflict with the organic law.

Judgment affirmed.

[The foregoing opinion was rendered at the January Term, 1872, when the Court consisted of Justices WALLACE, CROCKETT, RHODES, and NILES. Mr. Justice NILES having been of counsel did not participate in the opinion. A rehearing was granted, and at the April Term, 1872, the following decision was made. Mr. Justice NILES being disqualified did not sit in the case.]

By the Court, RHODES, J.:

We adhere to the opinion which was heretofore delivered in this cause and order that the judgment be affirmed.

Argument for Appellants.

[No. 2,941.]

HENRY GRAFF ET AL. v. S. P. MIDDLETON ET AL.

QUITCLAIM DEED.—A quitclaim deed received in good faith, and for a valuable consideration, and which is recorded before a prior deed of bargain and sale, will prevail over such prior deed.

INDEMNITY.—A quitclaim deed passes whatever interest the seller has in the land at the time of its execution.

ACT CONCERNING CONVEYANCES.—The twenty-sixth section of the Act of April 30th, 1850, requires conveyances made before its passage to be recorded.

APPEAL from the District Court of the Fifteenth Judicial District, City and County of San Francisco.

This was an action to quiet the title to a tract of land in San Francisco, being a portion of the pueblo lands confirmed to said city.

The tract in controversy was granted to William Chandler, by the Alcalde of the pueblo, on the 30th day of December, 1848. Said Chandler, in 1849, conveyed the land by a deed of bargain and sale to Jones and McCormick, and their title passed by sundry mesne conveyances to the defendants. On the 29th day of November, 1853, said Chandler executed to Arthur Eggleso a quitclaim deed of the same land, and the plaintiffs claim under him.

The other facts are stated in the opinion.

J. M. Seawell and John W. Dwinelle, for Appellants.

The deed from William Chandler, dated November 29th, 1853, under which plaintiffs claim, was merely a quitclaim deed and conveyed no title, said Chandler having previously conveyed the land to Jones and McCormick. (*Coe v. Persons Unknown*, 43 Maine; *Dupont v. Wertheman*, 10 Cal. 354; *Clark v. McElroy*, 11 Cal. 154; *Adams v. Cuddy*, 13 Pick.; *Farrar v. Patton*, 20 Miss. 82; *Chaffin v. Chaffin*, 4 Gray, Mass. 202; *Brown v. ———*, 3 Story, 391; 1 Cowen,

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613; 14 Johns. 193; 20 Johns. 478; 4 Kent, 261, 270, note; 14 Ill. 317.)

H. B. Jones and W. H. Patterson, for Respondents.

A quitclaim deed of land affects land, conveys such land, and is therefore a conveyance. (*Jackson v. Fish*, 10 John. R. 456; *Beldoe's Ex'r v. Wadsworth*, 21 Wend. 126; *McConnell v. Reed*, 4 Scammon, Ill. 121; *Flagg v. Mann*, 2 Sumner, 486; *Brady v. Spurck*, 27 Ill. 482; *Sherwood v. Barlow*, 19 Conn. 471; *Pray v. Pierce*, 7 Mass. 381.)

By the Court, BELCHER, J.:

This is an action to quiet the title to certain real property in the City of San Francisco. Both parties claim under one William Chandler, who, it is admitted, became the owner of the premises in fee in December, 1848.

There can be no doubt that Eggleso purchased of Chandler in good faith and for a valuable consideration, for it is admitted that he paid three thousand seven hundred and fifty dollars for the property, and took his deed without notice, actual or constructive, of any prior deed or other defect in the title. It is manifest that he supposed he was purchasing a good title. He received a quitclaim deed and at once placed it on record. The plaintiffs also purchased of him in good faith and for a valuable consideration, and placed their deed of record. As early as 1856 they entered into the actual possession of the premises, and have held that possession ever since.

It appears that Chandler in fact conveyed the premises to Jones and McCormick in 1849, but their deed was destroyed by fire in June, 1850, and was never recorded, and no possession was ever taken under it. The defendants claim under this deed, and insist that it was effectual to pass the title as against the subsequent quitclaim deed to Eggleso.

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The plaintiffs had judgment in the Court below, and the defendants appeal.

Sections twenty-six and thirty-six of the Act concerning conveyances are as follows:

"Sec. 26. Every conveyance of real estate within this State, hereafter made, which shall not be recorded as provided in this Act, shall be void as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate, or any portion thereof, where his own conveyance shall be first duly recorded."

"Sec. 36. The term 'conveyance,' as used in this Act, shall be construed to embrace every instrument in writing by which any real estate or interest in real estate is created, aliened, mortgaged, or assigned, except wills, leases for a term not exceeding one year, executory contracts for the sale or purchase of lands, and powers of attorney."

The Act concerning conveyances was passed April 30th, 1850, and it is settled that it requires conveyances made before its passage to be recorded, and denounces the same penalty for failing to record them as in the case of conveyances made after its passage. (*Stafford v. Lick*, 7 Cal. 479; *Clark v. Troy*, 20 Cal. 219; *Anderson v. Fisk*, 36 Cal. 625.)

It is said this rule ought not apply in this case, because the deed to Jones and McCormick was burned and could not be recorded. It will be observed that it was not destroyed till more than a month after the passage and taking effect of the Act; but if it had been destroyed before the Act was passed, we do not see how it could help the defendant's case. It is a familiar rule, that when the fault or misfortune of one has caused a loss to another, he whose fault or misfortune it is to have caused the loss must bear its consequences.

There can be no doubt upon the question presented, if real estate, or an interest in real estate, can be aliened or assigned by a quitclaim deed. To alien or alienate means simply to

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convey or transfer title to another. In this State, from the earliest times, quitclaim deeds have been in every-day use for the purpose of transferring title to land, and have been considered as effectual for that purpose as deeds of bargain and sale. It is true they transfer only such interest as the seller then has, and do not purport to convey the property in fee simple absolute, so as to pass an after-acquired title, but to the extent the seller has an interest they divest him of it and vest it in the purchaser.

We consider, therefore, that a quitclaim deed received in good faith, and for a valuable consideration, which is first recorded, will prevail over a deed of older execution which is subsequently recorded.

Judgment affirmed.

[No. 2,882.]

THE PEOPLE OF THE STATE OF CALIFORNIA v.
WILLIAM WILLIAMS.

CONTINUANCE OF CRIMINAL CASE.—If the person indicted for murder, at the time and just before he killed the deceased, stated that he was about to kill him, and asked others to witness the killing, the absence of a witness who saw the defendant and the deceased have a friendly conversation the day before, is no ground for a continuance, for the fact, if sworn to, would be no defense.

SUMMONING TRIAL JURY.—If no trial jury has been drawn before the term, and a necessity for one arises during the term, the District Court may order a trial jury to be summoned by the Sheriff. It is immaterial whether the cause for this necessity arose before or after the commencement of the term.

ARGUMENT OF COUNSEL, WHEN TO BE MADE.—The counsel for the prisoner is not entitled to make his argument on the case made out by the prosecution when the prosecution closes. The argument is to be made when the evidence is concluded.

HOMICIDE.—If a homicide is committed by means of wilful, deliberate, and premeditated killing, it shows an abandoned and malignant heart.

INSTRUCTIONS SHOULD BE BASED ON EVIDENCE.—If there is no evidence on the subject as to which an instruction is asked, it should be refused.

Statement of Facts.

DELIBERATION OF ACCUSED BEFORE KILLING.—When the question of the capacity of the accused to deliberate, at the time of the homicide, is before the jury, the Court may also instruct as to what might amount to such deliberation.

ITEM.—In deliberating, there need be no appreciable time between the intention to kill and the act of killing.

INSANITY PRODUCED BY INTOXICATION.—Insanity produced by intoxication does not destroy responsibility for crime, if the accused, when sane, voluntarily made himself intoxicated.

DRUNKENNESS IN CONNECTION WITH PREMEDITATION.—Drunkenness cannot be given in evidence as an excuse for crime; but when, in a case of homicide, the jury are to pass on the question of premeditation, for the purpose of fixing the degree of the crime, drunkenness may be taken into consideration for the purpose solely of passing on the fact of premeditation, keeping in view the fact that a drunken man may act with premeditation as well as a sober one.

APPEAL from the District Court of the Ninth Judicial District, Siskiyou County.

The indictment was found and certified to the District Court before the commencement of the term at which the accused was tried.

The fifteenth instruction, referred to in the opinion, was as follows:

“It is a well settled rule of law that drunkenness is no excuse for the commission of a crime. Insanity, produced by intoxication, does not destroy responsibility, when the party, when sane and responsible, made himself voluntarily intoxicated; and drunkenness forms no defense whatever to the fact of guilt, for when a crime is committed by a party while in a fit of intoxication, the law will not allow him to avail himself of his own gross vice and misconduct to shelter himself from the legal consequences of such crime. Evidence of drunkenness can only be considered by the jury for the purpose of determining the degree of the crime, and for this purpose it must be received with great caution.”

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The eighteenth instruction referred to in the opinion was as follows:

"In this case, if the killing was willful (that is, intentional), deliberate, and premeditated, it is murder in the first degree; otherwise, it is murder in the second degree, and in determining the degree, any evidence tending to show the mental status of the defendant is a proper subject for the consideration of the jury. The fact that the defendant was drunk, does not render the act less criminal, and in that sense it is not available as an excuse, but there is nothing in this to exclude it as evidence upon the question as to whether the act was deliberate and premeditated. Presumptively, every killing is murder, but so far as the degree is concerned, no presumption arises from the mere fact of killing, considered separately and apart from the circumstances under which the killing occurred. The question is one of fact, to be determined by the jury from the evidence in the case, and it is not a matter of legal conclusion, and drunkenness, as evidence of a want of premeditation, is not within the rule which excludes it as an excuse. Drunkenness neither excuses the offense nor avoids the punishment which the law inflicts, when the character of the offense is ascertained and determined, but evidence of drunkenness is admissible with reference solely to the question of premeditation.

"In cases of premeditated murder, the fact of drunkenness is immaterial. A man who is drunk may act with premeditation as well as a sober one, and is equally responsible for the consequences of his act. In murder in the first degree, it is necessary to prove the killing was premeditated, which involves, of course, an inquiry into the state of mind under which the party committed it, and in the prosecution of such an inquiry, his condition as drunk or sober is proper to be considered. The weight to be given to it is a matter for the

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jury to determine, and it is sufficient for the Court to say to the jury that it should be received with caution, and carefully examined in connection with all the circumstances and evidence in the case. In determining the question of premeditation, you can take into consideration previous threats of the defendant against the deceased, if the evidence satisfies you, beyond a reasonable doubt, there were any such threats made."

The other facts are stated in the opinion.

E. Steele, for Appellant.

The true interpretation of section seventeen of the Criminal Practice Act is that the cause for a jury shall arise during the term, and not in a case that has been certified to the Court long anterior to the term.

The practice has always been to allow defendant's counsel to comment on the testimony for the prosecution when the prosecutor closes his case. It was error for the Court to refuse this privilege.

John L. Love, Attorney General, for the People.

By the Court, WALLACE, C. J.:

The prisoner having been convicted of the crime of murder in the first degree in taking the life of John Todhunter, and adjudged to suffer death, brings this appeal:

1. The first error relied upon is the refusal of the Court to continue the case upon affidavit filed. This affidavit of the prisoner sets forth that he expected to prove by the absent witness, Clay Todhunter, a son of the deceased, that two or three days before the homicide the witness and the deceased visited the house of the prisoner, situated in a secluded place, and there met the prisoner, and that the interview then had between the parties was friendly in its character.

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This, it was supposed, would tend to show that if the prisoner entertained any preconceived design of taking the life of the deceased he might have then and there executed it. In view of the case made by the prosecution, however, this evidence was entirely immaterial. It appears that on the day of the homicide, and before its commission, the prisoner announced his purpose to take the life of the deceased. He stated to the witness, Meagher, that Todhunter was in town and that he was going to kill him, and being advised to go home he replied that he would not go home until he had killed Todhunter, and invited the witness to go with him and see him do it. When on his way to the saloon in search of Todhunter, he said in the hearing of Eubanks, another witness: "I will cut his d—d guts out," and stepping into the saloon commenced an assault upon Todhunter with a bowie knife. He had also, on the same day, told the witness, Michilwait, that he was going to kill Todhunter "because he had killed his colt;" and about the same time he invited Dr. Conlan "to come up and see him kill him," and starting toward the saloon looked back at Conlan and said: "Are you coming?" The deceased, who was unarmed, retreated from the assault; the prisoner pursued him out of the saloon and across the street—a considerable distance—and stabbed him to the heart. There is not the slightest contradiction in the evidence in respect to the circumstances of the killing, and the testimony of Clay Todhunter, as to the visit of his father, two or three days before, to the house of the prisoner, could have had no appreciable bearing upon the case, nor would it have tended in the slightest degree to the exculpation of the prisoner.

2. The challenge of the defendant interposed to the panel of trial jurors summoned was properly overruled. No trial jury for the District Court having been drawn and summoned, and it having therefore "become necessary" during the term of the District Court to order a trial jury to be

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summoned, the case came precisely within the provisions of section seventeen of the Act of 1868-4 (p. 527), and the order to summon the jury was properly made by the Court. The necessity for this course arose during the term — that is enough; whether this necessity be attributable to a cause existing before or only arising after the commencement of the term is immaterial. The language of the statute is as follows: "Sec. 17. When from any cause it shall become necessary during the term, the Court may order the Sheriff to summon * * * a sufficient number of persons," etc. This is the view announced in *People v. Stuart*, 4 Cal. 225, also in *People v. Vance*, 21 id. 400.

3. The Court correctly refused to allow the prisoner's counsel to make his argument upon the case made by the prosecution in opening the case of the prisoner. The argument is to be made "when the evidence is concluded." (Crim. Pr. Act, Sec. 362, Sub. 5.)

4. At the instance of the prisoner the Court gave the jury the following instructions: "1st. Murder is the unlawful killing of a human being with malice aforethought, either express or implied. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature which is manifested by external circumstances capable of proof. Implied malice is where no considerable provocation appears, or where all the circumstances of the killing show an abandoned and malignant heart. 2d. All murder which shall be perpetrated by means of poison or lying in wait, torture, or by any other kind of willful, deliberate, and pre-meditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder in the first degree. All other kinds of murder shall be deemed murder in the second degree."

Immediately succeeding these instructions there is found in the record a third instruction asked by the prisoner, and

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the refusal of which by the Court is relied upon as error. The third instruction thus refused refers to the two preceding instructions given and is as follows: "3d. The above grades of murder are fixed by our statute and malice is an ingredient of both degrees. If you find that the defendant committed the homicide with malice aforethought, but not under circumstances showing an abandoned and malignant heart, and that it is perpetrated by means of poison or lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary, you will find the defendant guilty of murder in the second degree."

The instruction as thus asked was correctly refused. Its hypothesis is an inherent impossibility. If the jury find that the defendant committed the homicide with malice aforethought, but not under circumstances showing an abandoned and malignant heart, how are they to find that it was perpetrated by means of willful, deliberate, and premeditated killing? How could the jury find that the homicide was effected by means of willful, deliberate, and premeditated killing, and at the same time that the killing was not done under circumstances showing an abandoned and malignant heart? I should be inclined to suspect, from the reading of the proposed instruction, that a clerical error had occurred in the transcript, were it not that the learned Judge of the Court below, in refusing the motion for a new trial, in adverting to this instruction, uses the following language: "The third instruction asked by defendant specifies several kinds of murder, which the statute declares to be murder in the first degree, and asks the Court to charge the jury that they are only murder in the second degree."

5. The ninth instruction asked and refused is as follows: "9th. If, in your judgment, the homicide complained of was voluntary upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible,

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the offense is but manslaughter—and in considering the provocation you can take into consideration the state of mind of the accused as to intoxication, and his capacity to then resist provocation.”

It is sufficient to say of this proposed instruction that there is no evidence in the record upon which to predicate it, and as was said here in *People v. Roberts*, 6 Cal. 217, and often since then repeated in substance, “instruction in civil and criminal trials should be drawn with some slight reference to the case made by the evidence.”

6. The Court, at the instance of the prisoner, having instructed the jury that if they entertained a reasonable doubt whether or not the prisoner was capable of deliberation at the moment of committing the homicide, they must give him the benefit of such doubt, the prisoner thereupon asked, the Court to give the following instruction:

“19th. And if you have such reasonable doubt as to the capacity to deliberate—of defendant—at the time the act was committed—he is entitled to an acquittal of the crime of murder in the first degree.” The instruction was given; but the Court thereupon added the following:

“In deliberating there need be no appreciable space of time between the intention to kill and the act of killing. They may be as instantaneous as successive thoughts of the mind. It is only necessary that the act of killing be preceded by a concurrence of will, deliberation, and premeditation on the part of the slayer; and if such is the case the killing is murder in the first degree, no matter how rapidly these acts of the mind may succeed each other, or how quickly they may be followed by the act of killing.” It is now claimed that there was an error in giving this last instruction in connection with the other.

The question of the capacity of the prisoner to deliberate at the time of the homicide having been, at his instance, placed distinctly before the jury, there was obviously no

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error in also instructing them as to what might amount to such deliberation on his part — and in doing so the Court below gave the precise instruction which had been given and was approved here in *People v. Nichols*, 34 Cal. 211.

7. The fifteenth instruction given to the jury, as to insanity produced by intoxication, is correct. It is the same which was approved here in *People v. Lewis*, 36 Cal. 531.

8. In its eighteenth instruction, as to the effect of the intoxication of the prisoner in connection with determining the degree of the murder, the Court but followed the rule laid down here in the case of *The People v. Belencia*, 21 Cal. 544, and subsequently approved in the case of *The People v. King*, 27 Cal. 507, and other cases in this Court. In this there was no error.

We discover no error in the action of the Court below in any of the proceedings of the trial. The various legal propositions involved were correctly and distinctly placed before the jury by the learned Judge, in an elaborate charge, remarkable for its clearness and force.

9. The last point made is that the Court erred in denying the motion for a new trial, on the ground that the entire evidence taken together shows that the offense of the prisoner amounted to no more than murder in the second degree. I have carefully read and attentively considered the record in this connection, and am entirely satisfied that upon the case presented no enlightened and conscientious jury could have done otherwise than find a verdict of murder in the first degree.

Judgment and order affirmed.

Mr. Justice CROCKETT did not express an opinion.

Argument for Petitioner.

[No. 2,839.]

**HENRY E. ROBINSON v. THE SUPERVISORS OF
BUTTE COUNTY.**

MANDAMUS TO SUPERVISORS TO LEVY A TAX.—When the Legislature makes it the duty of the Supervisors of a county to levy a tax sufficient to pay the interest on, and ultimately satisfy the principal of, outstanding bonds of the county, the Board must fairly exercise its judgment with a view to effect the end contemplated, and if it refuses to do so, may be compelled by the writ of mandate.

SUM.—If in such case the Board levies a tax which its members know will not produce a sufficient sum, it will be compelled by writ of mandate to levy the additional percentage required.

The facts are stated in the opinion.

Beatty & Denson, for Petitioner.

There was no discretion in the Board. It was simply a matter of calculation. The law provides that it shall yearly raise enough to pay the interest and the bonds at maturity. The annual interest is twenty thousand dollars, and, as the bonds had ten years to run after 1870, the Board should have levied a tax in 1870 that would yield twenty thousand dollars and one tenth of the principal. It is true that, there being no exact method of determining the precise percentage necessary to raise the forty thousand dollars, the Board must exercise its judgment (not discretion) in determining the necessary percentage. But this is just what the Board did not do, admitting the petition to be true. The Board exercised its discretion in refusing to carry out the law, and in determining it would only raise a fraction of the yearly interest. We want them compelled to exercise their judgment in determining what percentage will be required to pay the entire interest and the proper proportion of principal.

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Haymond & Stratton, for Defendants.

The power of the Supervisors is exhausted. (*People v. Supervisors of Schenectady*, 35 Barb. 408.)

When discretion enters into the act of the inferior tribunal or Board, it ousts the jurisdiction by mandate. (*People v. Sexton*, 24 Cal. 78; *Magee v. Calaveras County*, 10 Cal. 376; *Flugley v. Hubbard*, 22 Cal. 37.)

Discretion, in the sense in which it is used by the authorities cited, is the exercise of judgment—the power of acting without being bound by any fixed rule. (Burrell's Law Dictionary.)

The laws in question prescribe a fixed rule, and also provide for the exercise of judgment. The fixed rule is that a tax must be levied. Judgment is exercised as to the amount to be levied. The Supervisors have levied a tax, and have exercised their judgment as to the amount. For these reasons the writ should be denied.

By the Court, WALLACE, C. J.:

This is an application made to this Court for a writ of mandamus directing the Board of Supervisors of Butte County to increase the levy of taxes for the Railroad Fund of that county from forty cents to eighty cents on each one hundred dollars worth of property in the county. The Board have appeared and filed a general demurrer to the petition.

It appears that the petitioner is the holder of thirty-two of the bonds, each for one thousand dollars, issued under the Act of March 14th, 1860 (p. 90); the amendatory Act of March 29th, 1860 (p. 133), and the Act of April 8th, 1863 (p. 237), authorizing the County of Butte to purchase and hold two hundred of the first mortgage bonds of the California Northern Railroad Company (each for one thousand

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dollars) and to issue two hundred bonds of said county (each for one thousand dollars), in the purchase of the same, and for other purposes connected therewith. The petition alleges that a large sum for interest accrued is due and unpaid, and that the Board levied a tax of forty cents upon each one hundred dollars worth of taxable property in the county, and no more, for the Railroad Interest Fund; and further, that it is the fact, and the Board at the time well knew it to be the fact, that that rate of taxation is insufficient to produce the amount necessary to pay the annual accruing interest upon these bonds, etc.

The Acts referred to, and under which the bonds were issued, provided that the Railroad Interest Fund, in the County Treasury of Butte County, should be made up of moneys to be collected upon the interest coupons of the two hundred thousand dollars of bonds issued by the railroad (and which the county held in exchange for her own bonds issued for the same amount), and that any deficiency resulting should be supplied by taxation, to be levied and collected in the same manner as other taxes. But, by an Act passed in the year 1866 (p. 338), the Board were authorized to exchange the railroad bonds held by the County of Butte for her own bonds outstanding, at the rate of two railroad bonds for one county bond; and the Act further provided (section four) that "the Board of Supervisors shall annually, at the same time and in the same manner as other taxes are levied, levy and cause to be collected a tax upon all the taxable property of the county sufficient for the payment of the interest accruing from year to year upon all the bonds of the county outstanding, the proceeds of which tax shall be paid into the Railroad Interest Fund of said county; and on and after the year 1870, in addition thereto, shall cause to be levied and collected, in like manner, yearly, a tax sufficient to redeem said bonds at maturity."

The effect of the statute was to make it the duty of the

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Board to provide by taxation a sufficient amount to meet the accruing interest on the county bonds outstanding, and also to create a Redemption Fund.

This is the duty of the Board, specially enjoined upon them by the statute of 1866, and one to the effective performance of which they are bound, and in so doing are to fairly exercise their judgment with a view to effect the end contemplated, to wit, the payment of the accruing interest, and providing a fund for the redemption of the bonds. The petition alleges, and the demurrer admits, for the purpose of this determination, that when the Board made the levy of forty cents it, and each of the members thereof, well knew that the forty cents levied would not produce enough to pay the annual accruing interest upon the outstanding county bonds by from some two thousand dollars to six thousand dollars — would not pay any of the interest already accrued and remaining unpaid, nor provide any sum whatsoever for the Sinking Fund, out of which the bonds are to be ultimately redeemed.

Upon the allegations of the petition the petitioner is unquestionably entitled to the writ, and the demurrer must be overruled.

[No. 2,980.]

**LEWIS AUTENREITH v. JOHN N. HESSENAUER,
HERMAN PFENNINGER, FERDINAND BUCK,
AND JOSEPH LANG.**

WRIT OF ASSISTANCE IN CASE OF PARTNERSHIP PROPERTY.— A party who forecloses a mortgage, given by one partner, on, and obtains a sheriff's deed for, an undivided interest in partnership property, without making the other partner a party to the action, is not entitled to a writ of assistance to be placed in possession, as against a receiver who has been appointed by the Court, at the instance of such other partner, in an action commenced by him to dissolve the partnership, and have the partnership property sold to pay the debts.

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APPEAL from the District Court of the Ninth Judicial District, County of Siskiyou.

Autenreith, in the foreclosure suit, made Pfenninger, Buck, and Lang defendants, because they had caused attachments to be levied on the property, claiming that the liens they had acquired by the attachments were subsequent to the lien of his mortgage. Junker, in his complaint against Hessenauer, claimed that the partnership was indebted to him. Autenreith obtained the Sheriff's deed under his foreclosure sale on the 8d day of May, 1870, and on the ninth of May demanded of Junker, the receiver, possession of the property. His demand not being complied with, on the 21st of May, 1870, he moved the Court for a writ of assistance, and the motion was denied. From the order denying the motion he appealed.

The other facts are stated in the opinion.

E. Steele, for Appellant.

[No brief on file for Respondent.]

By the Court, *BELCHER, J.*:

We do not think the Court erred in denying the plaintiff's application for a writ of assistance.

When he commenced the action to foreclose his mortgage, and from that time till the application for the writ was denied the Pacific Brewery—the undivided one half of which was covered by the mortgage—was in the hands of a receiver appointed by the same Court in the case of *Junker v. Hessenauer*. The plaintiff's mortgage was dated January 28th, 1869, and on that day Junker filed his complaint against Hessenauer, alleging therein among other things, that the plaintiff and defendant became equal partners in the brewing business in June, 1864, and had continued to be such up

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to the time of the filing the complaint, and that the partnership property consisted in part of the Pacific Brewery, and praying that a receiver be appointed to take charge of the property; that there be an accounting between the parties, and that the partnership be dissolved, etc.

The plaintiff did not make Junker a party to his foreclosure suit, nor did he ever in any way intervene in the action commenced by Junker to dissolve the partnership. Both actions were pending at the same time and were tried independently, one resulting in a decree that the undivided half of the Pacific Brewery be sold to satisfy the plaintiff's mortgage, and the other adjudging that the whole property was partnership property, and directing it to be sold to satisfy partnership liabilities. Whether the property was in fact partnership property, and, if it was, whether it became so before the execution of the plaintiff's mortgage, and whether there were partnership liabilities, are questions which, as against the plaintiff, had not been tried when this application was heard, and could not be without some appropriate proceedings instituted for that purpose.

Until such proceedings were taken, and the respective rights of the parties determined thereunder, the Court did not err in refusing to surrender to the plaintiff a possession which it had taken and was holding by its receiver.

Order affirmed.

Statement of Facts.

[No. 2,290.]

CYRIL V. GREY AND J. R. BRANDON v. HIRAM TUBBS.

CONTRACTS.— Courts of equity have not the power to make contracts for parties, nor alter those which have been deliberately made.

CONTRACT TO CONVEY LAND.— If, in a contract for the sale and conveyance of land, it is provided that the purchaser shall pay certain sums at specified times, and that, if he fails to do so, the seller shall be released from all his obligations in law or equity to convey the premises, and the purchaser shall perfect his right to a conveyance, and the purchaser makes default in his payments, without excuse, a Court of equity will not enforce the contract against the seller.

ISSUE.— In such contract the parties have made time essential in performing the conditions of the contract, and Courts of equity will not inquire into their motive for doing so.

APPEAL from the District Court of the Fourth Judicial District, City and County of San Francisco.

The following is the contract for the sale of land, referred to in the opinion. An action was commenced on the 4th day of January, 1869, to enforce a specific performance of the contract. Wright assigned the contract to the plaintiffs on the 27th day of November, 1868:—

“ Article of agreement made and entered into the 1st day of July, 1867, between Hiram Tubbs, party of the first part, and Horace Wright, both parties of the Town of Clinton, Alameda County, State of California, of the second part, in the manner following:

“ That the said party of the first part, for the consideration hereinafter expressed, hereby agrees to sell unto the said party of the second part a certain parcel of land in the Town of Clinton, in block number (105) one hundred and five, commencing fifty feet from the corner of Jones and Lacy streets, on Jones street; and thence along Jones street one hundred feet; and thence parallel with Lacy street one hundred and fifty feet; and thence parallel with Jones street

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one hundred feet; and thence parallel with Lacy street one hundred and fifty feet, to Jones street, the place of beginning; the same being a lot of land one hundred by one hundred and fifty feet, in block number one hundred and five, as per official map of the Town of Clinton, recorded at San Leandro, Alameda County, State of California, for the sum of four hundred United States gold dollars, which the said party of the second part hereby agrees to pay to the said party of the first part, as follows: Four hundred dollars on or before July 1st, 1870, with interest at the rate of one per cent per month, payable quarterly, in advance, on the first days of January, April, July, and October of each year till paid. Principal and interest payable in United States gold coin. And the said party of the second part agrees to pay all State, city, and county taxes, or assessments of whatsoever nature, which are or may become due on account of above mentioned. In the event of failure to comply with the terms hereof by the party of the second part, the party of the first part shall be released from all obligations in law or equity to convey said property, and said party of the second part shall forfeit all right thereto. And the said party of the first part, on receiving such payment at the time and in the manner above mentioned, shall execute and deliver to the said party of the second part, or to his assigns, a proper deed. And it is understood that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators, and assigns of the respective parties.

“In witness whereof the parties to these presents have hereunto set their hands and seals the day and year above written.”

The Court below gave judgment in favor of the plaintiff, and the defendant appealed.

The other facts are stated in the opinion.

Argument for Appellant.

Campbell, Fox & Campbell, for Appellant.

While there are many cases where time is not in equity held to be of the "essence of the contract," yet the parties by their express agreement may make it so, and in such case equity will not change the agreement to benefit either party, but will leave them to their legal remedy. (Fry on Spec. Perf. of Contracts, Sec. 710.)

Time is originally of the essence of the contract in view of a Court of equity, whenever it appears to have been the real intention of the parties that it should be so, etc. (*Potter v. Tuttle*, 22 Conn. 512; *Benedict v. Lynch*, 1 John. Ch. 319; *Colslake v. Tell*, 1 Russell, 375; *Bodine v. Gladding*, 21 Penn. 54; *King v. Wilson*, 6 Beaver R. 124; *Brown v. Covillaud*, 6 Cal. 571; *Pearis v. Covillaud*, 6 Cal. 617; *Green v. Covillaud*, 10 Cal. 317; *Webber v. Marshall*, 19 Cal. 447.)

Grey & Brandon, for Themselves.

The result in equity of a contract of sale is, that the thing sold becomes the property of the purchaser, and the purchase money the property of the vendor, and the vendor holds the estate in trust for the purchaser subject to the payment of the purchase money. (Story's Equity Jurisprudence, Vol. II, Sec. 790; Dart's Vendors and Purchasers, *114; Fry on Specific Performance, *377; Hilliard on Vendors, 6. 7.)

In the case at bar, therefore, the defendant held the estate in trust, subject to the payment of the purchase money, four hundred dollars, on or before July 1st, 1870, with interest.

The money and a deed for execution were tendered in December, 1868.

The question of the hardship of a contract (which is to prevent its enforcement) is to be judged of at the time it was entered into; if it be then fair and just, it will be immaterial

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that it may, by the force of subsequent circumstances and a change of events, have become less beneficial to one party, except where those subsequent events have been in some way due to the party who seeks the performance of the contract. (Fry on Specific Performance, *116, 107, 119.)

Equity discriminates between those terms of the contract which are formal, and a breach of which it would be inequitable in either party to insist on as a bar to the other's rights, and those which are of the substance and essence of the agreement, and applies to contracts those principles which have governed its interference in relation to mortgages. (Fry on Specific Performance, *312.)

By the Court, RHODES, J.:

The contract of sale which the plaintiffs, who are the assignees of the purchaser, seek to have specifically enforced provides that the interest on the purchase money shall be paid quarterly in advance on the first days of January, April, July, and October. The principal sum was to be paid on or before July 1st, 1870—three years from the date of the contract. The interest up to January 1st, 1868, was paid in advance, but the interest for the next quarter was not tendered until the last day of February, 1868. The defendant refused to receive the money and stated to the purchaser that he had forfeited his contract. The plaintiff, in December, 1868, before the commencement of the action, tendered to the defendant the principal sum and all the interest then due, according to the terms of the contract.

The fact that the purchaser did not tender the amount which became due on the first of the two quarters succeeding January 1st, 1868, is not material; for if a Court of equity can excuse the delay in tendering the money which became due on the last mentioned day, the failure to tender the

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interest for the next two quarters at the times mentioned in the contract is, under the circumstances, readily excusable.

The contract contains the following covenant: "In the event of failure to comply with the terms hereof by the party of the second part [the purchaser] the party of the first part shall be released from all obligations, in law or equity, to convey said property, and said party of the second part shall forfeit all right thereto." The plaintiffs rely upon the rule which has so frequently been applied by Courts of equity, that time is not of the essence of the contract, or as it is better expressed by Parsons in his excellent work on Contracts, that time is not necessarily of the essence of a contract. The defendant, while denying the applicability of the rule to contracts for the sale of property of the character of that in controversy—city or town lots—particularly in this State, where such property is as marketable and as subject to fluctuations in value, and is bought and sold with the same facility as personal property, yet he relies more upon a necessary qualification of the rule: which is that time is of the essence of a contract, if it be made so by the parties themselves, or by the circumstances of the case. He insists that the clause of the contract above cited, shows that the parties intended that the time for the performance of the contract on the part of the purchaser should be material, and of the essence of the contract. The parties agreed that a failure on the part of the purchaser "to comply with the terms hereof"—that is to say, to pay the money according to the terms of the contract—should operate as a release of the vendor from all obligation to convey the premises to the purchaser or his assignees; and to make the matter still clearer, and to show that the parties intended to make time essential, it was agreed that such failure should release him from all obligation "*in law or equity*" to convey the premises. The parties further agreed—as if to place the matter beyond all doubt—that in case of such failure on the part of

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the purchaser he should *forfeit all right* to a conveyance. It would be difficult to express with greater clearness and certainty, than the parties did in this contract, that time is of the essence of the contract, except it were done by the insertion of those very words in the instrument. Courts of equity have not the power to make contracts for parties, nor to alter those which the parties have deliberately made; and whenever it appears that the parties have *in fact* contracted, that if the purchaser make default in the payments, as agreed upon, he shall not be entitled to a conveyance, and shall lose the benefit of his purchase; and when it also appears that the purchaser is without excuse for his delay, the Courts will not relieve him from the consequences of his default. They will not inquire into the motive or the sufficiency of the motive that induced the parties to contract, that time should be essential in the performance of any of the agreements contained in the contract of purchase; but if it appears that the parties have thus contracted, the Courts of equity will not disregard the contract in order to give effect to some vague surmise, that all that the vendor intended to secure by the contract, was the payment of the purchase money, with interest, at some indefinite time.

Judgment reversed, and cause remanded for a new trial.

Mr. Justice CROCKETT did not sit in this case.

Argument for Petitioner.

[No. 1,816.]

**THE CENTRAL PACIFIC RAILROAD COMPANY v.
THE BOARD OF EQUALIZATION OF PLACER
COUNTY.**

CASES IN WHICH CERTIORARI WILL LIE.—The only cases in which the writ of certiorari will lie are those in which an inferior tribunal, Board, or officer exercising judicial functions, has exceeded the jurisdiction of such tribunals, Board, or officer, and there is no appeal, nor, in the judgment of the Court, any plain, speedy, and adequate remedy.

JURISDICTION—CONSTRUCTION OF STATUTE.—The words in section four hundred and fifty-six of the Practice Act "has exceeded the jurisdiction of such tribunal, Board," etc., present substantially the same idea as the words "has regularly pursued the authority of such tribunal, Board," etc., in section four hundred and sixty-two of that Act.

DEFINITION OF JURISDICTION.—The general definition of jurisdiction is the power to hear and determine, and, as applied to a particular claim or controversy, is the power to hear and determine that controversy.

ERROR AS TO REASONS AND EVIDENCE NOT TO BE REVIEWED UPON CERTIORARI.—Erroneous views entertained, or incorrect reasons assigned, or evidence erroneously admitted in deciding the controversy, do not make a case of want of jurisdiction, and are not to be considered upon certiorari.

CERTIORARI to the Board of Supervisors of Placer County, sitting as a Board for the equalization of taxes.

The plaintiff is the owner of forty and one half miles of railroad in Placer County. The property was valued by the Assessors at twelve thousand dollars per mile, and the plaintiff applied to the defendant to reduce the valuation to six thousand dollars per mile.

The other facts are stated in the opinion.

[For reports of a similar proceeding between the same parties, see 32 Cal. 582 and 34 Cal. 352.]

S. W. Sanderson, for Petitioner, argued that the review of the proceedings of the inferior tribunal is not to be confined to the bare question whether the subject matter, as a whole, or the parties, or either of them, were within or without the jurisdiction, but must extend to all questions affecting the

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mode in which the jurisdiction or the power of the inferior tribunal has been exercised. He also argued that section four hundred and sixty-two of the Practice Act should be construed as enlarging the meaning of section four hundred and fifty-six so as to give a united meaning, to the effect that the review may extend far enough to determine whether the subject matter and the parties were such as the inferior tribunal had authority to deal with, and whether it dealt with them in the manner authorized by law. (*Nible v. Post's Administrators*, 25 Wend. 291, and cases cited in brief in that case; *Rathbun v. Sawyer*, 15 Wend. 451; *Morehouse v. Hollister*, 2 Seld. 324; *Whitney v. Board of Delegates of San Francisco Fire Department*, 14 Cal. 500; *Lowe v. Alexander*, 15 Cal. 300; *Blair v. Hamilton*, 32 Cal. 49.)

T. B. McFarland and *E. L. Craig*, for Respondent, argued that the writ of certiorari can be granted only where the jurisdiction of the inferior tribunal has been exceeded, and that mere error committed in ruling upon the admissibility of evidence by such tribunal, having full power and authority to hear and determine a matter, is not in excess of jurisdiction within the meaning of the Practice Act. (*Ex Parte Hanson*, 2 Cal. 263; *Clay v. Hoagland*, 5 Cal. 476; *Coulter v. Stark*, 7 Cal. 244; *Whitney v. Board of Delegates*, 14 Cal. 479; *Comstock v. Clemens*, 19 Cal. 7; *People v. Burney*, 29 Cal. 459; *People v. Dwinelle*, 29 Cal. 632; *People v. Johnson*, 30 Cal. 98; *Winter v. Fitzpatrick*, 35 Cal. 269.)

By the Court, WALLACE, C. J.:


This is an application made to this Court for a writ of certiorari to review the proceedings of the Board in the valuation of the railroad of the Central Pacific Railroad Company, in Placer County. The proceedings instituted before the Board, and to review which is the purpose of the present application, were proceedings commenced there by

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the railroad company, by its petition filed, praying the Board to reduce the amount at which the respective Assessors of the several revenue districts of Placer County had fixed the taxable value of said road. The Board, after a hearing, denied the petition.

The office of the writ of certiorari in this State is defined by statute (Pr. Act, Sec. 456), and only embraces cases in which "an inferior tribunal, Board, or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, Board, or officer, and there is no appeal nor, in the judgment of the Court, any plain, speedy, and adequate remedy." These are the only cases in which the writ lies, and upon its return the sole inquiry to be made is "whether the inferior tribunal, Board, or officer, has regularly pursued the authority of such tribunal, Board, or officer." (Sec. 462.) "*Has exceeded the jurisdiction of such tribunal, Board,*" etc., and "*has regularly pursued the authority of such tribunal, Board,*" etc., as expressed in these two respective sections of the Practice Act, present substantially the same idea. Mere irregularity intervening in the exercise of an admitted jurisdiction — mere mistakes of law committed in conducting the proceedings in an inquiry which the Board had authority to entertain — as, for instance, the admission of evidence not the best in degree, or not applicable to the issue in hand, are not to be considered here upon certiorari, otherwise that writ is to be turned into a writ of error.

That the Board of Equalization of the County of Placer had authority in the first instance to entertain the complaint made to them by the railroad company in this case is not questioned. It is claimed, however, that the Board, in determining the assessable value of the railroad proper, received and acted upon certain illegal evidence adduced before it by the people who resisted the application of the railroad company for a reduction of the valuation of their road. This evidence concerned the amount of profits which



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had been earned by the road in the prosecution of its business.

The valuation which the Assessor had placed upon the property of the road was not disturbed by the Board—no affirmative action was taken by it—it simply refused to disturb that which had already been done by the Assessor, and left unchanged the valuation he had made.

It is now claimed that in this respect the Board *exceeded its jurisdiction—that it did not regularly pursue its authority* in the premises.

Jurisdiction is the power to hear and determine—this is its general definition. Jurisdiction, as applied to a particular claim or controversy, is the power to hear and determine that controversy.

The mere grounds upon which the determination is reached may or may not be correct in themselves. These may be supported by evidence inadmissible when tested by the rules governing the introduction of evidence. The reasons given for the conclusion arrived at may or may not be such as address themselves to the judgment of others; but erroneous views entertained, or incorrect reasons assigned, or evidence erroneously admitted in deciding the controversy, do not make a case of want of jurisdiction. The judgment of the Board of Equalization upon the question of valuation involved was the purpose, and the lawful purpose, had in view by the railroad company when it presented its petition before it praying a reduction of valuation. The judgment of the Board upon that question was obtained. That judgment was to the effect that no reduction ought to be made. The company now come here to say that in arriving at that particular judgment the Board exceeded its powers. The proposition then is, that if a question of valuation be brought before the Board, and it determine it one way—that is, reduce the valuation—then it is a determination within its jurisdiction to make; but if it determine it

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the other way — that is, refuse to make the reduction — then such determination is one without the lawful jurisdiction of the Board to make. But the conclusive answer to this is, that jurisdiction over a question presented being conceded, carries with it necessarily the authority — the mere power — to decide the question either way — that to hold that there was jurisdiction to decide in only one way, and not in the other, is to say that there was in reality no question before the Board at all — it is to dictate the determination in advance.

We are of opinion that the writ be dismissed; and it is so ordered.

[No. 2,784.]

DENNIS C. FEELY v. SILAS SHIRLEY.

STRIKING OUT PART OF A PLEADING.—The ruling of the Court in striking out a portion of a complaint or answer does not form a part of the judgment roll, and cannot be reviewed on appeal, unless made a part of the record by a statement or bill of exceptions.

ISSUES IN PLEADINGS.—If the complaint avers that the defendant wrongfully broke down the plaintiff's flume for carrying water, and the answer denies that the defendant, wrongfully or otherwise, broke down the flume, it is an admission that the defendant broke down the flume, and only a denial of its wrongful character.

DAMAGES FOR WRONGFUL ACT.—If a complaint avers the commission of a wrongful act by the defendant, and the answer merely denies the wrongful nature of the act, and the plaintiff owns the property upon which the injury was done, the plaintiff is entitled to nominal damages without proof that the defendant committed the act.

APPEAL from the District Court of the Third Judicial District, Santa Clara County.

The complaint averred that the plaintiff was the owner and in possession of a ditch and flume, constructed for conducting water, and that he had for a long time been

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conveying water in the same for irrigating his land, and that the defendant wrongfully and unlawfully pulled down and destroyed the flume and diverted the water. There was a prayer for an injunction and for judgment for damages.

The answer denied that the defendant wrongfully and unlawfully, or otherwise, pulled down or destroyed the flume and ditch.

The Court, on motion of the plaintiff, struck out a portion of the answer.

The defendant filed a statement and moved for a new trial, and appealed from the judgment, and from an order of the Court below denying a new trial.

In the printed transcript, the appellant included in the judgment roll the respondent's notice of motion to strike out a portion of the answer, and the order made by the Court granting the motion, but said notice and order were not made a part of the bill of exceptions or included in the statement.

The other facts are stated in the opinion.

C. C. Stephens, for Appellant.

Belden & Younger, for Respondent.

By the Court, NILES, J.:

The ruling of the Court in striking out a portion of the answer cannot be reviewed upon this appeal, since it forms no part of the judgment roll. (*Dimmick v. Campbell*, 31 Cal. 238; *Moore v. Del Valle*, 28 Cal. 174.)

The motion for a nonsuit was properly denied. The breaking of the flume was distinctly alleged in the complaint, and the answer took issue upon the wrongful character of the act merely, but did not deny its commission. The breaking was, therefore, an admitted fact; and, conceding the plaintiff's right of property in the flume, no proof of

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the breaking was requisite to establish his right to recover at least nominal damages.

The testimony in the case was conflicting, and there appears sufficient testimony to support the findings of the Court upon all the issues made by the pleadings.

Judgment and order affirmed.

[No. 2,264.]**'ALFRED SMITH v. JAMES O'HARA ET AL.**

APPROPRIATION OF WATER.—If the first appropriator of water takes only a part of the quantity flowing in a stream, another may afterward appropriate the remainder, and if the first appropriates the water only during certain days in the week, another may afterward take during the remaining days of the week.

SALE OF A DITCH.—The sale of a ditch used for appropriating water must be evidenced by a deed. Such sale cannot be proved by parol evidence.

PRIOR APPROPRIATION OF WATER.—One who enters into the possession of a ditch used for appropriating water, under a verbal sale made to him of the same, does not succeed to the rights of the seller, so as to claim the benefit of the seller's prior appropriation of the water flowing in the same, but must date his appropriation from the time he enters into possession.

APPEAL from the District Court of the Fifth Judicial District, Tuolumne County.

The plaintiff alleged in his complaint that he and his grantors, since 1851, had owned a ditch known as Woods' Ditch, and had, until prevented from doing so by defendants, appropriated in it all the night and Sunday water flowing in Woods' Creek, to the extent of eighty-four inches, and had also appropriated in it all the day water, to the extent of eighty-four inches, except the first twenty-five inches flowing down the same; that plaintiff became the owner of said property in 1868, and that defendants had diverted said waters and appropriated the same, and threatened to con-

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tinue to do so. Judgment was asked for damages and a perpetual injunction.

The defendants were miners, who were using the water in Woods' Creek for mining purposes, and claimed that they had located their mining ground before the water was appropriated in the ditch.

The Court gave the jury the following instructions:

"That if at the time Woods constructed his ditch the waters of Woods' Creek had to a certain extent been used by miners at work in the bed and banks of said creek in the working of their mining claims, they making no claim to the use of the waters of said creek on Sundays or in the night-time, then Woods might, during Sundays and the night-time, take for his own use, for a useful purpose, the waters of said creek, and turn them into his ditch, to be used elsewhere than in the bed or banks of said creek; and if you believe, from the evidence, that such use and appropriation of the waters of Woods' Creek was acquiesced in by the said miners, Woods and the miners mutually using the waters of said creek in the manner and at the times indicated, then Woods, by such appropriation, followed by a continued use of the same, would acquire such a right to the use of the waters of said creek during Sundays and night-time as would forbid the said miners, without his consent, from taking for their use the waters of said creek during Sundays and night-time, when by such taking they should deprive Woods of the use of the waters by him so originally taken and continuously used for a useful purpose during Sundays and night-time."

The defendants excepted to this charge.

The Court then submitted the following special issues to the jury, which, after they had retired, they answered as follows:

Argument for Appellants.

"1st. To how many inches of water is plaintiff entitled of the waters of Woods' Creek during the night-time and Sundays, as against defendants in this action?

"Answer—Eighty-four (84) inches.

"2d. To how many inches of water of Woods' Creek were the miners in Woods' Creek entitled in the day-time, prior to any appropriation of the waters of Woods' Creek by the plaintiff?

"Answer—Twenty-five (25) inches.

"3d. After allowing for the amount of water of Woods' Creek to which you may find the miners of Woods' Creek entitled as against plaintiff, to how many inches of water is plaintiff entitled as against the defendants?

"Answer—Eighty-four (84) inches.

"4th. Did the defendants, between the 1st day of October, 1868, and 25th day of June, 1869, deprive the plaintiff of the use of any water to which he was entitled as against the defendants?

"Answer—Yes.

"5th. If defendants have deprived the plaintiff of the use of any water to which he was entitled, what damage has plaintiff sustained by reason of such acts of defendants?

"Answer—One hundred and four (104) dollars."

The Court rendered judgment for the plaintiff, and enjoined the defendants from appropriating the night and Sunday water to the extent of eight-four inches, and any of the day water to the extent of eighty-four inches, after they had first taken out twenty-five inches. The defendants appealed.

The other facts are stated in the opinion.

Caleb Dorsey, for Appellants.

After ownership of the locator once attaches by prior appropriation, it continues nights and Sundays, as well as at

Argument for Respondent.

other times. Because a party did not use his property at the times when the laws of nature and the law of society require him to rest from his labor, and because he acts in obedience to such laws, is no reason why he should be deprived of his property on account of its non-user during such times. Such a principle would certainly be novel and very unjust. The answer to the question did not tend to prove any appropriation at all, and only tended to confuse and mislead the jury. It was error to have permitted the question to be asked the witness. The mere fact that defendants did not object to plaintiff taking the water when they were not using it, without suspecting or knowing that he intended to claim the water as against them, was no acquiescence on the part of defendants such as would afterwards estop them from claiming the water from plaintiff. The silence of defendants under such circumstances was no estoppel which would prevent them from asserting their rights to the water during the night-time and Sundays. In order to create an estoppel by silence, there must be something fraudulent in the silence. The silence must be equivalent to an admission of plaintiff's right to the water, and it must appear that plaintiff relied on such admission and was misled by it. (*Ferris v. Coover*, 10 Cal. 68; *Davis v. Davis*, 26 Cal. 41.)

Edwin A. Rodgers, for Respondent.

Respondent contends that there may be an appropriation of the waters of a stream by A. for a given portion of the time and for a particular purpose, and also by B. for the remainder of the time and for a different purpose, and that such appropriation being recognized and acquiesced in by all parties interested through a series of years, is binding on all parties interested. Again, the right of such appropriation for a given portion of the time is one of the rights upon which the material interests and prosperity of the mining section of the State depends. The fact of such joint

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appropriation forms a part of the history of every mining community. Vineyards have been planted and gardens cultivated, dependent entirely for irrigation upon water collected nights and Sundays from streams the waters of which were used for mining purposes during the day-time. Ditches have been dug, as in this instance, at great expense, in good faith, for collecting and subjecting to a useful purpose the night and Sunday waters of a creek which were otherwise running to waste.

By the Court, RHODES, J.:

It is not to be doubted, that the person who first appropriates for mining or other purposes the waters of a stream running upon the public lands, is entitled to the same, to the exclusion of all subsequent appropriations by other persons for the same or other purposes. The defendants do not question this doctrine, but deny its application to this case.

The Court instructed the jury, in effect, that if the miners who were using the waters of the creek, made no claim to the use of the waters during Sunday and in the night-time, another person might appropriate the water, during such time, to his own use; and if he did so appropriate and continuously use the waters, the miners could not thereafter deprive him of the use of the waters during those times to the extent to which he had appropriated them. The jury found that the plaintiff was entitled to eighty-four inches of the water of Woods' Creek during the night-time and Sundays, as against the defendants. It results from the proposition first stated, that if the person who first appropriates the waters of a stream only appropriates a part, another person may appropriate a part or the whole of the residue; and when appropriated by him his right thereto is as perfect, and entitled to the same protection, as that of the first appropriator to the portion appropriated by him. In *Ortman v.*

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Dixon, 13 Cal. 34, it was decreed that the defendants were entitled to the waters of the creek for the use of their mill; that the plaintiffs were then entitled to sufficient water to fill their ditch, No. 2; and that the defendants were next entitled to the residue to fill their ditch, No. 3. The cases are very numerous which affirm, or assume without question, this doctrine. It is usually the case that the amount of water to which the several persons claiming its use are entitled, is measured by inches, according to miner's measurement, or by the capacity of the ditches through which it is conducted from the stream, but there is no reason why the amount may not be measured in some other mode. They hold the amount appropriated by them respectively as they would do had the paramount proprietor granted to each the amount by him appropriated. The right to use the waters, or a certain portion of them, might be granted to one person for certain months, days, or parts of days, and to other persons for other specified times. An agriculturist might appropriate the waters of a stream for irrigation during the dry season, and a miner might appropriate them for his purposes during the remainder of the year. And so may several persons appropriate the waters for use during any different periods. There is no difference in principle between appropriations of waters, measured by time, and those measured by volume.

The plaintiff adduced no written evidence of the transfer to himself of the right to the ditch through which were conveyed the waters claimed by him, from those who had constructed it, or been in possession of it, but he proved by oral testimony that it was sold to him by Woods, the person, or one of the persons, who had constructed and used it. This evidence was properly stricken out by the Court. But the Court, in instructing the jury in respect to the appropriation and use of the waters of the creek, charged them in respect to the relative rights of Woods and the miners who used the waters of the creek. This was calculated to

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mislead the jury, by giving them the impression that the plaintiff had succeeded to the rights of Woods. The instruction, in that respect, was erroneous, and the defendants, in order to correct that erroneous impression, were entitled to have the instruction given which was asked by them, to the effect that the plaintiff could not connect himself with the rights acquired by Woods and Sedgwick except by deed. We cannot say that this error did not injure the defendants, for it cannot be ascertained from the record whether the jury found for the plaintiff upon his own appropriation and use of the waters, or upon that of Woods and Sedgwick.

Judgment and order reversed, and cause remanded for a new trial.

[No. 2,157.]**HENRY N. MORSE v. RODMOND GIBBONS.**

FEES OF SHERIFF ON EXECUTION SALE.—If an execution is placed in the Sheriff's hands, and he advertises property for sale, and the judgment debtor pays the full amount of the judgment to the judgment creditor before sale, he cannot deprive the Sheriff of his fees, but is liable to him for the fees allowed in case of a sale.

APPEAL from the District Court of the Third Judicial District, Alameda County.

The plaintiff claimed four hundred and seventy-seven dollars and sixty-seven cents in gold coin as his fees in the foreclosure suit mentioned in the opinion. The controversy was submitted upon an agreed statement of facts without action. The Court below gave judgment for plaintiff. The defendant appealed.

The other facts are stated in the opinion.

Argument for Respondent.

Williams & Thornton, for Appellant.

This claim is based upon the following paragraph in section nine of an Act of the Legislature entitled "An Act to regulate fees of office," etc., approved March 5th, 1870, viz: "For commissions for receiving and paying over money on execution without levy, or when the lands or goods levied on shall not be sold, on the first one thousand dollars, one and one half per cent, and one per cent on all over that sum." (Stats. 1869-70, p. 159.)

This language seems too plain to admit of doubt in its construction. It gives the percentage for receiving and paying over money in one or the other event specified. How, possibly, can the percentage be claimed, when, in fact, the money was neither received nor paid?

In California the plaintiff may send his execution to every county in the State. Suppose he were to do so, and each Sheriff were to advertise some property for sale, and then return the execution under order of plaintiff's counsel, could it be plausibly contended that each Sheriff would be entitled to his commissions? Our statute, framed with a different intent, would bear no such inequitable construction.

Stephen G. Nye, for Respondent.

Respondent relies on the Act to regulate fees, approved March 5th, 1870: "For commissions for receiving and paying over money on execution without levy, or where the lands or goods levied on shall not be sold, on the first one thousand dollars one and one half per cent, and one per cent on all over that sum."

The next clause provides for the collection of these fees from the judgment debtor. (Stats. 1869-70, p. 159.)

The compensation therein provided is what is known under the English and New York laws as poundage. (Practice Act, Sec. 222.)

Opinion of the Court—Wallace, C. J.

And this compensation attaches the moment any act is done under the execution or order by the Sheriff.

No judicial construction has ever been placed upon this or any kindred Act in this State; but we are not without light from the decisions of other Courts upon statutes of a like nature. (*Hildreth v. Ellice*, 1 Caine, 192; *Adams v. Hopkins*, 5 Johnson, 258; *Scott v. Shaw*, 18 Johnson, 378; *Bolton v. Lawrence*, 9 Wendell, 487; *Parsons v. Boudoin*, 17 Wendell, 14.)

By the Court, WALLACE, C. J.:

Du Pont had recovered judgment against Gibbons for forty-seven thousand two hundred and sixty-seven dollars, and directing a sale of certain mortgaged premises, which are admitted to have been in value sufficient to satisfy that sum and all costs.

An order of sale had been placed in the hands of Morse, the Sheriff, who had duly advertised the sale of the premises, and would have actually sold them had not the sale been repeatedly postponed from time to time by the direction of Du Pont.

During this postponement Gibbons paid the forty-seven thousand two hundred and sixty-seven dollars, not into the hands of the Sheriff, as he might have done, but directly to Du Pont himself, and the latter, having acknowledged satisfaction, ordered the Sheriff to discontinue further proceedings and to return the process in his hands.

Had the payment been made to the Sheriff it is not disputed that he would have been entitled to charge against Gibbons the half commission allowed by statute for receiving and paying over money where no sale of the property has been had. (*Stats.* 1869-70, p. 159.)

It is said, however, that as the Sheriff did not in fact receive nor, of course, pay over this money he is not entitled

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to the commission. I am of opinion, however, that the payment made to Du Pont under these circumstances must be considered, for this purpose, to have been made to the Sheriff, whose official duty and interest it was to have received it had it been tendered to him. The statute has allowed the judgment debtor to reduce the commissions of the Sheriff by one half should he pay off the judgment before sale actually made, but has not permitted him to deprive the officer of the whole compensation by ignoring him and making such payment directly to the judgment creditor.

This was the construction given by the New York Courts to their statutes allowing fees for *serving an execution* — and as subsequently amended for *collecting* money thereon. (*Bolton v. Lawrence*, 9 Wend. 435; *Parsons v. Boudoin*, 17 Id. 14.)

Indeed any other construction of the Act would practically convert the statutory fees of the officer upon the collection of money into a mere *honorarium* — to be allowed or to be withheld from him at the absolute election of the judgment debtor, who could in every instance relieve himself by making payment of the judgment directly to the judgment creditor.

Judgment affirmed.

[No. 2,924.]

GEORGE D. ROBERTS v. R. H. EVANS.

WAIVER OF TORT.—When the goods of one are wrongfully taken and used by another, the owner may waive the tort, and sue in assumpsit for their value, as for goods sold and delivered.

ACCEPTANCE OF OFFER TO SELL PERSONAL PROPERTY.—An offer to sell personal property, when no time is given, must be accepted at once, or within a reasonable time, and six months afterwards is not a reasonable time, as matter of law, to accept the offer.

OFFER TO TAKE PAY FROM ONE JOINT WRONGDOER, NO WAIVER OF ACTION AGAINST THE OTHER.—Roberts owned personal property, and

Opinion of the Court — Belcher, J.

offered to sell it to Ellsworth, but his offer was not accepted. More than six months afterwards Ellsworth went with a servant of Evans and took the property, and delivered it to Evans, who kept and used it, and paid Ellsworth for it. Roberts afterwards wrote to Ellsworth to pay him for the property, but not being paid sued Evans for its value: *Held*, that Roberts' right of action against Evans was not waived by this offer to accept of pay from Ellsworth, and that his purchase from Ellsworth did not release him from liability to Roberts for the value of the property.

APPEAL from the District Court of the Sixteenth Judicial District, Kern County.

The defendant, on the trial, asked the Court to give the following instruction to the jury, which was refused. It is the third instruction referred to in the opinion:

"If the jury believe that Evans, the defendant, purchased the shoes and dies in question, in good faith, of Ellsworth, and without notice of fraud, then you will find for defendant."

The other facts are stated in the opinion.

G. F. & W. H. Sharp, for Appellant.

An offer is binding, if accepted before withdrawal. (1 Par. on Con. 480.)

J. W. Freeman, for Respondent.

[No brief on file.]

By the Court, BELCHER, J.:

This is an action to recover the value of certain cast-iron shoes and dies, alleged in the complaint to have been sold and delivered by the plaintiff to the defendant. The answer denies that the defendant purchased or received the shoes and dies from the plaintiff. The plaintiff had judgment, and the appeal is from the judgment and from the order overruling the defendant's motion for new trial.

Opinion of the Court — Belcher, J.

The testimony shows that the shoes and dies were the property of the plaintiff, and that they were at a quartz mine owned by him in Kern County; that in December, 1869, one Ellsworth went with a teamster, who was at work for defendant, to the plaintiff's mill, and having tried and failed to obtain permission from one of the parties in charge of the mill to take the shoes and dies, took them without such permission, and carried them to the quartz mill of the defendant, where they were received and used by the defendant; that the defendant furnished the wagon to haul them to his mill, and knew where they were obtained.

When the plaintiff rested, the defendant moved for a nonsuit, on the ground that the plaintiff had failed to show any sale or delivery of the shoes and dies by the plaintiff to the defendant, or by any one acting under his authority, and also on the ground that he had failed to show any authority from the defendant to contract with the plaintiff, or any one else for them.

We think the Court did not err in overruling the motion. It is well settled that when the goods of one are wrongfully taken and used by another, he may waive the tort, and sue in assumpsit for their value, as for goods sold and delivered. (*Fratt v. Clark*, 12 Cal. 89; 2 Greenleaf on Ev., Sec. 108.)

The defendant claimed, and introduced witnesses to prove, that he bought the shoes and dies from Ellsworth, and paid him for them; that about a year before they were taken the plaintiff had offered to let Ellsworth have them for their cost and freight, but that he did not want them at that time, and did not then accept the offer; that knowing the plaintiff wanted to sell them, Ellsworth thought it safe to go and take them without any new permission; and that some seven or eight months after they were taken plaintiff wrote to Ellsworth to remit to him the money in payment for them.

If all this were so, we do not see how it would constitute

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any defense to the action. An offer to sell, when no time is given, must be accepted at once, or within a reasonable time thereafter. A year, or even six months, must be held, as a matter of law, to be an unreasonable time.

When Ellsworth, therefore, took the property he had no more right to take it than he would have had if there had been no conversation or correspondence between him and the plaintiff in reference to it; and he could clothe the defendant with no better right to it than he had. The fact that the plaintiff was willing to have other shoes and dies returned in the place of those taken, or to receive pay for them from Ellsworth, was not material; for his right of action had already accrued against the defendant as well as against Ellsworth, and the offer was not a waiver of that right.

Some of the instructions given at the request of the plaintiff might have been better, and perhaps more accurately expressed, but they did not mislead the jury to the prejudice of the defendant.

The third instruction asked by the defendant was properly refused. It was not law as applied to the facts of the case.

The judgment and order are affirmed.

[No. 3,122.]

THE PEOPLE OF THE STATE OF CALIFORNIA v.
PHILIP KEARNEY.

CHARGE OF COURT IN CRIMINAL CASE.—The Court may, in a criminal case, by the express consent of the defendant, or by the mutual consent of the parties, charge the jury orally.

NOTE.—An entry in the minutes of the Court, in a criminal case, that "the Court charge the jury orally (a written charge being expressly waived)," must be construed as a "mutual consent" to an oral charge.

APPEAL from the County Court of Alameda County.

Opinion of the Court — NILES, J.

The defendant appealed.

The other facts are stated in the opinion.

G. W. Tyler, for Appellant, argued that the entry in the minutes did not show that the defendant waived a written charge.

Jo Hamilton, Attorney General, and *W. R. Hinkson*, for the People, argued that the words "a written charge being expressly waived" applied to both the people and the defendant.

By the Court, NILES, J.:

The defendant was tried and convicted of the crime of robbery. The minutes of the trial contain the following entry: "And the Court charge the jury orally as to their duty under the statute (a written charge being expressly waived), and the jury retire," etc. The oral charge by the Court is assigned as error upon appeal.

It is settled by a uniform series of decisions that a Court cannot charge the jury orally in a criminal case without the express consent of the defendant. (*People v. Sandford*, ante, p. 29, and case cited.) But the same section of the statute, which requires the charge to be reduced to writing, provides the exception to the rule that the charge may be given orally "by the mutual consent of the parties." (Stats. 1855, p. 275.) In this case it appears from the minutes of the trial which form a part of the record, that an oral charge was *expressly waived*. This cannot be construed otherwise than as a mutual consent — for the right to a written charge cannot be waived without the assent of each of the parties entitled to the privilege.

Judgment affirmed.

Statement of Facts.

[No. 2,172.]

**THE PEOPLE OF THE STATE OF CALIFORNIA v.
BLANDA CASTRO DE BERNAL, AND CERTAIN
REAL ESTATE.**

SERVICE OF SUMMONS.— In making service of a summons, and in the return of such service, the provisions of the statute must be, and must be shown to have been, substantially observed and followed by the officer, otherwise the proceedings cannot be supported upon a direct appeal taken.

IDEM.— If the statute for the collection of a tax and the enforcement of its lien on real estate provides that a summons may be served by delivering a copy to each defendant, but if the personal defendant cannot be found, by posting a copy for twenty days at the Court House door, and that no personal judgment shall be rendered unless the person against whom it is rendered shall have been personally served, a personal judgment rendered on a service made by posting a copy at the Court House door, is erroneous, and will be reversed if attacked by direct appeal.

IDEM.— Whether such judgment is void, so that it may be attacked collaterally, not decided.

IDEM.— If in such case the statute requires the service of summons on the real estate to be made by delivering a copy to the person in possession thereof, and by posting a copy in some public place thereon, a return by the Sheriff that he posted a copy on the premises, without stating that it was posted in a public place on the premises, will not support a judgment if attacked by direct appeal. In like manner, the judgment will be reversed, unless the return falls to show that a copy was delivered to a person in possession of the premises, or that there was no person in possession.

APPEAL from the District Court of the Third Judicial District, Monterey County.

Action against Bernal, and an undivided one half of two thousand nine hundred and seventy acres of land owned by him, to recover judgment for five hundred and eighty-nine dollars and ninety-one cents tax assessed against the land in 1869. The case came up on the judgment roll.

The other facts are stated in the opinion.

Argument for Respondent.

J. A. Moultrie, for Appellants.

The rule is too well established to require comment or citation of authorities that, in a proceeding against property for the collection of taxes, each act required by the statute to be performed is necessary to be done to give the Court jurisdiction. (*Mayo v. Ah Loy et al.*, 32 Cal. 477; *People v. Fox*, 39 Cal. 621.)

No personal service was made on the defendants, nor did they appear in the action. No personal judgment was or could be entered. (Hitt., Vol. 2, para. 6193; Revenue Act, 1861, Sec. 44.)

The Sheriff's return shows that ten days before the return was made he posted a copy of the summons at the Court House door; but ten days posting is worthless, twenty days are required to give the Court jurisdiction. (Hitt., Vol. 2, para. 6190; Rev. Act, Sec. 41.)

John L. Love, Attorney General, for Respondent.

There is nothing in the record to show that the defendant Bernal was not personally or otherwise served somewhere. If it be contended that the service by posting was constructive merely and bad, it is answered by the language of *Eitel v. Foote*, 39 Cal. 439: "In a tax suit a recital in the decree 'that all owners and claimants of the property have been duly summoned to answer the complaint herein, and have made default in that behalf,' there being nothing contradictory to it in the record, is conclusive, in a collateral proceeding, that the Court acquired jurisdiction of the owner of the premises."

The recital of a fact in the judgment, there being nothing to contradict it in the record, is conclusive. The judgment should be affirmed.

Opinion of the Court — WALLACE, C. J.

By the Court, WALLACE, C. J.:

The people on the 6th day of October, 1870, had judgment *by default* against the personal defendant and the real estate, also made a defendant in the action, and the defendants have appealed from the judgment. The question, as made by the appellants, is as to whether or not it sufficiently appears in the record that the Court below obtained jurisdiction of the defendants by the service of process, so as to authorize the entry of judgment against them, the judgment reciting the fact of service.

1. As to the personal defendant: The return, made by the Sheriff upon the summons, is to the effect that after a diligent search the personal defendant could not be found, and that on the 5th day of August, 1870, he posted a copy of the summons on the door of the Court House in the City of Monterey. The Act (Hitt., Sec. 6190), requires that the summons shall be served by delivering a copy thereof to each defendant named—"provided, that if the personal defendant cannot be found in the county in which said action is brought, then service may be made upon such defendant by posting a copy of the summons for twenty days at the Court House door of said county." The return of the Sheriff shows that the personal defendant could not be found, and that thereupon he posted the copy of the summons at the Court House door, and was so far forth a compliance with the requirements of the statute, for the personal defendant was thereby served, though not *personally* served, with the summons. But the same Act in an after section (Sec. 6193) also provides in terms "that no personal judgment shall be rendered unless the person against whom it is rendered shall have been personally served with the summons, or shall have appeared in said action." The purpose usually had in view in effecting the service of a summons upon a defendant in a civil action, whether such service be personal or constructive

Opinion of the Court — Wallace, C. J.

merely, is to acquire that jurisdiction of his person which is ordinarily indispensable to enable the Court to proceed to judgment, and if such service of the one character or the other be effected pursuant to the provisions of law in a case where the subject matter is itself one cognizable by the particular Court before which the defendant is cited to appear, it results upon general principles that the Court may rightfully proceed to determine the cause, and that its judgment concerning the subject matter of the suit cannot be questioned for mere lack of jurisdiction to render it. The statute having provided that though under certain circumstances a service not personal in its character might be properly effected upon a personal defendant, yet that in such case no personal judgment should be rendered against him, and the judgment here having been in fact rendered against him without such personal service and without appearance, it is not necessary (as it would have been in case the proceeding before us were a mere collateral attack upon the judgment) to determine if a judgment so rendered would be absolutely void — a mere nullity in the strict sense. Whether void or not, it is certainly erroneous, and upon direct appeal, as here, cannot be supported.

2. As to the real estate made a defendant in the action: The return of the Sheriff appearing upon the summons is to the effect that he served the summons upon the real estate "by posting a true copy hereof on the same said premises, and by posting a copy on the door of the County Court House in Monterey City," etc. The statute (Sec. 6190) provides that service of the summons shall be made "as to said real estate * * * by delivering a copy thereof to the person or persons in possession of the same, and further as to all real estate by posting a like copy in some public place thereon," etc. The return does not show service upon the real estate made or attempted by delivering a copy of the summons to any person in possession of such real estate, nor does it show

Points decided.

that the officer was unable to find any person in possession thereof; nor does it show or set forth that a copy of the summons was posted in a public place on the premises—by which the statute means some place on the premises most likely to meet the eye of a person passing upon or near them. A copy of the summons merely posted on the premises is not all that the statute has provided for in that respect; but at some public place thereon is also required. In making service of the summons, and in the return of such service, the provisions of the statute must be and must appear to have been substantially observed and followed by the officer, otherwise the proceedings cannot be supported upon a direct appeal taken.

Judgment reversed and cause remanded.

[No. 2,542.]**THOMAS W. MOORE v. PETER MASSINI.**

ERROR TO BE POINTED OUT.—Error will not be presumed; but the presumption is that the proceedings below were correct, so far as such presumption is not overcome by the record.

INJUNCTION TO RESTRAIN TRESPASS.—In an action for damages and to enjoin future trespasses upon land, the Court, in granting the injunction, should not extend it to land not owned by the plaintiff, although included in the description given in the complaint.

APPEAL from the District Court of the First Judicial District, Santa Barbara County.

The facts are stated in the opinion, and in the report of the case on the former appeal, 37 Cal. 432.

Albert Packard and *W. H. L. Barnes*, for Appellant.

J. P. Hoge and *John Reynolds*, for Respondent.

Opinion of the Court — WALLACE, C. J.

By the Court, WALLACE, C. J.:

The case was here in 1869, and is reported in 37 Cal. R. 432. It was then determined that the confirmation and patent to Hill were bounded on the south by the seashore—that is, by the line of high water—notwithstanding the calls and distances contained in the patent include portions of the sea. The judgment was then reversed and the cause remanded for a new trial, and the plaintiff having again recovered, the appeal now brought here is from the judgment alone, and rests upon the judgment roll containing the findings of fact, no statement upon appeal being found in the record. The only question made is as to whether or not on the second trial the Court below observed the distinction between land above and land below high-water mark upon the southern boundary of the rancho.

The Court found that the patent, according to the lines of the survey, by course and distance, included all that tract of land described in the complaint, to wit, bounded and described as follows: "Commencing at the southeasterly corner of the rancho called 'La Goleta;' thence running along the eastern boundary line of the said rancho to the tract of land occupied by A. C. Scull, and the line of the tract occupied by Samuel Sharp, and along the bed of a creek to the eastern line of the tract now owned and occupied by the plaintiff; thence along the line of the last before mentioned tract of land southwardly, westwardly, and northwardly, to the bed of the creek; thence following the course of the bed of said creek to the Pacific Ocean and the front line of the survey of said rancho (being the low-water mark); thence along the said front boundary line of said rancho to the place of beginning."

The Court further found "that said patent recites that said confirmation was to a tract of land bounded on the south by the seashore; but the survey, as made and approved,

Opinion of the Court — Wallace, C. J.

and upon which said patent is based, according to the courses and distances thereof, notwithstanding such recital, includes the land lying between the present line of ordinary high and low water;" and further, "that there are upon the premises described in the complaint large banks or veins of asphaltum, commencing in the bank many feet above the beach and the highest flow of the tides, and extending out in spurs connecting with the banks beyond the line of ordinary low water, and rising above the flow of the tides, and which are very hard and can only be removed by quarrying the same." Further, that in 1858 and 1859 Hill, the grantor of the plaintiff, gave a verbal license to the defendant Pierce "to take from said veins asphaltum for the sum of one dollar per ton," etc.; that Pierce and the other defendants under him took out asphaltum under this license until 1860, when Hill terminated it and gave it to other parties, who took asphaltum by Hill's permission until 1861; but the defendants also continued to take out and remove asphaltum from said veins from July 1st, 1861, to May, 1864, against the will and without the consent of Hill; that the quantity of asphaltum thus taken by defendants was one thousand nine hundred and sixteen and seventeen one-hundredths tons, of the value of four dollars per ton; that in November, 1864, Hill conveyed the premises to the plaintiff, with all claim for damages sustained by the taking of the asphaltum, etc. Judgment was thereupon rendered in favor of the plaintiff for seven thousand six hundred and sixty-five dollars and costs.

1. The rule is familiar that a party complaining of alleged error committed to his injury must point it out — error will not be intended, but the presumption indulged is that the proceedings below were correct so far as such presumption is not overcome by the record. If the plaintiff was permitted to give evidence of the taking of the asphaltum by the defendants at points below the line of high-water

Opinion of the Court — Wallace, C. J.

mark on the southerly side of the rancho; and if the value of such asphaltum taken from such points formed an element in the judgment rendered, it was error. But we cannot discover from the record here that such was the case. It is true that the Court finds as a fact that the survey upon which the patent is based includes, according to its courses and distances, land lying between high and low-water mark; that the courses and distances of the survey do pass beyond that line and into the ocean is a fact admitted in the case and one upon which our former judgment proceeded. But the finding of this fact is not inconsistent with the proposition that the asphaltum for the taking of which the plaintiff recovered was taken upon or to the northward of the line of high water forming the true southern boundary of the rancho. and we must, under the rule adverted to, presume that such was the case.

2. But besides the judgment rendered for the damages a final decree was entered enjoining the defendants from trespassing upon the premises described in the complaint, and referring to the complaint alone for a description of the premises included in the decree. The description as found in the complaint follows the line of low-water mark. The injunction thus following that line is in that particular clearly erroneous. The judgment in that respect is therefore reversed and the cause remanded with directions to modify it so as to exclude from the injunction these lands below high-water mark; in all other respects the judgment is affirmed, the appellants to recover the costs of the appeal.

Opinion of the Court — Wallace, C. J.

[No. 2,609.]

JAMES PIERATT v. JAMES KENNEDY.

ARBITRATION — ENTRY OF SUBMISSION BY CLERK NECESSARY.— Under section three hundred and eighty-two of the Practice Act the Clerk of the Court must be authorized by the stipulation of the parties to an arbitration to enter in his register of actions a note of the submission, and he must make the entry therein; otherwise there is no jurisdiction in the Court over the subject matter or the parties.

APPEAL from the District Court of the Seventh Judicial District, Sonoma County.

The facts are stated in the opinion.

G. L. Wratten and A. Thomas, for Appellant.

W. B. McConnell, for Respondent.

By the Court, WALLACE, C. J.:

This appeal is taken from an order denying a motion to set aside an award, and also from the judgment entered thereon.

The proceedings are founded upon a written submission signed by the respective parties, in which it is recited that differences have arisen between them in reference to their respective accounts and claims against each other; the parties then stipulate and agree to submit these to arbitration, and they thereupon nominate and appoint three named persons to act as arbitrators in the premises. The submission then proceeds in the following words: "It is further stipulated and agreed between us that this submission and stipulation shall be filed by the Clerk of the District Court of the Seventh Judicial District in and for Sonoma County, State of California, and shall have the force and effect of an order of said Court; and it is agreed that the award shall be

Opinion of the Court — Wallace, C. J.

filed in said Court in the manner pointed out by law, and shall have the force and effect of a judgment of said Court." The submission was signed on the 21st of September, 1869, and filed on the twenty-fifth of the same month, but no entry of a note of submission was made by the Clerk in the register of actions. An award subsequently made and filed by the Clerk was set aside by the District Court, and it was ordered that a new award be made, which new award was afterward filed, and it is from an order entered refusing to set aside this second award and from a judgment rendered thereon that this appeal is taken.

The statute (Pr. Act, Sec. 380) provides that persons capable of contracting may submit to arbitration any controversy which might be the subject of a civil action between them except a question of title to real property in fee or for life.

It is further provided (Sec. 382) that it may be stipulated in the submission "that it be entered as an order of the County Court or of the District Court, for which purpose it shall be filed with the Clerk of the county where the parties or one of them, reside."

It is not necessary to inquire if the agreement to the effect that the *mere stipulation* itself "shall have the force and effect of an order of said Court," is to be considered the legal equivalent of the *required* stipulation that the *submission be entered as an order of Court*. It may well be doubted, however, if anything short of a stipulation unequivocally authorizing the entry of the submission by the Clerk will confer upon that officer the authority to make such entry in his register.

But however this may be, and if it be conceded that there is no substantial insufficiency in the stipulation as made, what is to be said upon the fact that the Clerk did not make in his register any note of the submission to arbitration? The provisions of the statute upon the point are not to be mistaken: "The Clerk shall thereupon enter in his register

Argument for Appellants.

of actions a note of the submission, with the names of the parties, the names of the arbitrators, the date of the submission when filed," etc. (Sec. 382.) He must in the first place be authorized by the stipulation to make note in his register, and in the second place he must, in fact, make it there — the mere authority without the act done is no more than the act done without the authority would be. Both these must concur (*Ryan v. Dougherty*, 30 Cal. 218), and in the absence of either there is no jurisdiction over the subject matter or the parties.

Judgment reversed and cause remanded.

[No. 2,985.]

HUGH DAVANAY v. DAVID EGGENHOFF ET AL.

COMPLAINT ON A PROMISSORY NOTE.—A complaint on a promissory note should allege that the note remains due and unpaid. Without such allegation it does not state facts sufficient to constitute a cause of action.

ANSWER TO COMPLAINT ON A NOTE.—If the complaint on a promissory note, without being verified, contains a copy of the note, and avers that it has not been paid, a general denial in the answer puts in issue the fact of payment, and the plaintiff is not entitled to judgment on the pleadings.

APPEAL from the District Court of the Thirteenth Judicial District, Mariposa County.

The complaint, among other things, averred "that there is now due from the defendants to the plaintiff on the aforesaid note the principal sum of two thousand dollars, with interest thereon at the rate of one and a quarter per cent per month from the 10th day of March, 1870," etc. The defendants appealed.

The other facts are stated in the opinion.

L. F. Jones, and McKune & Welty, for Appellants.

What are the material allegations of the complaint?

First — The debt or consideration of the note.

Opinion of the Court—Rhodes, J.

Second — That the note was made.

Third — That it was executed.

Fourth — That it was delivered.

Fifth — That the principal sum of two thousand dollars has not been paid.

Sixth — That the interest has not been paid.

The general denial in this case is equivalent to the general issue at common law, and puts in issue all the material allegations in the complaint. (*White v. Moses*, 11 Cal. 69; *Dseux v. Domec*, 18 Cal. 83; *Glazer v. Clift*, 10 Cal. 303.)

It is necessary to aver in a complaint on a bill of exchange or promissory note that it has not been paid. (*Frisch v. Caler*, 21 Cal. 71; *Jones v. Frost*, 28 Cal. 245.)

J. M. Corcoran and J. B. Campbell, for Respondent.

The general denial raises no issue with plaintiff.

The complaint containing a copy of the note, and the answer not being verified, the genuineness and due execution of the note is admitted (Sec. 53 Civil Prac. Act), and plaintiff was entitled to judgment on the pleadings. (*Horn v. Volcano Water Co.*, 13 Cal. 69; *Kinney v. Osburn*, 14 Cal. 113; *Sacramento County v. Bird*, 31 Cal. 66; *Corcoran v. Doll*, 32 Cal. 83.)

Evidence of payment could only be given under a plea of payment. (*Edson v. Dillage et al.*, 8 Howard Pr. Rep. 274, 275; *Piercy v. Sabin et al.*, 10 Cal. 22; *Glazer v. Clift*, 10 Cal. 303; *Green v. Palmer*, 15 Cal. 417; *Coles v. Soulsby*, 21 Cal. 47; *Hook v. White*, 36 Cal. 302.)

By the Court, RHODES, J.:

The complaint contains a copy of the promissory note in suit. The answer, among other matters, contains a general denial. The pleadings are not verified. The plaintiff moved for and obtained judgment on the pleadings.

Opinion of the Court — Rhodes, J.

The question is; whether the general denial presents any issue of fact. In *Frisch v. Caler*, 21 Cal. 14, this question was fully considered. The statute then in force required a replication to new matter in the answer. The answer averred that the note in suit had been paid by the defendant, except a small sum, which was admitted to be then due; and it was contended that that averment was admitted, because of the failure on the part of the plaintiffs to file a replication denying it; but the Court held that it was not new matter; that the failure to pay the note constituted the breach, and must be alleged; and that the allegation in the answer — that it had been paid — was only a traverse of the allegation in the complaint that it had not been paid. (See, also, *Brown v. Orr*, 29 Cal. 120.) The opinion of Mr. Justice CORRE, in the case of *Frisch v. Caler*, is distinguished for its force and clearness; and the doctrine then laid down has not since been departed from, so far as we are aware, except in the case of *Hook v. White*, 36 Cal. 300. In that case the pleadings were verified, and the answer denied *on information and belief* that the note had not been paid, or that any sum of money was due on it. A denial of that averment, on information and belief, is clearly insufficient. (*Humphreys v. Call*, 9 Cal. 62; *Brown v. Scott*, 25 Cal. 195; *Vassault v. Austin*, 32 Cal. 606.) That was all that the exigencies of that case required to be decided, on the point in question, and the case, so far as it holds that the allegation in the complaint, that the note remains unpaid, is immaterial, and that a denial of the allegation does not put any fact in issue, ought, in our opinion, to be overruled.

The general denial in this case put in issue the averment of the complaint, that the promissory note remained due and unpaid.

Judgment reversed, and cause remanded for a new trial.

Mr. Justice BELOHER did not express an opinion.

Points decided.

[No. 2,088.]

**THE PEOPLE OF THE STATE OF CALIFORNIA v.
THE CENTRAL PACIFIC RAILROAD COM-
PANY OF CALIFORNIA, AND THAT CERTAIN
REAL ESTATE SITUATED IN THE COUNTY
OF PLACER, AND DESCRIBED AS NINETY-
TWO AND ONE FOURTH MILES OF RAILROAD
AND TELEGRAPH LINE, SITUATE IN THE
COUNTY OF PLACER, AND STATE OF CALI-
FORNIA, AND KNOWN AS THE CENTRAL
PACIFIC RAILROAD AND TELEGRAPH LINE.**

STATEMENT ON MOTION FOR A NEW TRIAL.—The specification of reasons why a new trial should be granted, to be made in the statement, is not a general one of errors, in admitting or excluding the evidence, as set forth in the foregoing statement, but a particular specification, and a pointing out and reference to each alleged error.

TAX ON CENTRAL PACIFIC RAILROAD AND TELEGRAPH LINE BY STATE.—The State of California has authority to impose taxation for State purposes upon that portion of the Central Pacific Railroad, and the telegraph line in connection therewith, lying within its limits.

TAXATION BY STATE ON PROPERTY OF CORPORATION.—A railroad corporation, organized under the laws of a State, cannot claim an exemption of its property, lying within the limits of a State, from State taxation, because the corporation thus created has been subsequently adopted by the Federal Government, and is employed in the service of the General Government, in the carriage of mails, munitions of war, etc.

EXEMPTION FROM STATE TAXATION.—The principle upon which the business of a corporation created by the Federal Government as an agent in the execution of its powers, is exempt from State taxation, does not apply to the real property of the corporation lying within the limits of a State.

UNIFORM OPERATION OF LAWS.—The Constitution of this State does not require laws to have a uniform operation, unless they are of a general nature; and whether a law is of a general or special nature depends, in a measure, upon the legislative purpose discernible in its enactment.

ISSUE.—The Constitution does not prohibit a special Act, because the subject with which it deals might have been the subject of a general law.

UNIFORM OPERATION OF TAX LAWS.—A State revenue law is not unconstitutional because there is a want of uniformity between the particular laws prevailing in the several counties, with regard to the enforcement of the payment of delinquent taxes.

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REVENUE DISTRICTS AND ASSESSORS OF PROPERTY.—The Legislature is not prohibited by the Constitution from creating more than one revenue district in a county, and providing for the election of Assessors and Collectors of revenue in each district.

SUITS BY DISTRICT ATTORNEY TO RECOVER DELINQUENT TAXES.—The Constitution of the State allows the Legislature to pass a law directing the District Attorney of a county to bring actions in the name of the people to recover delinquent taxes, and such law does not interfere with the constitutional duties of the Tax Collector.

APPEAL from the District Court of the Fourteenth Judicial District, County of Placer.

The facts are stated in the opinion.

Robert Robinson and *Lewis Ramage*, for Appellants, confined their argument to questions arising on the motion for a new trial, which are not passed on in the opinion, as the statement was held defective.

S. W. Sanderson, also for Appellants.

The railroad and telegraph line attempted to be taxed in this case have been "established" for postal and military purposes by the General Government, in the exercise of its constitutional powers, and are therefore national works over which the Federal Government has jurisdiction and control, as to all matters affecting their efficiency and use as such. Such being the case, the laws of this State, so far as they authorize the taxation of said railroad and telegraph line for State purposes, are repugnant to the laws of Congress by which said railroad and telegraph line have been "established," and are therefore null and void, as being an unconstitutional interference with the means adopted by Congress for the purpose of carrying into execution certain powers of the General Government.

A brief glance at the provisions of the Act of Congress of the 1st of July, 1862, will suffice to show that the "Union Pacific Railroad Company" is a national corporation, and that the Pacific Railroad and Telegraph Line, so far as they

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have been constructed by that company, were intended by Congress to be a national railroad and telegraph line, subject entirely to the legislative management and control of that body, in relation to all matters affecting their use and maintenance for the purposes intended.

The first section names a number of persons, and declares that they, "together with five Commissioners to be appointed by the Secretary of the Interior, and all persons who shall or may be associated with them, and their successors, are hereby created and erected into a body corporate and politic, in deed and in law, by the name, style, and title of the 'Union Pacific Railroad Company.'" The company thus created is vested with the usual and customary powers of a corporation. The corporation is then expressly authorized to construct and maintain a railroad and telegraph line, upon a given line, and between certain points named. The amount of the capital stock is next prescribed, and also certain rules and regulations for the government of the corporation, the management of its affairs, and the transaction of its business. Provision is also made for the election of a Board of Directors, and for the appointment of two additional Directors by the President of the United States, to act as Directors on the part of the Government. The second section grants a right of way through the public lands, with the further right to take from the public lands, adjacent to the line of the road, materials of every description for the construction of the road, concluding with a promise, on the part of the United States, that the Indian titles to all lands falling under the operation of the Act shall be extinguished as rapidly as may be. The third section grants to the company alternate sections of land, on each side of said road, with certain reservations as to mineral lands and lands reserved, or otherwise disposed of, or to which preëmption or homestead claims have attached. The fourth section provides, among other things, for the appointment of three

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Commissioners by the President, who are to examine the road, from time to time, and report to him as to the manner of its construction and the progress made therein, with a view to the issuing of patents for said lands, and that all vacancies occurring in said Board of Commissioners shall be filled by the President. The fifth section provides for loaning the credit of the Government, in the shape of bonds, and securing the payment thereof by a first lien upon the road and telegraph, together with all the rolling stock and other property, and concludes with a provision which has a most important bearing upon the question in hand, viz: "And on the refusal or failure of said company to redeem said bonds, or any part of them, when required to do so by the Secretary of the Treasury, in accordance with the provisions of this Act, the said road, with all the rights, functions, immunities, and appurtenances thereunto belonging, and also all lands granted to the said company by the United States, which, at the time of said default, shall remain in the ownership of the said company, may be taken possession of by the Secretary of the Treasury, for the use and benefit of the United States." This provision, so suggestive of the intent of Congress to impart to the road and telegraph line a national character, and place them under the jurisdiction and control of the General Government, is followed by another provision, no less significant of such intent, contained in the sixth section, which provides: "That the grants aforesaid are made upon condition that said company shall pay said bonds at maturity, and shall keep said railroad and telegraph line in repair and use, and shall at all times transmit dispatches over said telegraph line, and transport mails, troops, and munitions of war, supplies, and public stores, upon said railroad, for the Government, whenever required to do so by any department thereof, and that the Govern-

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ment shall at all times have the preference in the use of the same for all the purposes aforesaid." Power to consolidate with other companies named in the Act is given in the sixteenth section — a power which the sovereign only can confer. The right to connect with the road is given to other companies by the fifteenth section — a condition which the sovereign only can impose. The President is authorized to establish a uniform width of track, so that the same cars can be run from the Missouri River to the Pacific Ocean, by the twelfth section — a condition which the sovereign only can impose. The seventeenth section provides that if said company shall fail to comply with the terms and conditions of the Act, or to keep the road in repair and use for an unreasonable time, "Congress may pass any Act to insure the speedy completion of said road and branches, or put the same in repair and use, and may direct the income of said railroad and telegraph line to be thereafter devoted to the use of the United States," etc.; and further, that if said roads are not completed "so as to form a continuous line from the Missouri River to the navigable waters of the Sacramento River, by the 1st day of July, 1876, said roads, with all their rolling stock, fixtures, etc., shall be forfeited to and be taken possession of by the United States" — all being powers which the sovereign only can exercise. A still further and perhaps more conclusive demonstration of the alleged intent of Congress to exercise complete legislative power over the road, for all the purposes for which its construction was undertaken, is found in the eighteenth section, which deals with the question of fares and the power of Congress to add to, alter, amend, or repeal the Act. It provides that when the net earnings of the road and telegraph shall have reached a certain per centum upon their cost, "Congress may reduce the rates of fare thereon, if unreasonable in amount, and may fix and establish the same by law. And the better to accomplish the object of this Act —

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namely, to promote the public interest and welfare, by the construction of said road and telegraph line, and keeping the same in working order, and to secure to the Government, at all times (but particularly in time of war), the use and benefits of the same for postal, military, and other purposes—Congress may at any time, having due regard for the rights of said companies named herein, add to, alter, amend, or repeal this Art.” Finally, by the last section, the company is required to make annual reports, as to certain matters therein mentioned, to the Secretary of the Treasury, for the obvious purpose of enabling the General Government to supervise and control the road and telegraph by legislation and otherwise (12 U. S. St. at Large, 489).

This provision in relation to fares has a controlling effect upon the question in hand. The right to regulate tolls is incident to sovereignty. Where the latter does not exist the former does not. Nor can the doctrine of concurrent jurisdiction upon the subject of fares and freights be maintained if advanced. The clause that Congress may regulate them after the profits of the road shall have reached a certain percentage upon the cost, upon familiar principles, is a denial of a right to interfere before that time on the part of either the General or State Governments; and the clause in relation to uniformity is a denial of any right on the part of State Governments to interfere at any time; for if a right to interfere be admitted, the right to adopt any rate they might severally elect is implied. They might, therefore, adopt rates not uniform, and such result, being in conflict with the declared purpose of Congress, shows that Congress has so far legislated upon the subject as to render repugnant all State legislation. Besides, whenever from any cause, uniformity of rule is demanded, the right to deal with the subject at all is vested exclusively in the General Government. So, by the nature of the subject, as well as the express will of Congress, all State interference is prohibited. (*Cooley v.*

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Board of Wardens, 12 How. 299; *Gilman v. Philadelphia*, 3 Wallace, 713; *Crandall v. The State of Nevada*, 6 Wallace, 35.)

The Amendatory Acts of July 2d, 1864 (13 U. S. Stats. 356), March 8d, 1865, and June 25th, 1868, are of the same general character. They make some changes, but such changes only serve to confirm the opinion that the intent of Congress was to establish the Pacific Railroad and Telegraph Line as national improvements, for the use of the National Government for postal, military, and other purposes, and generally to promote and subserve the public interest and welfare. As their provisions furnish only cumulative evidence upon the question of Congressional intent, no further reference to them is deemed necessary.

In view of the title of the Act, and the several provisions thereof, to which reference has been made, and the several Acts since passed by Congress upon the same subject, it is submitted that there is no rational ground for doubting the national character of this railroad and telegraph. The purposes of the Act, as declared in this title, and repeated in its body, are national in every sense of the term. The road and telegraph for which provision was made are local in no sense of the term. They were to span more than half the continent, and to constitute a part of a continuous line of communication, stretching through States and Territories, from the Atlantic to the Pacific Ocean. The declared intent was to "promote the public interest and welfare, particularly in time of war," by making them the means of communication and transportation for Government dispatches, mails, troops, supplies, public stores, and munitions of war. No object or purpose could be more national.

In respect to this question, the Pacific Railroad Acts are upon all fours with the Act by which the Bank of the United States was established. (8 U. S. Stats. at Large, 266.) The plan adopted by Congress for the purpose of establishing the

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bank and securing its use to the Government, as a financial agent, is so similar to that adopted in the present case, as to suggest that the former served as a model for the latter. As in this instance, a corporation, with full banking powers, was created. The amount of its capital stock was fixed at thirty-five millions of dollars, of which sum the Government was to subscribe only one fifth, or seven millions, leaving twenty-eight millions to be taken by private individuals. The affairs of the bank were to be managed by twenty-five Directors, of whom twenty were to be elected by the stockholders and five to be appointed by the President of the United States, by and with the advice and consent of the Senate. The powers of the Directors and the business operations of the institution were defined and restricted. Power was given, with certain restrictions, to establish branch institutions in the several States. The Secretary of the Treasury was authorized to call upon the bank for a statement of its affairs, as often as once a week. For the privileges and benefits conferred by the charter, the President and Directors of the bank were required to pay to the United States a bonus of one million and five hundred thousand dollars, in three equal payments. And it was lastly provided that the books of the corporation should always be open to the inspection of a committee of either House of Congress, appointed for that purpose.

If we look to the objects and purposes of the two Acts, those of the Railroad and Telegraph Act are no less national in their character than those of the bank. If the latter was necessary — that is to say, appropriate to the proper administration and management of the finances of the Government, the former was no less appropriate or necessary to the proper conduct and management of its postal and military affairs. Each were but means to an end, which was assumed to be within the jurisdiction of the Government to accomplish. If the United States Bank was designed to be a national

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institution, subject to the jurisdiction of the General Government, or the legislative will of Congress, it would seem to be incontrovertible that the Union Pacific Railroad and Telegraph Line, if not more so, is certainly not less a national measure, and not less under the control of the National Government. That it was intended so to be, is further apparent from the fact that Congress has no power to create a corporation for any other than national purposes — for any other object than as an instrumentality, or machine, for carrying into effect the powers vested in the General Government. This was decided in the case of *Osborn v. The United States Bank*, 9 Wheaton, 738.

The Central Pacific Company, then, is a national corporation.

The Central Pacific was not in the first instance created a corporation by the General Government. It had become a corporation under the laws of this State prior to the passage of the Pacific Railroad Act. I claim, however, that by reason of the Acts of Congress in relation to it, that Congress has recognized its corporate existence, and has adopted it as its agent, and that it has thus become a national corporation, and that this State has released the company from all allegiance to her.

In 1852 the Legislature of this State passed the following Act:

"An Act to grant the right of way to the United States for railroad purposes.

"WHEREAS, The interests of this State, as well as the whole Union, require the immediate action of the Government of the United States for the construction of a national thoroughfare connecting the navigable waters of the Atlantic and Pacific Oceans, for the purposes of national safety, in the event of war, and to promote the highest commercial interests of the Republic:

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"The People of the State of California, represented in Senate and Assembly, do enact as follows:

"SECTION 1. The right of way through this State is hereby granted to the United States for the purpose of constructing a railroad from the Atlantic to the Pacific Ocean." (Stats. 1852, p. 150.)

Again, by the Act of 1862, Congress conferred the same powers upon the Central Pacific which it conferred upon the Union Pacific, annexing thereto the same conditions. In the ninth section of the Act it is provided that:

"The Central Pacific Railroad Company of California, a corporation existing under the laws of the State of California, are hereby authorized to construct a railroad and telegraph line from the Pacific coast, at or near San Francisco, or the navigable waters of the Sacramento, to the eastern boundary of California, upon the terms and conditions, in all respects, as are contained in this Act for the construction of said railroad and telegraph line first mentioned, and to meet and connect with the first mentioned railroad and telegraph line on the eastern boundary of California."

Again, in the tenth section, it is further provided:

"And the Central Pacific Railroad Company of California, after completing its road across the State, is authorized to continue the construction of said railroad and telegraph through the Territories of the United States to the Missouri River, including the branch roads specified in this Act, upon the routes hereinbefore and hereinafter indicated, on the terms and conditions provided in this Act in relation to the said Union Pacific Railroad Company, until said roads shall meet and connect, and the whole of said railroad and branches and telegraph is completed."

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So, throughout the Act, and the subsequent Acts, grants and powers are conferred upon the Central Pacific in the same manner, to the same extent, and upon the same conditions upon which they are conferred upon the Union Pacific, thus evincing an intent on the part of Congress to convert the former into a national agent or corporation, and to establish between it and the National Government precisely the relation which was being established between the National Government and the Union Pacific. These Acts, it is submitted, had the effect to convert the Central Pacific into a national corporation, which would continue to exist, even though this State should repeal the laws under which it was first incorporated; and, further, they also had the effect to withdraw the company from the jurisdiction of the State *quoad* all matters affecting the construction, maintenance, and use by the General Government of the railroad and telegraph line.

On the 4th of April, 1864, the Legislature of this State passed the following Act:

" An Act to aid in carrying out the provisions of the Pacific Railroad and Telegraph Act of Congress, and other matters relating thereto.

" The People of the State of California, represented in Senate and Assembly, do enact as follows:

" SECTION 1. Whereas, by the provisions of an Act of Congress, entitled 'An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes,' approved July 1st, 1862, the Central Pacific Railroad Company of California is authorized to construct a railroad and telegraph in the State of California, and in the Territories lying east of said State towards the Missouri River; therefore, to

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enable said company more fully and completely to comply with and perform the provisions and conditions of said Act of Congress, the said company, their successors and assigns, are hereby authorized and empowered, and the right, power, and privilege is hereby granted to, conferred upon, and vested in them, to construct, maintain, and operate the said railroad and telegraph line, not only in the State of California, but also in the said Territories lying east of and between said State and the Missouri River, with such branches and extensions of said railroad and telegraph line, or either of them, as said company may deem necessary or proper, and also the right of way for said railroad and telegraph line over any lands belonging to this State, and on, over, and along any streets, roads, highways, rivers, streams, water, and watercourses; but the same to be so constructed as not to obstruct or destroy the passage or navigation of the same; and also the right to condemn and appropriate to the use of said company such private property, rights, privileges, and franchises as may be proper, necessary, or convenient for the purposes of said railroad and telegraph, the compensation therefor to be ascertained and paid under and by special proceeding, as prescribed in the Act providing for the incorporation of railroad companies, approved May 20th, 1861, and the Acts supplementary and amendatory thereof; said company to be subject to all the laws of this State concerning railroad and telegraph lines, except that messages and property of the United States, of this State, and of the said company, shall have priority of transportation and transmission over said line of railroad and telegraph, hereby confirming to and vesting in said company all the rights, privileges, franchises, power, and authority conferred upon, granted to, or vested in, said company by said Act of Congress; hereby repealing all laws and parts of laws incon-

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sistent or in conflict with the provisions of this Act, or the rights and privileges herein granted.

"SEC. 2. This Act shall take effect and be in force from and after its passage." (Stats. 1863-4, p. 471.)

That Congress has the power to create corporations as agents, or instrumentalities, or means of carrying into effect other powers, which are sovereign, whenever such corporations may be regarded by Congress as appropriate means to such an end, has never been seriously doubted since the great cases of *McCullough v. The State of Maryland*, 4 Wheaton, 316, and *Osborn v. U. S. Bank*, 9 Wheaton, 738. (2 Story on Const., Secs. 1137, 1138, 1139, 1149, 1150.)

If Congress can construct a wagon road for a post road, may it not also construct a railroad for a like purpose? Although all-sufficient for that purpose, the power "to establish Post Offices and post roads" is not the only power to which the authority of Congress to construct and maintain the Pacific Railroad and Telegraph Line may be referred. It may be referred to the power to "provide for the common defense and general welfare of the United States." (*McCullough v. The State of Maryland*, 4 Wheaton, 406.)

The question as to what are appropriate means to be used in executing express powers, is a political question to be determined by Congress. (Id.)

A railroad and telegraph line, which extends two thousand miles through several States and Territories, is neither local in site nor in benefit. It requires no argument to show that it is a wise, if not an indispensable provision, for the common defense, or that it is calculated to promote the general welfare of the United States. The power of taxation exists as a concurrent power in the National and in the State Governments. It is an indispensable attribute of sovereignty which each must have the right to exercise, but by reason of the relation which subsists between them, the right of each must

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be so exercised as not to interfere with the sovereignty of the other (*Weston v. The City Council of Charleston*, 2 Peters, 486.)

The above case involved the question whether the City of Charleston could tax six and seven per cent stock of the United States, and it was held that it could not. Such has continued to be the law of that Court down to the present time. In the case of *The Bank of Commerce v. New York City*, 2 Black. 620, it was held, further, that it made no difference whether the State law taxed the stocks *eo nomine*, or included them in the aggregate of the taxpayer's property, to be valued, like the rest, at its worth on the market, thus showing that no change in mode or form can affect the result. If the result be to cast a burden upon the measures of Congress adopted for the purpose of carrying into effect the powers of the Government, the State law is void. Again in the *Bank Tax Case*, 2 Wallace, 200, it was declared that "a tax laid by a State on banks 'on a valuation equal to the amount of their capital stock paid in, or secured to be paid in,' is a tax on the property of the institution, and when that property consists of stocks of the Federal Government, the law levying the tax is void."

Another application of these principles is found in the case of *Dobbins v. The Commissioners of Erie County*, 16 Peters, 435. The plaintiff was a Captain in the United States revenue service, residing in Pennsylvania. The laws of that State imposed an ad valorem tax on offices, and the question was whether the law, as to offices held under the United States, was not void. It was declared to be void, the ground of the decision being that it was within the power of the United States Government to fix the compensation to be paid to its officers, and that any law of a State, the effect of which was to diminish the amount of such compensation, conflicted with the law of Congress, and was therefore void.

Suppose the corporations had already failed to perform

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the conditions imposed by Congress, and the Secretary had already taken possession of this road and telegraph, who would be sovereign then, the General Government or this State? The right to take possession implies sovereignty no less than possession with such conditions. If the General Government was now in possession, operating the road by officers and engineers employed and paid by it, was now devoting its income to the use and benefit of the United States, is there any one so hardy as to assert that the General Government would have to pay taxes to this State—that the paramount would have to pay tribute to the subordinate? (*Passenger Cases*, 7 How. 283; *Gibbons v. Ogden*, 9 Wheaton, 1; *Crandall v. The State of Nevada*, 6 Wallace, 35; *Tin Sing v. Washburn*, 20 Cal. 534.)

T. B. McFarland and E. L. Craig, for Respondents.

The position of counsel is that the railroad in question is a national institution, and therefore is exempt from State taxation within the rule of *McCullough v. The State of Maryland*, 4 Wheaton, 316.

The Railroad Acts of California and of Congress, cited by counsel and upon which he relies in this part of his case, are private statutes, and should have been both pleaded and proved in the Court below. They are private because they relate to certain individuals, and not to the people at large. (Sedgwick on Stat. and Const. Law, 30, and note.)

If they are private statutes they should have been specially set up as a defense. This is elementary. (*Ellis v. Eastman*, 32 Cal. 449.)

Even though not held to be technically private statutes, still, as appellant claims a special privilege under them not accruing to citizens generally, in order to avail itself of that privilege the statutes should have been specially pleaded; and the facts bringing appellant within the statutes relied

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on should have been proved on the trial. All these things appear in the record in every case cited by counsel.

But if the Court, overruling our views, should deem it proper to consider these statutes, then we say: first, that appellant is a state corporation, organized by the State of California, subject to its sovereignty, and therefore entirely without the rule of the cases cited by its counsel. It is admitted by counsel that if appellant be a State corporation then the above conclusion follows. And in *McCullough v. The State of Maryland*, 429, the Court say:

“The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission.”

Counsel don't deny, of course, that the appellant was created by the State of California, and exists under her laws. How, then, does he propose to remedy this great defect in his case? Why, he says that Congress has “recognized its corporate existence,” and, for certain purposes, “adopted it as its agent,” and “thereby” has “converted it into a national corporation.” This is virtually saying that to “recognize” or to “employ” is the same as to “create”—a confusion of ideas perfectly bewildering.

We suppose, therefore, according to this doctrine, that if the General Government should employ an incorporated express, or stage, or steamboat company to carry its mails or munitions of war, or to do any business for it whatever, it would thereby immediately “convert it into a national corporation.” Is there anything in such a notion that demands a serious answer?

Again: counsel says that the State of California “has released the Central Pacific Railroad Company from all allegiance to her,” and in support of this position he quotes in full the Act of this State of April 4th, 1864, which assumes legislative control of the company all the way through

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it, and contains, among other things, the following express provision:

"Said company to be subject to all the laws of this State concerning railroad and telegraph lines, except that messages and property of the United States, of this State, and of said company, shall have priority of transportation and transmission over said line of railroad and telegraph." (Stats. 1863-4, p. 471.)

Does this look like a release from "all allegiance" to the State? Is there anything more to be said on the subject?

But if the corporation of the Central Pacific Railroad Company had been expressly created by the General Government, still there is nothing in this case that brings it, in any sense, within the rule of *McCullough v. The State of Maryland*.

In the first place, it must be remembered that the tax in the case at bar is not upon the "corporation," or its "franchise," or its "acts," or its "operations," but simply upon its ordinary property, which is taxed in common with all the other property in the State.

Now what was the case of *McCullough v. The State of Maryland*, and what did it decide? In that case the Court was dealing with a statute of the State of Maryland aimed directly and specially at the operations of the United States Bank. The Act organizing the bank was passed under great political excitement, and against the most bitter opposition, the controversy turning upon the relative power of the General and State Governments. A branch of the bank was established in Baltimore in 1817. In 1818, at the next meeting of the Legislature of Maryland, an Act was passed to "impose a tax upon all banks" not chartered by the State Legislature, prescribing the manner in which the notes of the bank should be issued and their denominations, and providing that its notes should be issued

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upon paper furnished by the State, and that the bank should pay a stamp duty to the State upon every note issued, ranging in amount from ten cents to twenty dollars, unless the bank should pay a large yearly sum in gross for the privilege of doing business. (4 Wheat. 317, 318, 319.) Congress passed the United States Bank Law as a proper measure for the prosecution of its fiscal operations, for the convenient transmission of public moneys, and for the general conduct of the financial department of the Government; the Government itself being the principal stockholder.

Now what did the Court decide? Simply this: First, that the bank was a constitutional measure, lawfully instituted and employed by the General Government for the exercise of its powers; and second, that the Act of Maryland imposed a tax upon the "operations" of this constitutional "measure," and was therefore void.

Throughout the whole opinion Mr. Chief Justice MARSHALL speaks of the tax as directed against a "measure"—an "instrument"—the "means" established by the Government for its own purposes. The whole theory of the case is that the tax was a burden imposed upon the bank itself; upon the corporation; upon its acts; its operations; its business; its very existence; its right to fulfill the purposes for which it was created. It was not a tax upon the ordinary property of the bank, and therefore has no bearing on the case at bar. If the State of California had imposed a stamp duty upon the tickets issued by appellant to its passengers, or a general tax upon the corporation itself, or upon its right to do business, or upon any of its acts or "operations," there would be some slight analogy between the two cases.

At the conclusion of the opinion Mr. Chief Justice MARSHALL gives the whole gist of the case as follows:

"The result is a conviction that the States have no power, by taxation or otherwise, to retard, impede, hinder, or in any

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manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government."

And, as if seeing half a century ahead, and providing for this present attempt of this appellant to escape the just payment of its taxes under the shadow of the great opinion he was then delivering, he adds the following:

"This opinion does not deprive the States of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank in common with the other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution in common with other property of the same description throughout the State. But this is a tax upon the operations of the bank, and is, consequently, a tax on the operation of an instrument employed by the Government of the Union to carry its powers into execution. Such a tax must be unconstitutional."

None of the other cases cited by counsel on this point go any further than *McCullough v. State of Maryland*. In *Osborn v. U. S. Bank*, 9 Wheat. 738, the law of Ohio, as the Court say (p. 868), was more objectionable than the law of Maryland. In this case the State statute imposes a tax upon "all banks" not chartered by the State, and specially provides that the United States Bank, if it should "continue to transact business," shall pay "an annual tax of fifty thousand dollars." The tax was not upon the ordinary property of the bank, but upon the right to "transact business." In *Weston v. City Council of Charleston*, 2 Peters, 449, the tax was upon stock issued by the United States Government as evidences of its indebtedness; and the Court held it void because a burden upon the power of the Government to contract and to borrow money. The other cases cited by

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counsel in no way alter the principle of *McCullough v. Maryland*.

The position of counsel that because the Pacific railroad companies are to transmit and transport dispatches, mails, munitions of war, and other property of the Government over their lines, therefore their railroads, and other property used by them, can't be taxed, for the reason that they are means used by the General Government within the reason of *McCullough v. Maryland*, would apply with equal force to all stage coaches, wagons, steamboats, etc., belonging to other contractors with the Government. But that such property is not subject to the rule as contended for is expressly decided in *Searight v. Stokes*, 3 Howard, 151. In this case the United States had granted to the State of Pennsylvania all that portion of the Cumberland road lying within her limits, upon a compact providing, among other things, that "no toll shall be received or collected for the passage of any wagon or carriage laden with the property of the United States, or any cannon or military stores belonging to the United States" (p. 165); and afterwards the State of Pennsylvania passed a law providing "that in all cases of wagons, carriages, stages, or other modes of conveyance, carrying the United States mail, with passengers or goods, such wagon, stage, or other mode of conveyance, shall pay half toll." (Page 166.) The question was as to the validity of the latter law; and counsel for the United States took the position: first, that the law was in violation of the compact above referred to; and, second, that a stage carrying the United States mail is a "means" of the Federal Government to execute its powers within the rule in *McCullough v. Maryland*, and therefore, not subject to State taxation. Upon the first point the Court was divided, the majority holding that the word "property," as used in the

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compact, included "mail," and that, therefore, the law was in conflict with the compact. The constitutional question is not much discussed in the opinion of the majority, but Mr. Chief Justice TANNEY, who delivers it, says:

"If the State had made this road herself, and had not entered into any compact upon the subject with the United States, she might undoubtedly have erected toll gates thereon; and if the United States afterwards adopted it as a post road, the carriages engaged in their service in transporting the mail, or otherwise, would have been liable to pay the same charges that were imposed by the State on other vehicles of the same kind."

But Mr. Justice McLEAN, who held that "property" did not include the mails, and that the law was not in conflict with the compact, delivers a dissenting opinion, in which he reviews at length the constitutional question, and clearly shows the true meaning of *McCullough v. The State of Maryland*, and kindred cases cited by counsel in the case at bar. To the latter part of this opinion, commencing at page one hundred and seventy-nine, we earnestly invite the attention of the Court. It is well known that Mr. Justice McLEAN was a distinguished member of that school of constructionists at the head of which stood the illustrious MARSHALL, who claimed that the Constitution of the United States should be interpreted, not strictly, but rationally. And it will be seen from this opinion that those eminent jurists who went the furthest in enlarging the powers of the Federal Government, never dreamed of carrying the doctrine to the extreme point claimed by the appellant in the case at bar.

But the very questions which we have been discussing have been settled adversely to the views of appellant in the case of *Thompson v. The Union Pacific Railroad Company, Eastern Division, et al.*, recently decided by the Supreme

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Court of the United States. (Not yet reported, but published in the *Sacramento Union* of May 12th, 1870, and other public newspapers of that date.) In that case, the Union Pacific Railroad Company, Eastern Division, bore exactly the same relation to the system of companies which were subsidized by Congress — and which, together, completed the overland railroad — that is borne by the appellant in the case at bar. The company was incorporated by the State of Kansas, and afterward, like the appellant here, had certain rights conferred on it by Congress. But the Court say:

“The corporation, however, remained a State corporation, though entitled to certain benefits and subject to certain duties under the legislation of Congress.”

This is a complete answer to counsel's theory about appellant being “converted into a national corporation.”

The action in the case we are considering was a bill to restrain the collection of taxes imposed by the State of Kansas upon the railroad and telegraph of the company. The complaint alleges, among other things, “that the property of the the company is mortgaged to the United States; that the company is bound to perform certain duties, and ultimately to pay five per cent of its net earnings to the United States; that the company will be greatly hindered and embarrassed in the performance of its obligations and duties to the United States if the taxes imposed are collected;” and that the collection of the taxes will be to the “prejudice of the just rights of the complainants and of the securities of the United States.”

This is precisely the position taken by appellant here, except that in the former case the position was taken in the pleadings in the Court below, while in the case at bar it is first taken in the brief in the Court above. The reasoning employed, however, and the authorities cited, are the same in the two cases. The Court say:

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"The main argument for the complainants, however, is that the road, being constructed under the direction and authority of Congress, for the uses and purposes of the United States, and being a part of a system of roads thus constructed, is therefore exempt from taxation under State authority. * * The case of *McCullough v. Maryland* is much relied on."

Thus it will be seen that the questions to be decided were exactly those raised in the case at bar. The decision of the Court, which is somewhat lengthy, and covers the whole ground, expressly and pointedly declares that the case is not within the rule of *McCullough v. Maryland*; that the latter case only goes to a tax levied by a State upon the "operations" of an instrument "created by the General Government" as a "means" for executing its powers, and does not extend to the case of a corporation enacted by a State, or to the property of any corporation or agent. The Court say:

"We do not think ourselves warranted, therefore, in extending the exemption established by the case of *McCullough v. Maryland* beyond its terms. We cannot apply it to the case of a corporation deriving its existence from State law, exercising its franchise under State law, and holding its property within State jurisdiction, and under State protection. * * * We fully recognize the soundness of the doctrine that no State has a 'right to tax the means employed by the Government of the Union for the execution of its powers.' But we think there is a clear distinction between the means employed by the Government. Taxation of the agency is taxation of the means; taxation of the property of the agent is not taxation of the means."

The last sentence above quoted is a concise and exceedingly forcible expression of the principle for which we are contending.

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The final result at which the Court arrived is stated as follows:

“ We are unable to find in the Constitution any warrant for the exemption from State legislation claimed in behalf of the complainants.”

We expressly invite the attention of the Court to this case, as it will be found to be a full determination of all the questions raised in the third brief of counsel for appellant.

By the Court, WALLACE, C. J.

This action is brought to recover of the railroad company the taxes upon some ninety-two miles of railroad and telegraph line, the property of the company, lying within two of the several revenue districts into which the County of Placer is divided.

The complaint, which is in the form usual in such cases, avers, among other matters, that the railroad company is a corporation duly organized and acting under the laws of the State of California, and is engaged in the business of constructing, operating, and running therein its railroad and telegraph line; that ninety-two and one fourth miles of the road and telegraph line are situated in the County of Placer, and are subject to taxation therein for both State and county purposes; that a tax was duly levied upon all the property in the county subject to taxation — a State tax of one dollar, and a county tax of one dollar and ten cents upon each one hundred dollars worth of property; that there was thereby duly assessed to the railroad company, upon so much of their road and telegraph line as lay within the First Revenue District of the county, upon a valuation of twelve thousand dollars per mile, a State tax of one thousand nine hundred and fifty dollars and a county tax of two thousand one hundred and forty-five dollars; and upon so much of their road

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and telegraph line as lay within the Second Revenue District in said county, upon a like valuation per mile, a State tax of nine thousand one hundred and twenty dollars, and a county tax of ten thousand and thirty-two dollars—all which several sums are alleged to be due and unpaid, and judgment is demanded therefor, with the percentage, damages, and costs in such cases provided by statute.

The answer of the company does not deny that it is a corporation deriving its existence from the State laws, but, among other defenses set up, denies the validity of the alleged tax; denies that the valuation really fixed upon the road and telegraph line by the Assessor and Board of Equalization exceeded six thousand dollars per mile thereof, but alleges that there was added to this valuation of six thousand dollars per mile another sum of six thousand dollars per mile, by which the gross valuation of the road and telegraph line purported on its face to have been fixed at twelve thousand dollars per mile, but that this additional six thousand dollars per mile was, in truth, the imposition of a tax upon the value of the business of the company transacted upon the road in the transportation of passengers, freight, etc., and that the Board of Equalization of Placer County, in dealing with the taxation of the road and telegraph line, received and considered certain evidence brought before them as to the mere business done and profit realized by the company in the use of the road and the telegraph line.

A trial was had in the District Court for Placer County, where judgment having been rendered in favor of the people, as prayed for in their complaint, and a motion of the defendant for a new trial having been denied, this appeal is brought from the judgment and the order denying the new trial.

No point can be considered here which is rested upon the refusal of the motion for a new trial. There is found in the record no sufficient specification of the grounds of the mo-

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tion, in accordance with the prescribed practice. The statement, as filed and settled, purports, it is true, to set out in the body of it the several proceedings had at the trial—the proffers of evidence, the rulings of the Court, and the exceptions reserved; the only attempted specifications of the grounds of the motion, however, are as follows:

“First—Errors in admitting the evidence offered by plaintiff, as set forth in the foregoing statement, objected to and excepted to at the time.

“Second—Errors in excluding the evidence offered by defendant, as stated in the foregoing statement, and to which refusal and exclusion defendant then and there excepted.”

It has been repeatedly determined here that, in support of a motion for a new trial, the specifications of the *particulars* in which the evidence is insufficient, or of the *particular errors of law* upon which the moving party will rely, is indispensable under section one hundred and ninety-five.

The specification required, though found in, and, therefore, in one sense a part of the statement, is nevertheless distinct practically from the statement—it must, of course, be supported by the statement—but it may be and usually is narrower than the statement in its scope. It cannot, indeed, be broader; it cannot point to anything which is not to be found in the statement by which it is supported, but it may, and in practice usually does, omit many matters of alleged error and insufficiency which are to be found in the statement, and which, by thus omitting, it definitively repudiates and abandons. Its office is to select out of the mass of these, and by this selection to preserve such and only such of the matters appearing in the statement itself, upon which it is the purpose of the party to finally rely and insist in support of the motion. It would be unprofitable in this connection to go over the numerous cases in this Court in which this rule has been applied and the statement disre-

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garded; it is sufficient to say that in more than one of them the rule referred to was much more nearly complied with than has been done in this case. (*Beans v. Emanuelli*, 36 Cal. 117; *Butterfield v. C. P. R. R. Co.*, 37 id. 381.) This view disposes of several questions argued by counsel, but there are others made and not depending upon the motion for a new trial, which we proceed to consider.

First—It is claimed that the railroad and telegraph line in question are not subject to taxation under State laws. An elaborate argument has been submitted on the part of the railroad company, in which it is urged that the road and telegraph were established by the Federal Government in the exercise of its constitutional powers “to establish Post Offices and post roads;” “to provide for the common defense and general welfare of the United States;” “to suppress insurrections and repel invasion,” and “to raise and support armies.” That the taxing power of the State Government, otherwise extending generally to all subjects found within the borders of the State, is to some degree qualified and restrained by the provisions of the Federal Constitution and by Acts of Congress passed in pursuance thereof, is undeniable. The question in this respect has always been, as to the mere degree or extent of the restraint imposed. When the Federal Constitution was before the States for ratification, the question of the respective powers of taxation to be thereafter exercised by the individual States upon the one hand, and the Federal Government upon the other, in the event of the proposed ratification, was a subject of the most anxious consideration. The opponents of the proposed system which was to be established under the Federal Constitution held this language: “Revenue is as requisite to the purposes of the local administration as to those of the Union, and the former are at least of equal importance with the latter, to the happiness of the people. It is, therefore, as necessary that the State Governments should be able to

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command the means of supplying their wants as that the National Government should possess the like faculty in respect to the wants of the Union. But an indefinite power of taxation in the *latter* might, and probably would in time, deprive the *former* of the means of providing for their own necessities, and would subject them entirely to the mercy of the National Legislature."

To this objection, Mr. HAMILTON, the recognized champion of the proposed new system, and who lent the force of his unrivaled abilities and the weight of his high personal character to its adoption, replied in this language: "Yet I am willing here to allow in its full extent the justness of the reasoning which requires that the individual States should possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants. And making this concession I affirm that (with the sole exception of duties on imports and exports) they would under the plan of the Convention retain that authority in the most absolute and unqualified sense; and that any attempt on the part of the National Government to abridge them in the exercise of it, would be a violent assumption of power unwarranted by any article or clause of its Constitution." (Fed. No. 32.)

"Though a law, therefore, laying a tax for the use of the United States, would be supreme in its nature and could not legally be opposed or controlled, yet a law abrogating or preventing the collection of a tax laid by the authority of a State (unless upon imports and exports) would not be the supreme law of the land, but an usurpation of a power not granted by the Constitution." * * * "The inference from the whole is that the individual States would, under the proposed Constitution, retain an independent and uncontrollable authority to raise revenue to any extent of which they

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may stand in need by every kind of taxation, except duties on imports and exports." (Fed. No. 33.)

This was the theory upon which the Constitution was ratified, but when it subsequently came to be applied in practice, it was determined in the Supreme Court of the United States that "imports and exports" were not the only subjects which had been withdrawn from the operation of the taxing power of the States. In the case of *McCullough v. The State of Maryland*, 4 Wheaton, 316, there was brought in question the validity of an Act of the Legislature of the State imposing a tax upon all banks established and doing business as banks of discount and deposit in that State, without first obtaining a charter from the Legislature. Among the other provisions found in the State law was one which imposed a duty upon all such banks to procure from the State office, by payment of a designated stamp tax, stamped paper of graduated value whereon to issue their notes. The Bank of the United States, chartered in the year 1816, having established one of its branches in the City of Baltimore, an attempt was made to subject its business to taxation under the State law.

The opinion of the Court, delivered by Mr. Chief Justice MARSHALL, utterly and pointedly repudiated the views we have already referred to as having been enunciated in the *Federalist*; that opinion declared in effect that the State power to tax had been taken away, not only as to "imports and exports," but as to all other subjects constituting the means provided by the Federal Government for the exercise of its constitutional powers. It was admitted that this view found no direct support in any particular clause or express provision of the Federal Constitution. It was, however, declared to result from an asserted principle upon which the Federal Government had itself been founded—the principle of supremacy—and it was said that it was "of the very essence of supremacy to remove all obstacles to its action

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within its own sphere," and that this principle (to quote further the language of the Chief Justice) "so entirely pervades the Constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it without rending it into shreds."

The bank being in the opinion of the Court, a *means* "necessary and proper" to conduct the fiscal operations of the Government, it was accordingly held that its business, though carried on within the State, was not the subject of taxation by State laws.

Several years subsequently the same question arose before the same Court in the case of *Osborn v. The Bank of the United States*, 9 Wheaton, 738. In that case a statute had been passed by the State of Ohio similar in its general scope to that of Maryland, and under its provisions an attempt had been made to enforce the payment by the branch of the United States Bank, located at Chillicothe, of a State tax upon its banking business. The Court reviewed to some extent the position taken in the case of *McCullough v. The State of Maryland*. "The whole opinion of the Court" (in that case, said the Chief Justice), "is founded on and sustained by the idea that the bank is an instrument which is 'necessary and proper for carrying into effect the powers vested in the Government of the United States.' It is not an instrument which the Government found ready made and has supposed to be adapted to its purposes; but one which was created in the form in which it now appears for national purposes only." The same general views were subsequently reasserted and applied by the Court in *Weston v. The City Council of Charleston*, 2 Peters, 449, in which a municipal tax had been imposed by ordinance of the City of Charleston upon certain loan stock issued by the Federal Government, and also in other cases.

But we are of opinion that the case under consideration

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does not fall within the principle announced in any of these cases, for several reasons.

The corporation here was not in the first instance created by the Government of the United States, but by the State; and even if it be conceded that the corporation thus created under State law has been subsequently adopted by the Federal Government, and availed of by that Government as a means of carrying into effect its constitutional powers, such adoption would not, upon the principles adverted to, exempt it from the operation of the State revenue laws. But there is another reason which we think conclusive upon this point, and that is, that the tax in question is not a tax imposed upon the business of the corporation defendant, but only upon its real property situate within the State. The principle upon which mere *means* created by the Federal Government, as agencies in the execution of its powers, are to be exempted from State taxation, has never been applied to the exemption of real property within the State, even when occupied or used exclusively in connection with the business which is itself exempted. Hence, in *McCullough v. The State of Maryland*, supra, the Chief Justice observed: "This opinion does not deprive the States of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the State," etc. It is said, however, by the counsel for the railroad corporation, that this was a mere *dictum* of the Chief Justice — that the only question before the Court in that case was as to the authority of the State to tax the *business* of the bank, and that its authority to tax the *real estate* belonging to the bank was not a point in judgment. But the Court having announced a principle, by the application of which the extent of the State authority to impose taxes was to be measured and defined, it of course became necessary to indicate the limits of the operation of that principle — to point out the general

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subjects to which it *did not* — as well as those to which it *did* apply. The counsel for the State of Maryland had urged that the principle itself was purely arbitrary, and one which, if sanctioned by the Court, was utterly incapable of limitation. "We have not been told," he said, "whether the banking houses of this corporation, and any other real estate it may acquire for the accommodation of its affairs, are also of this privileged order of property. In principle it must be the same; for the privilege, if it exists, belongs to the corporation, and must cover equally all its property." These views had been urged upon the attention of the Court in the discussion at the bar — a discussion characterized, as the Chief Justice declared, by "a splendor of eloquence and strength of argument seldom, if ever, surpassed." It was in response to this position, and in answer to the reasoning by which it had been supported, that the opinion of the Court undertook to expound and apply the principle which it had asserted; and we think that, when in order to distinctly define the scope of its operation, the Court declared that the principle of exemption *did not extend to real property within the State*, it was the authoritative determination of a question of surpassing importance in itself — one which had been distinctly presented, elaborately argued by counsel, and deliberately considered by the Court.

But whether the case of *McCullough v. The State of Maryland* is to be considered as an authoritative adjudication upon this precise point or not, becomes comparatively unimportant, in view of the much later case of *Thomson v. Pacific Railroad*, 9 Wallace, 579, determined by the Supreme Court of the United States in the year 1869. In that case, certain stockholders in a railroad corporation filed a bill in the Circuit Court of the United States for the District of Kansas, to enjoin the collection of taxes assessed upon the railroad and telegraph property of the company under the revenue laws of the State of Kansas. It was there distinctly claimed

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that the principle of exemption from State taxation was applicable to that property — and this was the principal issue, indeed the sole question presented. The argument by which the claim was supported was much the same in its general scope as that submitted for our consideration. The Court was, however, unanimously of the opinion that such a claim was without support. After a review of the authorities, it expressed its views as follows: "But we are not aware of any case in which the real estate or other property of a corporation not organized under an Act of Congress has been held to be exempt, in the absence of express legislation to that effect, to just contribution, in common with other property, to the general expenditure for the common benefit, because of the employment of the corporation in the service of the Government." Further, speaking of the principle upon which such exemption is rested, it said: "We cannot apply it to the case of a corporation deriving its existence from State law, and holding its property within State jurisdiction and under State protection."

We have not overlooked the argument of the counsel for the defendant here, in which it is asserted that there is a distinction to be taken between the case of *Thomson v. Pacific Railroad* and the one now under consideration. It is said that in the former case it was admitted in the pleadings that the corporation was "a local or State corporation," but we have already had occasion to observe that it is also admitted by the pleadings in this case "that the said defendant, the Central Pacific Railroad Company of California, is a corporation duly organized and acting under the laws of the State of California." In this respect, therefore, the two cases are substantially identical. It is also urged that in the former case "there had been no legislation on the part of Kansas by which that State could be said to have relinquished any of its sovereign rights over the railroad company; while it is insisted that upon the part of the State of

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California such laws have been enacted as amount to a renunciation of State power in the premises. Without pausing at this point to consider whether under our constitutional system of government it is or would be competent to either the State or Federal Government to abdicate in favor of the other its rightful authority, constitutionally vested in it, over such a subject as this, so as to destroy the uniformity of the relations existing between the several States upon the one hand and the Federal Government upon the other, we are of opinion that there is nothing to be found in the legislative enactments of this State which imports a renunciation upon its part of the sovereign power of taxation over the railroad and telegraph line in question. On the contrary, we find that in the statute of April 4th, 1864 (Stats. 1863-4, p. 471), enacted for the purpose of enabling the railroad company to comply with and perform the provisions and conditions of the Act of Congress of July 1st 1862, it is distinctly provided as follows: "Said company to be subject to all the laws of this State concerning railroad and telegraph lines, except that messages and property of the United States, of this State, and of the said company, shall have priority of transportation and transmission over said line of railroad and telegraph." The exception points out, and was obviously intended to point out, the *only particulars* in which the assent of the State there accorded to the provisions of the Act of Congress should change in any respect the conditions theretofore existing between the railroad corporation upon the one hand and the State of California upon the other, and the liability to State taxation was not one of these. For these and many other reasons which we need not here stop to enumerate, we are of opinion that the authority of the State to impose taxation upon the railroad and telegraph line, in common with all other subjects of taxation within its limits, is clear and unquestionable, and

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the objection of the defendant in that respect must be overruled.

Second—It is next objected that the revenue laws of the State are unconstitutional—null and void—as not being uniform in their operation, and in this connection Article I, Section 11, of the State Constitution is cited in the following words: “All laws of a general nature shall have a uniform operation.”

It is not denied that the mere taxation imposed by the revenue laws is equal and uniform, nor is it pretended that property is taxed otherwise than in proportion to its value; but it is said that although these cardinal constitutional rules are observed in the structure of the revenue laws of the State, yet there is a want of uniformity between the particular laws prevailing in several localities of the State in respect to the enforcement of the payment of *delinquent* taxes; that in some counties this payment is enforced by means of a levy upon the property of the delinquent, and a sale thereof made by the Tax Collector to the bidder who will pay the tax for the least amount of property, while in other counties an action at law, judgment, execution, and Sheriff's sale are resorted to; that where the sale is made by the Sheriff, under judgments rendered, the deed delivered to the purchaser is conclusive, while in case the sale be made by the Tax Collector, it is only *prima facie* evidence of title, etc.

That the legislative power is restrained only by the limitations of the Constitution, clearly imposed upon its exercise, and that a statute enacted is not to be put aside by the Courts, unless its conflict with the fundamental law be manifest, are the rules of familiar application. The deference we owe to the legislative will is only second to that which we owe to the commands of the Constitution, which both the Legislature and the Court are sworn to obey.

The particular section of the Constitution supposed to

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have been infringed by the Revenue Law in force in the County of Placer concerns "*laws of a general nature*," and declares that *such* laws shall have a *uniform operation*. The Constitution, it will be observed, has not undertaken to declare that *all* laws shall have a uniform operation—uniformity in that respect is made requisite only in case the law itself be one of a *general nature*, and if it do not purport to be such an one, no objection as to uniformity or want of uniformity in its operation can be interposed. The *nature* of a given statute as being general or special must depend in a measure upon the legislative purpose discernible in its enactment. We are not to say that a statute, plainly special in its scope, must either have a uniform operation or not operate at all—for this were to add another to the limitations which the Constitution has imposed upon the legislative power, and to hold in effect that no special Act could be passed at all—at least if "uniform" operation means *universal* operation, as the argument of the defendant's counsel would apparently maintain. Nor are we to say that a special statute—special in its *aim* and in the object it has in view, is by mere construction to be converted into a general statute, because the subject with which it deals *might* have been made the subject of a general law. It is obvious that every law upon a *general subject* is not *per se*, nor by constitutional intendment, necessarily a law of a general nature. The subject may be general, but the law and the rule it prescribes may be special. Fees of office, for instance, constitute a general subject—one which pervades the length and breadth of the State, and extends into every political subdivision of which it is composed—yet a statute may prescribe what these fees of office shall be in a particular county, and may declare that they shall differ from fees established for the same official duties performed in another county. Such a law would

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not be a law of a general nature, involving the constitutional necessity of uniform operation, but it would be a special law upon a general subject, and at an early period in our judicial history the constitutionality of such a statute was unhesitatingly sustained by this Court. (*Ryan v. Johnson*, 5 Cal. 85.) The legislation of the State has since then proceeded upon the assumed correctness of the construction given to the Constitution in that case. The views there announced have never since then been seriously questioned by any case in this Court to which our attention has been called, and as an exposition of the clause of the Constitution under consideration, in point of time almost contemporaneous with the adoption of the Constitution itself, and, ever since its enunciation, observed and followed in the legislative proceedings of the State, it must be considered as conclusive upon the point of constitutional law involved in this objection.

Third—It is claimed that the tax in question was illegally assessed, because not assessed by a County Assessor for Placer County—the point being that the record shows that the assessment of a portion of this road and telegraph line was made in Revenue District Number One, by the Assessor of that district, and the assessment of the remainder of the road and telegraph line in Placer County was made in Revenue District Number Two, by the Assessor of that district. It is argued that such an officer as a *District Assessor*—at least of a district less in its territorial extent than an entire county—is unknown to the Constitution. That instrument (Art. II, Sec. 13) provides as follows: “Section 13. Taxation shall be equal and uniform throughout the State. All property in this State shall be taxed in proportion to its value, to be ascertained as directed by law; but Assessors and Collectors of town, county, and State taxes shall be elected by the qualified electors of the district, county, or town in which the property taxed for State, county, or town purposes is situated.” It is obvious that

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the "*district*" for which an Assessor is to be chosen is not necessarily coterminous with the boundaries of a single county, for a county being also named in the clause, the expression would become thereby merely tautological, and, so far, without the precision which is to be looked for in every word of the organic law. A *county* is one territorial division, expressly recognized by the Constitution for revenue purposes, in the clause already cited; a *district* is another, and these were obviously not intended to designate the same or an identical extent of territory. Obviously, then, a revenue district may be less in extent than a county, of which it is a part. There is nothing in the Constitution which expressly forbids it to be so, or presents a substantial difficulty in that construction of its several provisions.

Fourth — The fourth and last objection to be noticed is also rested upon section thirteen, Article II, of the Constitution, already cited. It is argued that the statute authorizing an action to be brought by the District Attorney, for the collection of taxes, is not warranted by this section of the Constitution — that if such an action is to be brought at all it must be brought by the Tax Collector. The action is brought not by the Tax Collector, nor by the District Attorney, but by the people of the State of California, and is conducted by their District Attorney for the County of Placer. The money sued for is claimed by the people as due to them for taxes delinquent and owing by the defendant to them. The office of District Attorney is one created by the Constitution (Art. VI, Sec. 11); and the Legislature is therein required to fix by law his duties and his compensation. By the Act of April 29th, 1851 (Hitt. General Laws, Sec. 2402), it is made the general duty of that officer to prosecute actions accruing to the State or his county; and by the Act of May 17th, 1861 (Hitt. General Laws, Sec. 6188), it is especially made his duty to commence actions in the name of the people of the State of California for the

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recovery of delinquent taxes. This legislation is directly authorized by section eleven, Article VI, of the Constitution, already referred to. It is the duty of the Tax Collector to receive taxes from those offering to pay them; and the law might have made it his duty to take steps to enforce their collection when delinquent, but it has not done so in this instance, but has assigned that duty to the District Attorney; and we do not find in the Constitution that where the taxpayer has neglected and refused to pay the taxes, though due, the Legislature may not authorize judicial proceedings to be instituted, and may not, in case of such proceedings, direct the proper District Attorney to conduct them as other judicial proceedings in which the people are the party in interest. The right to bring the suit at all imports the duty to provide for its conduct by some officer or person competent for the discharge of that duty; and even if it be conceded that it is the general duty of the Collector to receive the taxes when offered by the taxpayer, and that it is not competent to the Legislature to authorize any other officer to perform that general duty, unless it first make such officer *ex officio* Tax Collector, we apprehend that when the Tax Collector has been defeated in the performance of that duty by the persistent refusal of the taxpayer, and has made his official return to that effect, his legal duties as Tax Collector may be said to have so far come to an end, and been discharged by him, as that judicial proceedings may be instituted to recover of the delinquent a sum of money equal to the delinquent tax, together with damages, percentage, costs, etc.

We see nothing in this course, if pursued, which would amount to an interference with what is claimed to be the constitutional duties of the Tax Collector, or a disturbance of any discernible scheme of county government to be found in the Constitution.

Statement of Facts.

The judgment and order denying a new trial must, therefore, be affirmed; and it is so ordered.

[The defendant made application to the Chief Justice, under the provisions of the Federal Judiciary Act, for the allowance of a writ of error in this case, but the Chief Justice denied the application. The writ was, however, afterwards allowed by one of the Associate Justices of the Supreme Court of the United States; and the record having been returned into that Court, and the cause argued and submitted there, the writ of error was dismissed upon the application of the plaintiff in error.—REPORTER.]

[No. 2,946.]

JOHN S. OLELAND v. HENRY THORNTON AND J. WILLIAMS.

DAMAGES FOR BUILDINGS BURNED THROUGH NEGLIGENCE OF ANOTHER.—

In an action to recover the value of buildings destroyed by fire through the negligence of another, evidence as to the cost of new buildings to replace those destroyed, is admissible, as furnishing some data for an approximate estimate of the value of the old buildings.

IDEM—CHARACTER OF TIMBER.—In an action to recover the value of standing timber which has been destroyed by fire, evidence as to the character of the timber is admissible.

DAMAGES BY FIRE THROUGH NEGLIGENCE OF ANOTHER.—Where a party makes a fire for a necessary purpose, upon or near the grounds of another, but negligently leaves it, with combustible material about it, and the fire spreads and destroys adjacent property, the party building the fire is liable for the damages done by the fire.

APPEAL from the District Court of the Ninth Judicial District, Siskiyou County.

This was an action for damages. The complaint alleges that the defendants, while driving a herd of sheep through the country, encamped near the plaintiff's premises, and carelessly, negligently, and willfully permitted fires kindled

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by them to get out and spread over the adjoining country, thereby destroying a hay shed and corral, a blacksmith shop and tools, a dwelling house, household furniture, lumber, and other property belonging to the plaintiff; and also destroyed a forest of timber upon plaintiff's land, suitable for lumber, and adjoining a sawmill owned by him, thereby depriving the mill of logs, and making it comparatively valueless. The case was tried by the Court, without a jury. At the trial, evidence was admitted against the defendants' objections, to the effect that the probable cost of new buildings, to replace the ones that were burned, would be about two thousand six hundred dollars; and testimony that the timber destroyed was suitable for lumber was admitted also, against objections by the defendants. It was shown by the testimony, that the defendants had lighted a fire between the barn and the house, which was less than two hundred yards distant; that there was enough dry brush and material between the fire and the house, and in other directions, to convey the fire to the property burned; and that the defendants had gone away and left the fire burning. The Court rendered judgment for the plaintiff in the sum of one thousand seven hundred and fifty dollars. The defendants moved for a new trial, and the motion being denied, they appealed.

J. H. Budd and C. Edgerton, for Appellants.

L. N. Ketcham, for Respondent.

By the Court, CROCKETT, J.:

There was no error in the ruling of the Court admitting the evidence as to the cost of new buildings to replace those which were burned. The evidence was admissible as furnishing some data by which the Court would be enabled to estimate approximately the value of the old buildings; and it is evident from the opinion and order of the Court, that it

Points decided.

was received and considered for this purpose only, and not as affording a criterion of damages. The evidence as to the character of the timber for milling purposes in that immediate neighborhood was also admissible under the pleadings, when it was offered. But, whether strictly admissible or not, it is apparent from the findings, and from the opinion and order of the Court denying a new trial, that it did the defendants no harm. Nor can we disturb the judgment on the ground that the findings were not justified by the evidence, which was quite sufficient to warrant the conclusion that the damage to the plaintiff's property was caused by the negligence of the defendants, as charged in the complaint.

Judgment affirmed.

[No. 2,022.]

THE PEOPLE OF THE STATE OF CALIFORNIA v.
JOHN BOWEN.

THE PARDONING POWER.—The pardoning power, whether exercised under the Federal or State Constitution, is the same in its nature and effect as that exercised by the representatives of the English crown in this country in colonial times.

PARDON REMOVES DISABILITY TO TESTIFY.—One of the consequences of an executive pardon is to remove from the offender the disability which follows conviction of a felony.

PARDON AFTER PUNISHMENT.—An offender may be pardoned after he has suffered the punishment adjudged for his crime.

RESTORATION TO CITIZENSHIP NOT A PARDON.—An executive act restoring a convicted criminal to the rights of citizenship, is not a pardon—does not remove the legal infamy. So long as the judgment of guilt remains the disability to testify necessarily continues.

APPEAL from the County Court of Sutter County.

The defendant was convicted, and appealed from the judgment and from an order denying his motion for a new trial

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The other facts are stated in the opinion.

J. G. Eastman and G. W. Tyler, for Appellant.

Attorney General Love, for Respondent.

By the Court, WALLACE, C. J.:

On the trial of the prisoner upon an indictment for the alleged crime of grand larceny, one Davis was permitted to testify as a witness. Davis had been convicted of divers felonies in the Courts of the State, for which he had been adjudged to suffer and had suffered imprisonment in the Penitentiary. The record of these convictions was produced by the prisoner, who thereupon objected that Davis was thereby rendered incompetent to testify in the case. It appeared by the records produced and put in evidence by the prisoner in support of his objection, that in July, 1861, by the judgment of the Court of Sessions of the County of Santa Clara, Davis had been duly convicted of the crime of robbery and sentenced to suffer imprisonment in the Penitentiary; that in 1864 he had been duly convicted by the judgment of the County Court of the City and County of San Francisco of the crime of burglary, and again sentenced to imprisonment in the Penitentiary; and that in 1868, in the County Court of Santa Clara, he had been duly convicted of the crime of grand larceny, and by the judgment of that Court again sentenced to undergo punishment therefor by imprisonment in the Penitentiary.

It was conceded below and is conceded here that these convictions of themselves well supported the objection of the prisoner in that behalf. In order to remove the objection and to restore the competency of Davis, the people relied upon and exhibited to the Court an executive act which they claimed removed the disability arising from these several convictions, and which is as follows:

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"Whereas, Charles Davis alias Charles Moore has been convicted of criminal offenses against the laws of the State of California, and whereas it is desirable for the attainment of the ends of justice that he should be restored to citizenship; now, therefore, I, H. H. Haight, Governor of said State, do hereby restore said Davis to all the rights of citizenship possessed by him before his conviction for the offenses above referred to. Witness my hand and the great seal of the State at Sacramento this 17th day of March, 1871.

"H. H. HAIGHT, Governor.

[Seal.] "Attest: H. L. NICHOLS, Secretary of State."

The Court below being of opinion that the competency of Davis as a witness was thereby restored, thereupon overruled the objection of the prisoner in that behalf, and its ruling in this respect is now brought up for review.

The power of the Executive of the State to pardon offenses, other than the offense of treason or impeachable offenses, is conferred upon him by the Constitution. (Art. 5, Sec. 13.) His power in that respect is of the same general nature as that conferred upon the President of the United States by the Federal Constitution. (Art. 2, Sec. 2.) It is true that the pardoning power of the President extends to the pardon of offenses before as well as after conviction, while that of the Governor, under the provisions of the State Constitution, embraces only those cases in which a conviction has already been had; and it is also true that, except in cases arising in the military or naval service, the pardoning power of the President is unrestrained by legislative control, while that of the Governor is subject, in its exercise, to such regulations as the Legislature may provide in relation to the manner of applying for pardons; but the inherent nature and operation of the power itself, whether exercised by the one or the other of these officers, and the consequences of its exercise

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by either in a given case, must be considered to be substantially identical, and as extending its effect not merely to the punishment otherwise inflicted or to be inflicted, but also to the guilt of the offender. "The effect of a pardon (under the rules of the common law) is to make the offender a new man; to acquit him of all corporal penalties and forfeitures annexed to that offense for which he obtains a pardon; it gives him a new credit and capacity; and the pardon of treason or felony, even after conviction or attainder, will enable a man to have an action of slander for calling him a traitor or felon." (2 Blackstone, p. 402.) Mr. Chief Justice MARSHALL, speaking of the pardoning power of the President under the provisions of the Federal Constitution, said: "As this power had been exercised from time immemorial by the Executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance, we adopt their principles respecting the operation and effect of a pardon," etc. (*United States v. Wilson*, 7 Peters, 159.)

In *Ex Parte Wells*, 18 How. 810, the Supreme Court of the United States reaffirmed this view of the nature of the executive power to pardon offenses as existing under the Federal Constitution, and there can be no doubt that the pardoning power, whether exercised under the Federal or State Constitution, is the same in its nature and effect as that exercised by the representatives of the English Crown in this country in colonial times, and that one of the consequences of a pardon extended was and is to remove from the offender that disability to testify as a witness in a Court of justice which, by the rule of the common law, was consequent upon his conviction of a felony. The Governor might have pardoned Davis had he seen fit — he was not the less the subject of the executive power in that respect because he had already suffered the punishment adjudged for his crime. (2 Wheeler C. C. 451.) Had he done so, there is no doubt

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that his competency as a witness would have been thereby restored.

But the executive act under review is not a pardon, nor was it intended to be such. It did not purport to remove the guilt of Davis, nor wipe away the infamy by the law of the land attaching upon him by reason of his conviction. It sought to restore him to all the rights of citizenship possessed by him before his conviction of the offenses "above referred to," and to so restore him, while he yet remained a convicted felon, and with the consequent legal infamy attaching by law to that status. The stain of his iniquity, flowing from his conviction, is still left upon him by the Executive. The judgment of the law upon that fact is that the credit of his oath is so absolutely and effectually destroyed that he cannot be trusted to testify at all; that it is not to be hoped that he will speak the truth, but must be conclusively assumed that he will not. If the judgment be reversed, the disability is, of course, necessarily removed; if the offense be pardoned the same consequence, too, would follow. But so long as the judgment remains, the guilt it fixes upon the convict is not taken away, and the disability necessarily remains. They are legally inseparable; hence it is held that if the Executive pardon the offense, he necessarily removes the disability annexed to it by law, and a proviso inserted in the deed of pardon that the disability shall remain, notwithstanding the pardon of the offense itself, is void. (*People v. Pease*, 3 Johns. Cas. 333.)

These views dispose of the question presented, but if they did not, it might be not a little difficult to maintain that the attempted restoration of Davis "to all the rights of citizenship" he had theretofore possessed would, by expression, include a right to testify as a witness, or that there is any known relation between the competency of a witness and his "rights of citizenship."

Statement of Facts.

Judgment reversed and cause remanded for a new trial.

Mr. Justice CROCKETT did not express an opinion.

[No. 3,154.]

THE PEOPLE OF THE STATE OF CALIFORNIA
v. THOMAS M. LONG.

SUMMONS OF GRAND JURY.—Under section twelve of the Act of 1863, concerning jurors in certain counties, it is competent for the Judge of a Court, after the commencement of the session, to order a Grand Jury to be summoned.

ALLEGATION IN INDICTMENT FOR BURGLARY.—In an indictment for burglary, an allegation that the prisoner, in the night-time, entered, feloniously, burglariously, and with force and arms, is substantially to say *felonice et burglariter fregit*.

MOTION TO STRIKE OUT EVIDENCE GIVEN WITHOUT OBJECTION.—The practice, whether in civil or criminal cases, of deliberately permitting evidence to be given without objection in the first instance, and then moving to strike it out, on grounds which might readily have been availed of, to exclude it when offered, is not to be tolerated.

ADMISSIONS AS EVIDENCE.—A confession made to an officer who has the prisoner in custody, whether it appear to have been made voluntarily or not, is admissible, if it was not induced by improper means.

APPEAL from the County Court of Plumas County. *

The defendant was arrested on a charge of burglary, September 28th, 1871, and committed to jail to await examination. The Court convened November 6th, 1871, when the Judge made an order directing that a Grand Jury be summoned to be in attendance on the sixteenth of that month. When the Court convened on the latter date, the defendant, being present with his counsel, objected to the panel, on the grounds that the case was not one that would authorize the calling of a special Grand Jury, as having arisen since the commencement or immediately before the session of the Court; that the Grand Jury had not been summoned in con-

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formity with section five of the Act of April 4th, 1864; that the requisite number of ballots was not drawn, and that notice of the drawing had not been given in accordance with law. The challenge was overruled by the Court, and the defendant excepted. The defendant then demurred to the indictment as stated in the opinion, and the demurrer was overruled. On the trial, the Under Sheriff, Boring, was permitted to testify, without objection on the part of the defendant, that while the defendant was in his custody he had commenced a conversation with him, in which the defendant confessed the crime, but that witness had held out no inducements to him to make the confession. Afterward, the counsel for defendant moved to strike out the testimony, and the motion was denied. The defendant was convicted, and he appealed.

E. T. Hogan, for Appellant.

John L. Love, Attorney General, for Respondent.

By the Court, WALLACE, C. J.:

1. The challenge of the prisoner interposed to the panel of the Grand Jury was properly denied. By section twelve of the Act of 1863-4 (p. 526) it is provided, that if, after the commencement of the session of the Court, it shall appear proper to the Judge that a Grand Jury be summoned, he shall cause an order to that effect to be entered on the minutes of the Court. This was done; and in impaneling the Grand Jury so directed to be summoned, sections nine, ten, and eleven appear to have been observed.

2. The next error assigned is the overruling of the demurrer to the indictment. The offense of which the prisoner was convicted was that of burglary—defined by section fifty-eight of the statute concerning crimes and punishments. The indictment alleges that the prisoner, in the night-time,

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feloniously and burglariously, and with force and arms, entered the dwelling house of Taylor with intent to commit petit larceny, etc. The objection taken is that it is not alleged that the prisoner forcibly *broke* and entered, etc. We think that under section two hundred and forty-seven of the Criminal Practice Act the indictment was sufficient; the allegation that the prisoner in the night-time *entered feloniously, burglariously, and with force and arms*, is substantially to say *felonice et burglariter fregit*.

3. There was no error in permitting Boring, the Under Sheriff, to testify as to the confession of the prisoner made to him. The evidence was not objected to when it was offered and given upon the part of the prosecution, and for that reason its admission could not be erroneous. Had objection been then made to its admission, the prosecution would doubtless have shown that the confession was voluntary, as was subsequently shown in answer to the motion of the prisoner to strike out the evidence of the confession. The practice, whether in civil or criminal cases, of deliberately permitting evidence to be given without objection in the first instance, and then moving to strike it out on grounds which might readily have been availed of to exclude it when offered, is not to be tolerated. There is nothing in the points made upon the instructions given to the jury; these are necessarily disposed of by the views already expressed.

Judgment affirmed.

Mr. Justice CROCKETT did not participate in this decision.

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[No. 2,912.]

THE PEOPLE OF THE STATE OF CALIFORNIA
v. M. H. WALSH.

IMPLIED BIAS.—A challenge for implied bias must specify the particular cause from which the bias is to be inferred.

CONSTRUCTION OF STATUTE — JUSTIFIABLE KILLING.—Under the provisions of section twenty-nine of the Act concerning crimes and punishments, the killing of another is justifiable only when the entry into a habitation, is being made in a violent, riotous, or tumultuous manner, for the purpose of offering violence to some person therein, or for the purpose of committing a felony by violence.

REASONABLE OPPORTUNITY OF REMOVING INTRUDER.—W., who was a clerk of a hotel, saw A. in the act of entering at a window in the night-time, and fired at him, without first calling to him to desist or inquiring as to his purpose. *Held:* that there being no circumstances calculated to arouse the fears of a reasonable man or indicating a danger so urgent or pressing as to excuse the instant use of a deadly weapon, it was not error to refuse to instruct the jury to the effect that if W. did not have a reasonable opportunity of removing A. then he was justified in shooting him.

ERRORS AS TO ABSTRACT PRINCIPLES OF LAW.—The Supreme Court will not consider alleged errors upon merely abstract propositions of law, in giving instructions in a criminal case, but will merely review misdirection or refusal to give proper instructions upon points actually arising in the case.

APPEAL from the District Court of the Thirteenth Judicial District, County of Merced.

The facts are stated in the opinion.

G. W. Tyler, for Appellant.

Attorney General Love and Alexander Campbell, for Respondent.

By the Court, WALLACE, C. J.:

The prisoner was convicted of the crime of manslaughter, in killing one Atwill, and from the judgment and an order denying him a new trial he has prosecuted this appeal:

1. The challenge interposed to the juror Fowler "for im

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plied bias," specifying nothing, was properly denied. (*People v. Reynolds*, 16 Cal. 130; *People v. Renfrow*, 41 Cal. 37.)

2. It is insisted that the Court erred in its charge to the jury, and in the refusal to give to the jury certain instructions asked for by the prisoner, and refused by the Court.

The shooting was not denied, but was claimed by the prisoner to have been excusable under the circumstances. The prisoner was the clerk in charge at Coulter's Hotel, in Snelling, at which hotel the deceased was a boarder, but not a lodger, and about two o'clock in the morning saw a man, who proved to be the deceased, seemingly in the act of getting into or out of a window of one of the rooms on the ground floor of the hotel. The man appeared to be balanced upon the sill of the window, with his feet hanging out; and the prisoner seems to have fired at him from another window of the same hotel. The ball entered the upper portion of the left thigh of the deceased, lodging in the right leg, between the knee and ankle. Tetanus subsequently set in, causing death in a few days. The evidence for the prisoner, he having been sworn upon his own behalf, was to the effect that, hearing a noise about two o'clock in the morning, seemingly a striking against the sash of a window, he jumped up—had a revolver in his hand—and seeing by a faint moonlight the legs of a man hanging out of the window of the room occupied by the children of Mr. Strong, the proprietor of the hotel, he fired, without knowing who the person in the window was, and without warning him, or inquiring of his business there. Upon the other hand, the evidence upon the part of the prosecution tended to show that the prisoner was not ignorant of who the deceased was when he fired at him; that he knew well that it was Atwill in the window; that in the room into which the window opened was a woman, in charge of the children of Strong, the landlord, and that for the favors of this woman the deceased and the prisoner were rivals; that the deceased, as he expressed it

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in his dying declaration, put in evidence, had "got the inside track of Walsh," and had persuaded the woman to discard the latter altogether, and to swear fidelity to himself. The deceased was on a visit, or rather retiring from a visit to the woman when he was shot. He had gone into the room at about twelve o'clock at night, and after remaining with her some two hours, was crawling out through the window, feet foremost — detained for a moment in regaining his hat, which had been knocked off by the window curtain — when Walsh shot him in the legs. The theory of the prosecution, in short, was that the shooting was malicious, and was prompted by feelings of jealousy and revenge upon the part of the prisoner towards the deceased.

The Court refused to instruct the jury that if they believed "that the defendant, having charge of the house, had reason to believe that the person trying to enter the house by the window, at the midnight hour, did so for the purpose of committing a felony or other unlawful act, then the jury will acquit." It is clear that the instruction, as thus asked, is not the law. The phrase *unlawful act*, as contained in the instructions asked, goes beyond the provisions of section twenty-nine of the Act concerning crimes and punishments, with reference to which the instruction was apparently drawn. Under the provisions of that section the killing would be justified only when the entry into a habitation is being made in a violent, riotous, or tumultuous manner, for the purpose of assaulting or offering violence to some person dwelling or being therein, or for the purpose of committing a felony by violence or injury. The statute also provides that a bare fear of any of these offenses is not sufficient to justify the killing, but that it must appear that the circumstances were sufficient to excite the fears of a reasonable man, and that the party killing really acted under the in-

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fluence of those fears, etc. (Section 30.) The instruction as asked omits to present to the jury the question as to whether or not Walsh did believe that the entry was being made for the purpose of committing a felony, and really acted under any fear that such an offense was about to be committed when he fired the shot. At the request of the prisoner, the Court gave to the jury the eighth instruction, which is an exact copy of sections twenty-nine and thirty of the statute, and correctly set before them the rule by which their determination upon the point should be controlled; and in view of this instruction it can hardly be said, as claimed by the prisoner's counsel, that "the charges, taken as a whole, exclude the idea that the defendant could act upon appearances in shooting deceased, but that there must have been actual, real danger," as distinguished from mere apparent danger, sufficient to excite the fears of a reasonable person.

At the instance of the prisoner the Court instructed the jury as follows: "A man is not authorized to fire a pistol on every intrusion or invasion of his house. He ought, if he has a reasonable opportunity, to endeavor to remove the intruder without having recourse to the last extremity; but the making an attack upon a dwelling, and especially at night, the law regards as equivalent to an assault upon a man's person, for a man's house is his castle." There was no error in refusing an instruction subsequently asked, to the effect that if the prisoner did not have a reasonable opportunity of removing the deceased, then he was justified in shooting him, and should be acquitted. "A reasonable opportunity" is too vague an expression in this connection; besides, the facts appearing at the trial did not warrant the instruction as asked. The shot was fired without calling to the deceased to desist, or inquiring of him as to his purpose in being in the window of the hotel. There were no circumstances calculated to arouse the fears of a reasonable man,

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or indicating a danger so urgent or pressing as to excuse the instant use of a deadly weapon. Walsh himself, when upon the witness stand, does not pretend that there were. He does not claim that he thought at the time that the firing was necessary to avert any danger, real or apparent — according to his own account it would seem to have been done in a spirit of recklessness. He says: "I fired without taking any aim."

We discover no error in the action of the Court in giving or refusing to give instructions to the jury upon points involved in the shooting of the deceased. We will not consider the errors, or supposed errors, of the Court below upon merely abstract proposition of law, but will only look to see that no misdirection or refusal to give proper instructions upon the points actually arising, or which, from the nature of the accusation, must have necessarily arisen in the case, has occurred.

The question as to whether or not the death of the deceased resulted from the wound inflicted upon him by the prisoner or from other causes, was fairly submitted to the jury under the instructions; and the objection to the giving in evidence of the dying declarations of the deceased was properly overruled. In fact, the record discloses no error of which the prisoner can be heard to complain, or by which his substantial rights were prejudiced at the trial.

Judgment and order denying a new trial affirmed.

Mr. Justice CROCKETT did not participate in this decision.

Argument for Respondent.

[No. 2,681.]

FRANCES C. COOMBS, ADMINISTRATRIX OF THE ESTATE OF JOHN S. CHIPMAN, DECEASED, v. JAMES F. HIBBERD.

VACATING ORDER DENYING NEW TRIAL.—When an application for a new trial has been made in due form, upon a settled statement, and the Court has passed on the motion, the order made is conclusive so far as the Court making it is concerned. The Court cannot afterwards vacate the order and decide again on the motion.

APPEAL from the District Court of the Fourth Judicial District, City and County of San Francisco.

The facts are stated in the opinion.

A. M. Crane, for appellant.

The Court had no jurisdiction to set aside the order refusing a new trial, or to make an order granting a new trial after having once refused it. (Pr. Act, Secs. 333-6; *Haight v. Gay*, 8 Cal. 297; 1 Green, Iowa Reports, 235; 16 Ind. 358.)

W. W. Chipman, for Respondent.

The Court had a right, either on its own motion, or at the request of the party aggrieved, to vacate the order refusing a new trial, as improvidently made. The motion was in the nature of a petition for a rehearing, which it is in the inherent power of a Court to grant, as long as it has control of the cause. It is by virtue only of this inherent power that this Court grants rehearings. This power was always exercised at common law before enrollment. The entry of the judgment in this State does not complete the judgment roll (*Spanagel v. Dellinger*, 34 Cal. 476.) But our Statute of Amendment (Sec. 68 of the Practice Act) gives the largest powers to the Court in this respect, and warrants such a proceeding even after the lapse of the term.

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By the Court, NILES, J.:

The defendant having recovered judgment in the Court below, the plaintiff moved for a new trial, and the motion was denied on the 13th of July, 1870.

On the 21st of July the plaintiff gave a notice of a motion to "vacate the order denying a new trial, and to grant an order allowing the motion for a new trial to be reheard."

The application was to be made "upon the pleadings, statement on motion for new trial, stipulation of facts, the findings of the Court, and judgment roll."

This motion was heard on the twenty-third of July following, and taken under advisement by the Court. On the twenty-ninth of July the Court made an order vacating the order denying the motion for a new trial and allowing it to be reheard; and on August thirteenth made an order granting a new trial.

The defendant appeals from both of these orders.

It will hardly be contended that under our form of practice a Court could entertain two successive motions for a new trial in the same case, upon identical grounds. The right to move for a new trial is a creature of the statute, and this statute provides for but one statement and one motion.

The motion to vacate the order was equivalent in its effect upon the parties to a renewed motion for a new trial. It demanded another hearing of a question once determined, and resulted in the granting of a new trial which had been once refused. If this practice should be allowed, several consequences, not contemplated by the statute, would ensue. The limited time within which a motion for a new trial may be made would be practically enlarged, for there can be no good reason why the motion to set aside the order should be made within a limited number of days. The proceedings after judgment would be interminable, for the last order could be vacated upon motion of the losing party, and so

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ad infinitum. There must be some point where litigation in the lower Court terminates, and the losing party is turned over to the appellate Court for redress.

In the case of *Morris v. De Celis*, 41 Cal. 331, it appeared that the motion of plaintiff for a new trial was granted by the District Court upon its own motion, and before any statement had been settled or motion submitted by counsel. This Court held that the order should have been set aside upon the defendant's application.

There is an evident distinction between that case and the one now presented. There was no foundation, in the former case, for any order in the premises. There was no statement upon which the Court could act, and no motion for a new trial had been made. As the order stood in the way of defendant's appeal, by depriving him of the benefit of a statement, through which alone the grounds of appeal could be presented, it should have been set aside by the Court that made it. The error was not that the motion for a new trial was improperly granted, but that an order was made at all.

In the present case the proceedings upon plaintiff's motion for a new trial were in all respects regular. The statement had been settled and the motion heard and denied in the required order and in due form. Every error of the Court, including its supposed mistake in regard to the respective dates of the deed and lease, appeared in the statement, and could have been reviewed upon appeal from the order refusing a new trial. This was the plaintiff's proper and only redress.

The order vacating the order refusing a new trial, and the order granting a new trial, are reversed.

Opinion of the Court — WALLACE, C. J.

[No. 3,318.]

EX PARTE PATRICK MURRAY, UPON HABEAS CORPUS.

RECITAL IN JUDGMENT.—The judgment in a criminal case need contain no recital of the particular offense, but only of the general offense, within which the particular one is included.

ENTRY IN MINUTES IN CRIMINAL CASES.—The entry made in the minutes in criminal cases is part of the record, and errors or admissions in the record in that respect can be examined only on appeal, and will not be reviewed on habeas corpus.

HABEAS CORPUS — ACTION OF SUPREME COURT AS TO JUDGMENT.—Upon habeas corpus, if the Court whose judgment is assailed be one of competent jurisdiction to render a final judgment of the character appearing, the Court will only inquire if the judgment, as rendered, be upon its face certain and definite in terms, so that it may be known what punishment the prisoner is to suffer.

THE POLICE COURT OF SAN FRANCISCO.—The Police Court of the City and County of San Francisco is not of inferior jurisdiction, in the sense that upon mere collateral inquiry, nothing is to be intended in support of its judgment, when rendered in a particular case, included by general definition in that class of criminal cases over which jurisdiction has been conferred upon it by law.

THE petitioner was taken before the Court upon a writ of habeas corpus.

The facts are stated in the opinion.

Creed Haymond, for Petitioner.

By the Court, WALLACE, C. J.:

The return made to the writ issued in this case shows that the prisoner is detained by the Sheriff under a commitment of the Police Judge's Court of the City and County of San Francisco, which is as follows:

“In the Police Judge's Court of the City and County of San Francisco, State of California: *The People of the State of California v. Patrick Murray*. State of California, City and County of San Francisco, ss.—The People of the State of California to the Sheriff of the City and County of San

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Francisco, greeting: Whereas, Patrick Murray, having been duly convicted in the Police Judge's Court of the City and County of San Francisco, State of California, of the crime of misdemeanor, as charged in the complaint, upon oath, in the above entitled criminal action, and by said Court sentenced and adjudged, as a punishment for said crime, to pay a fine of forty (\$40) dollars, and in default of payment of said fine to be imprisoned in the County Jail of the City and County of San Francisco, State of California, for the period of twenty (20) days, as appears by the following full, true, and correct copy of the judgment rendered by said Court, and entered in the minutes and docket of said Court in the above entitled criminal action:

“Minute docket in the Police Judge's Court of the City and County of San Francisco, State of California: State of California, City and County of San Francisco, Court-room of said Court, Saturday, March 30th, 1872. In open Court. Present, presiding, Hon. Davis Louderback, Police Judge. *The People of the State of California v. Patrick Murray*, convicted of misdemeanor. In this action the defendant personally appears for sentence. The Court renders its judgment: That whereas the said Patrick Murray, having been duly convicted in this Court of the crime of misdemeanor, it is ordered and adjudged, as punishment therefor, that the said Patrick Murray pay a fine of forty (\$40) dollars, and in default of payment thereof, that said Patrick Murray be imprisoned in the County Jail of this city and county, for the period of twenty (20) days.’

“And whereas said fine has not been paid, these presents are therefore, in the name of the people of the State of California, to command you, the Sheriff of the City and County of San Francisco, forthwith to take, arrest, and safely keep and imprison the said Patrick Murray in the County Jail of the said City and County of San Francisco, State of California, for the period of twenty (20) days, or until said fine be

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paid or satisfied. And these presents shall be your authority for the same. Witness my hand and seal of the said Police Judge's Court, this 20th day of March, A. D. 1872.

[L. s.]

"DAVIS LOUDERBACK,

"Police Judge of the City and County of San Francisco."

The statute (Secs. 462, 463, Crim. Pr. Act) provides that when *judgment* in a criminal case has been rendered, *the Clerk shall enter the same in the minutes*, "stating briefly the offense for which the conviction has been had," etc., and that (except in capital cases) a certified copy of the entry, delivered to the proper officer, shall be his sufficient warrant to execute the judgment. The objection urged for the prisoner is that the judgment as entered does not specify the particular offense of which he was convicted, but states merely that he was "duly convicted in the Police Judge's Court of the City and County of San Francisco of the crime of misdemeanor."

The *judgment* is one thing—the brief statement of the offense of which the prisoner has been convicted is a different thing. The former—the *ideo consideratum est*—need contain no recital; it is here simply "that the said Patrick Murray pay a fine of forty dollars," etc. The entry made in the minutes in criminal cases is made by statute part of the *record* (Sec. 462, Sub. 5); and if there be errors or omissions in the record in that respect, they are examinable only on appeal or upon writ of error. But upon writ of habeas corpus, if the Court whose judgment is assailed be one of competent jurisdiction to render a final judgment of the character appearing, we are then only to inquire if the judgment, as rendered, be upon its face certain and definite in terms, so that it may be known what punishment the prisoner is to suffer. (Act concerning habeas corpus, Sec. 19, Sub. 2), and no objection in that respect has been, or can be taken to the judgment in question here.

Points decided.

The Police Court of the City and County of San Francisco, though of limited, is not of inferior jurisdiction in the sense that upon mere collateral inquiry nothing is to be intended in support of its judgments when rendered in a particular case included by general definition in that class of criminal cases over which jurisdiction has been conferred upon it by law.

The prisoner is therefore remanded.

Neither Mr. Justice RHODES nor Mr. Justice CROCKETT participated in this decision.

[No. 2,188.]

FERDINAND VASSAULT *v.* JAMES EDWARDS.

Correction of Transcript.—It is the duty of counsel to have clerical and typographical errors in the transcript corrected, and they must see to it that the corrections are made in all the copies filed with the Clerk.

EXECUTORY CONTRACT FOR SALE OF LAND.—A proposal to sell real estate, reduced to writing, and signed by the vendor alone, in which he recites that he has sold to the vendee the land for a price named, and has received a certain sum as a deposit, as part payment, which the vendor was to refund if the title was rejected or bad, the sale to be subject to a search of and approval of title, and the vendee to have twenty days for the examination of the title, is a valid contract of sale entered into between the parties.

IDEM.—In such contract, had no time been fixed, the vendee would have been entitled to a reasonable time in which to exercise his election, but time having been fixed, it is of the essence of the contract, and the Court has no power to extend it.

IDEM.—If such contract is extended, in order that the vendor may perfect his title, and the vendee, as soon as the title is perfected, accepts the same, and tenders the money, he accepts the vendor's proposal within a reasonable time, and it then ripens into a complete contract of sale.

IDEM.—An executory contract for the sale of real estate is valid and binding, and can be enforced by the vendee, if signed by the vendor alone.

PLEADING AGREEMENT TO SELL LAND.—An averment in a complaint, that an agreement was made to sell land, is sufficient, without alleging that it was in writing and signed. If denied, the proof must show that it was in writing and signed.

Argument for Appellant.

APPEAL from the District Court of the Fifteenth Judicial District, City and County of San Francisco.

The plaintiff appealed.

The other facts are stated in the opinion.

Daniel Rogers, for Appellant.

It is claimed that the contract is not mutual, because not signed by both parties.

This objection certainly arises from a misconception of our statute. The eighth section of the Act concerning fraudulent conveyances and contracts, provides that "every contract for the leasing for a longer period than one year, or for the sale of any lands, or any interest in lands, shall be void, unless the contract, or some note or memorandum thereof expressing the consideration, be in writing, and be subscribed by the party by whom the sale or lease is to be made." We now see that our statute does not require the contract to be signed by both parties, but simply by the party by whom the contract is made.

It is conceded that, generally, a contract to be specifically enforced by the Court must be mutual; but we contend that the present case is one of the exceptions to this rule, and that the statute only requires the agreement to be signed by the party by whom the contract is made, or by his agent, and is silent as to the signature of the other party. (*Child v. Comber*, 3 Sw. 423n; *Backhouse v. Mohun*, id. 434n; *Seton v. Slade*, 7 Ves. 265; *Ballard v. Walker*, 3 Johns. Cases, 60; *Fry on Specific Performance*, Secs. 290-298.)

It has been held by both Courts of law and equity that the statute—requiring the agreement shall be signed by the party to be charged therewith, or by whom the sale is to be made, and not by both parties—is satisfied by the signature of the party against whom the contract is sought to be enforced. (*Laythorp v. Bryant*, 2 Bing. N. C. 735; see note

Argument for Respondent.

"C" to *Sweet v. Lee*, 3 Man. & Gr. 462; *Ballard v. Walker*, 3 Johns. Cases, 60; *Olason v. Baily*, 14 Johns. 484; *McCrea v. Purmont*, 16 Wend. 460; 21 Wend. 446.)

There is no presumption that the agreement to extend the time was verbal, but, on the contrary, there is a presumption that it was in writing. Assuming that the fact alleged is necessary and material—that it was necessary to allege and prove this agreement to extend the time—the allegation that such an agreement was made is sufficient, as the presumption is that it was in writing, if the law so required it to be. (*Champlin v. Parish*, 11 Paige, 405.)

Campbell, Fox & Campbell, for Respondent.

There was no absolute contract to sell, no obligation to purchase, and no mutuality between the parties. It was a mere proposal to sell, subject to conditions not complied with.

The written contract appears by the complaint never to have been in force at all. The title was rejected. On that state of facts there could have been no mutuality. Neither was at that moment bound to the other; and appellant must, on his own complaint, rely on the supplemental agreement or fail.

The complaint does not state this to be in writing. (*Green v. Palmer*, 15 Cal. 415.) The "writing" is a fact essential to the cause of action, and we, therefore, taking the pleading most strongly against the pleader, have treated the statement as that of a verbal extension. A verbal extension of a contract, required by the Statute of Frauds to be in writing, is void. An unexecuted verbal agreement, made by a mortgagee to discharge a mortgage by a release, is within the Statute of Frauds. (*Phillips v. Leavitt*, 54 Me. 405.) *Hasbruch v. Tappen*, 15 Johnson's R. 200, is directly in point, showing the verbal extension to be void, and leaving the parties to stand on the written contract

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alone, which, we believe, the complaint itself shows is too weak to support appellant.

By the Court, RHODES, J.:

The alleged contract, which the plaintiff seeks to have specifically performed, is set out in the complaint. It is therein recited that the defendant had sold to the plaintiff the premises in controversy for the price of four thousand five hundred dollars, and had received fifty dollars in part payment; and the contract then proceeds as follows: "This sale is subject to a search of, and approval of, the title; and if the title is rejected or bad I agree to refund to said Vassault the fifty dollars paid on account; but if the title be approved I agree to convey the above premises to said Vassault, or his assigns, by a good and sufficient grant, bargain, and sale deed, on receiving the balance of the purchase money as above. And I hereby allow to said Vassault twenty (20) days for the examination of the title." It is signed by the defendant alone. The complaint alleges that the plaintiff paid the fifty dollars mentioned in the contract; that within the twenty days mentioned in the contract he examined the defendant's title to the lot, and found it defective in this, that the property had been sold to the defendant at a sale made under the order of the Probate Court; that the sale had been confirmed, and the administrator ordered to execute a deed, but that, in fact, no deed had been executed. It is further alleged that upon those facts being communicated to the defendant, he agreed to take the proper proceedings to obtain said deed, and "did extend the time mentioned in the agreement herein first above recited, for the purpose of completing said sale;" that the Probate Court subsequently ordered the administrator to execute a deed of the lot to the defendant; that thereupon the plaintiff did accept the title of the defendant, and so

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notified him, requested him to execute a deed, and tendered him the balance of the purchase money; but that the defendant refused, and still refuses to execute the deed. The demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, was sustained, and the plaintiff failing to amend, final judgment was rendered for the defendant.

There is a discrepancy between the copy of the alleged contract, as contained in the transcript, and that which is set out in the plaintiff's brief. In the transcript the words are, "and if the title is rejected *or* bad; while in the plaintiff's brief they are, "and if the title is rejected *as* bad." The defendant's brief leaves the matter in uncertainty, and we shall accept as correct the copy in the transcript. It is not material, however, to the questions which will be discussed, whether the reading in the transcript or in the plaintiff's brief is the correct one. The matter is alluded to for the purpose of saying that it is the duty of counsel to have clerical and typographical errors in the transcript, which are material, corrected, and that *they* must see to it that the corrections are made in *all the copies* filed with the Clerk.

The instrument above mentioned is not a contract. It is a mere proposal. "If the title is rejected or bad," then the defendant was to refund to the plaintiff the fifty dollars paid. If the title should be found to be bad the money was to be refunded; or if the plaintiff rejected the title the money was to be refunded. His right to reject was not subject to the condition that the title should be found to be bad; but he had the right, for any cause, to reject the title. The defendant insists that if the correct reading is "rejected *as* bad," still the plaintiff had the right to reject the title even if it were good; but it is not necessary to pass on that question.

The instrument, being a mere proposal for a sale, was a valid contract entered into between the parties; and if so,

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at what time did it become complete and binding? So far as the original proposal was concerned, the plaintiff was limited to twenty days in which to accept or reject the title. Time is unquestionably of the essence of the proposal for the sale. Had no time been mentioned, the plaintiff would have been entitled to reasonable time in which to exercise his election, but the time having been fixed, the Court has no power to extend it. And such is the rule among those dealing in real estate in this State, where such property is as salable as personal property. But it is alleged that when the plaintiff found that the defendant's title was bad, the defendant "did extend the time mentioned in the agreement herein first above recited, for the purpose of completing said sale." To this allegation the defendant objects, on the ground that the agreement to extend the time is not alleged to have been in writing. In this, however, the defendant is not sustained by the authorities. (See *Wakefield v. Greenwood*, 29 Cal. 599; and see cases collected in note to Sec. 505, Browne Stat. Fraud.) The Statute of Frauds has not changed the rules of pleading. The averment that the agreement was made is sufficient, without alleging that it was reduced to writing and signed; but if the statute requires the agreement to be in writing, the party alleging the agreement must, if the allegation be denied, prove it by the production of the writing, or by other competent evidence.

The time was extended, as well for the benefit of the defendant as the plaintiff, in order that the defendant might perfect his title to the lot, and although the length of the further period is not specified, yet as the plaintiff, upon the order of the Probate Court being made requiring the administrator to execute to the defendant a deed, accepted the title of the defendant, and notified him that he, the plaintiff, was ready to pay the purchase money, and requested him to execute the deed, it cannot be said that the plaintiff did not approve the title and accept the defendant's offer within a

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reasonable time. As soon as the plaintiff accepted the defendant's proposition or offer, it ceased to be merely a proposition, on the part of the defendant, to sell, but it ripened into a contract of sale. When the offer was accepted—and the approval of the title and the tender of the balance of the purchase money was an acceptance of the offer—the contract of sale was complete. The instrument in writing filled all the requirements of the Statute of Frauds, and the acceptance by the plaintiff was a sufficient legal consideration for the agreement on the part of the defendant. (*Boston & M. R. R. v. Bartlett*, 3 Cush. 224; 1 Para. Cont. 376 and 399.) It is only required by section eight of the Statute of Frauds that the contract of sale be signed by the party by whom the sale is to be made.

The further objection is taken under the demurrer that the contract is not mutual; and hence that a specific performance will not be decreed. The general rule undoubtedly is, that a contract will not be specifically enforced unless it be mutual—that is to say, such that it may be enforced by either party against the other. In cases falling within the fourth clause of the fourth section of the English Statute of Frauds—that no action shall be brought “upon any contract or [for] sale of lands, tenements, or hereditaments, or any interest in or concerning them * * * unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized”—and the analogous provisions of the statutes of the several States, the decisions have been almost uniform, that the agreement is required to be signed only by the party to be charged, and that it is valid and binding upon the vendor when so signed (if in other respects sufficient), without the signature of the other party to the agreement. Upon this point there is a greater degree of uniformity among the

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cases than in those involving the construction of most of the other provisions of the statute. The question is fully considered by Chancellor KENT, in *Clason v. Bailey*, 14 Johns. 484, and the authorities are reviewed at some length; and although he agreed with Lord Ch. REEDSDALE, in *Lawrenson v. Butler*, 1 Sch. & Lef. 13, that *on principle* the contract ought to be mutual, and ought not to be enforced in equity, unless each party would have the same right, yet he felt himself bound by the authorities, which were then too well settled to be disturbed. The Courts, however, in view of the uniform construction of the Statute of Frauds, that the agreement was valid and binding upon the party by whom it was signed, and in order to work out the requisite mutuality, held that in such cases it was sufficient if the *remedy* was mutual. It was accordingly held from an early day that when the action for a specific performance was instituted by the party who had not signed the agreement, the act of filing the bill made the remedy mutual. (See *Flight v. Bolland*, 4 Russ. 298; *Seaton v. Slade*, 7 Ves. 265; *Bowen v. Morris*, 2 Taunton, 373; *Ld. Ormond v. Anderson*, 2 Ball & Beatty, 363; *Palmer v. Scott*, 1 Russ. & Mylne, 391; *Martin v. Mitchell*, 2 Jac. & Walk. 413; *Shirley v. Shirley*, 7 Blackf. 452; *Clason v. Bailey*, 14 Johns. 484; 1 Sug. Vend. and Pur. 112.) There are no cases in this Court which bear directly on this question, except *Cooper v. Pena*, 21 Cal. 403; but there are several in which the merits of the cause were considered, though the contract of sale was not signed by the purchaser. Such cases, though not express authority on that question, tend to show that the Court did not deem it essential that there should be a mutuality in the contract. In *Cooper v. Pena*, the consideration for the land to be conveyed was to be paid by the personal services of the plaintiff; and the Court rightly, and in entire accord with the authorities

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some of which we have above cited, held that as the Court could not specifically enforce the performance of the personal services, the remedy was not mutual. There is no exception to the rule—at least none now occurs to us—that the contract, though signed by both parties, will not be specifically executed at the instance of one party, unless performance on his part can also be compelled. The proposition that specific performance of the contract would not be decreed when the party asking its enforcement could not be compelled to perform it, was decisive of the case, and upon it the case was, in fact, decided; and in our opinion the decision is sustained by the overwhelming weight of the authorities. The exceptions which are stated in some of the cases prove the rule. A suit cannot be maintained by an infant, because he cannot be compelled to perform the contract; but if the infant commence the action after he arrives at the age of majority, specific performance will be decreed, because there is then a mutuality of remedy, and the plaintiff can be compelled to perform on his part. A sale to a married woman furnishes another illustration. She cannot maintain a suit for specific performance, because she cannot be compelled to perform the agreement on her part.

In *Cooper v. Pena* the objection on the part of the defendant was that there was a want of mutuality in the agreement—it having been executed only by the defendant—and the form of the objection caused the Court, in some degree, to confound the question of the mutuality of the agreement with that of the mutuality of the remedy, although the Court finally said, that in view of the want of mutuality in the remedy, it was “unnecessary to hold that the position of the parties, as to equitable relief, was determined by the want of mutuality in the beginning.” The language of the Court, so far as it intimates that it is essential to the maintenance of the action that the contract be mutual, cannot be sustained without overturning the well recognized construction

Points decided.

of the Statute of Frauds—that the statute is fully complied with, if the agreement or the note or memorandum thereof be signed by the party to be charged, or the party by whom the sale is to be made, as provided by our statute; and without also denying the authority of the long and almost unbroken series of cases, in which the specific performance of contracts, signed by only one party, has been decreed.

Judgment reversed and cause remanded, with directions to overrule the demurrer.

Mr. Justice CROCKETT did not express an opinion.

[No. 2081.]

THOMAS G. MOLERAN v. J. E. BENTON, J. PURRINGTON, FRANCES PURRINGTON, HIS WIFE, EGBERT JUDSON, JAMES L. KING, J. JUDSON, MRS. J. JUDSON, HIS WIFE, ROBERT B. WOODWARD, AND TERRENCE RILEY.

CERTIFICATE OF ACKNOWLEDGMENT OF A DEED.—If the certificate of acknowledgment of a deed of a married woman for her separate property, does not state that she was examined by the Notary without the hearing of her husband, and that she was made acquainted with the contents of the instrument, it is radically defective and does not convey any title.

POSSESSORY RIGHT IN PUEBLO LANDS.—The right or interest which a person held in the pueblo lands of San Francisco, by virtue of possession alone, prior to the passage of the Van Ness Ordinance, if not devised by him, descended to his heirs and could be distributed by the Probate Court.

ASSIGNMENT OF LEASE BY LESSOR.—An assignment made on a lease of land, of all the tenant's right, title, and interest in the premises held under the lease, is not a surrender of the lease to the person to whom the assignment is made, nor does it amount to an attornment to him, unless he has purchased the title from the lessor, but such assignment makes the assignee the tenant of the lessor.

VAN NESS ORDINANCE.—The actual possession of land in San Francisco within the boundaries of the Van Ness Ordinance, by a tenant, was the possession of the landlord, so as to entitle him to the benefits of that ordinance, and the same result followed if the tenant assigned the lease, and his assignee took possession.

Argument for Appellant.

ABANDONMENT OF LAND.—An attempted sale of land which fails, because of a defect in the deed, is not an abandonment of the land. There cannot be an abandonment to a particular person or for a consideration.

GOOD FAITH IN PURCHASE OF LAND.—When a mother and her children own land in common, a purchaser from the mother in good faith, who buys supposing he has acquired the whole title, does not acquire the title of the children. The title of the children cannot be affected by the good faith of a purchaser from the mother.

APPEAL from the District Court of the Fourth Judicial District, City and County of San Francisco.

The facts are stated in the opinion.

B. S. Brooks, for Appellant.

Jacob Harmon being in the actual possession of the land in controversy, and claiming to own the same, at the time of his death, the right to the possession of the same descended to his legal representatives, the same as the legal title would have done, and passed by his will as effectually as an absolute title, as against the defendants and all the world, except the lawful owner; and even as to the lawful owner the possession passed by the will.

“The right of enjoyment of possession of public lands may descend among the effects of a deceased person to the executor or administrator, and the right of the deceased may be conveyed by regular sale to another.” (*Grover v. Hawley*, 5 Cal. 485; 2 Black. Com. 159; 2 Hil. on Real Prop. 155, 156; *Smith ex dem. Teller v. Lorillard*, 10 Johns. 355.)

By the decree of divorce Jacob Harmon and Eleonora Harmon became tenants in common of the land. (*Ewald v. Corbett*, 32 Cal. 493; *McLeran v. Benton*, 31 Cal. 29.) By the death of Harmon, Eleonora Harmon had one half of the said land, Jacob Harmon, Jr., one third, and Mary Ann Harmon one sixth.

The deed from Mrs. Foley, not being acknowledged by her as required by law, was a nullity, and, therefore, it con-

Argument for Respondents.

veyed nothing; therefore, the title to the land remained as before. (*Ewald v. Corbett*, ante.) The possession of Mrs. Foley was the possession of all her tenants in common. (*Warring v. Cross*, 11 Cal. 366.) The attornment made by Commerford to Brannan and others, being without the consent of his landlord, was void at law. (1 Hittell's Dig. 691.) The assignment made by Commerford to Brannan and others, and the entry by Brannan and his associates, placed them in the shoes of Commerford, and they became tenants of the heirs of Harmon. (1 Hittell's Dig. 690.) Harmon was not, nor were his successors in interest, trespassers upon the lands of the pueblo. The pueblo did not hold these lands in absolute fee, but in trust for those who should come to settle upon them. (*Hart v. Burnett*, 15 Cal. 530; *Fulton v. Hanlon*, 20 Cal. 450; *Payne et al. v. Treadwell*, 16 Cal. 220; *Coryell v. Cain*, 16 Cal. 567; *Doran v. C. P. R. R. Co.*, 24 Cal. 245; *Houseman v. Chase*, 12 Cal. 290.) Michael Commerford, the lessee of Mrs. Foley, being in possession on the 1st day of January, A. D. 1855, and up to the passage of the Van Ness Ordinance, the title of the pueblo, if it had not already passed, then passed to Harmon's legal representatives. (*Hubbard v. Barry*, 21 Cal. 321; *Board of Education v. Fowler*, 19 Cal. 11; *Hubbard v. Sullivan*, 18 Cal. 108.)

W. H. Patterson, for Respondents.

The legal question which counsel for appellant seeks to raise upon what he claims to be the legitimate facts, viz: "That the ancestor, Jacob Harmon, being in possession of the land in 1849-50, and up to the time of his death, was presumptively the owner of the land, and that his possessory title descends to the heir at law," is entirely foreclosed by the fact that the land was the property of the pueblo, and that subsequent to his death, on the passage of the Van Ness Ordinance, the title in fee became, and was vested in the defendants, as actual possessors and occupants. There-

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fore, it is unnecessary to discuss the proposition; for so soon as the evidence disclosed the fact that the legal title to the land was in the pueblo of San Francisco, the Court was called upon to declare that the possession of Harmon was a mere naked possession, and, in the absence of proof to establish that he held under some authority or consent of the city, he was to be regarded as a mere trespasser. But it is unnecessary to characterize his possession at all. It is sufficient that the land was subject to the disposition which the Van Ness Ordinance made of it. (*Wolf v. Baldwin*, 19 Cal. 306; *Davis v. Perley*, 30 Cal. 630; *Borel v. Rollins*, 30 Cal. 408; *Wakelee v. Goodrum*, 34 Cal.)

W. H. Patterson and J. W. Winans, also for Appellant.

The deed of Eleonora Harmon and husband was valid, because their right to convey to Brannan and others was not affected by the Act of April 17th, 1850, respecting husband and wife, nor by the Act of April 16th, 1850, respecting conveyances, inasmuch as her separate estate in the property was acquired before the adoption of the State Constitution and laws. Her deed, therefore, to make it valid, did not require to be acknowledged in conformity with the requirements of said Acts. (*Bodley v. Ferguson*, 30 Cal. 511.)

By the Court, RHODES, J.:

This is an action of ejectment to recover the possession of lands in San Francisco, lying within the lines of the Van Ness Ordinance. It is found, among other facts, that prior to September 13th, 1849, Jacob Harmon and Eleonora, his wife, were in the actual possession, use, and occupation of a tract of land known as the Harmon tract; and that they so took and held possession thereof after coverture, and resided thereon with their family. Harmon and wife were divorced

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by a decree of the Court of First Instance which was rendered October, 1849, and affirmed in 1850 by the Supreme Court. By the decree it was adjudged that Eleonora was entitled to the one half of the community property; but it does not appear that a partition thereof was ever made. In November, 1850, Harmon died, leaving a last will and testament, by which he devised the undivided two thirds of the land to his son Jacob, and the remaining third to his executors in trust for his daughter Mary Ann. Soon after the divorce, Eleonora married Michael Foley, and in 1850 they entered into possession of the land; and on the 16th of August, 1852, they executed a lease of the land to Commerford, for a term to expire January 16th, 1856, describing the land as a part of the Harmon estate. Immediately after the execution of the lease, Foley and wife removed from the land, and Commerford entered and occupied, under the lease. In June, 1853, Foley and wife entered into a contract in writing with Brannan and others — under whom defendants claim title — by which Foley and wife agreed to sell and convey to Brannan and others one hundred and sixty acres of the Harmon tract; and in the same month the purchase money, six thousand dollars, was paid, and Foley and wife executed to them a deed for the land. The contract and deed will hereafter be alluded to. In December, 1853, Commerford sold and assigned his lease to Brannan and others, but he remained as the tenant of Brannan and others until October, 1854, and for the period of ten months thereafter he remained on the premises as their agent or servant. In 1854 Mrs. Foley, with her two children, Mary Ann and Jacob Harmon, removed to the County of Santa Clara, and thereafter neither she nor the children had possession of the premises. In October, 1859, Jacob died a minor and unmarried, and in November, 1859, Mrs. Foley, his mother, died. In May, 1861, Mary Ann, who before that time had married Roussel, conveyed the premises to

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the plaintiff. From the time when Commerford relinquished the possession of the premises, the defendants and those under whom they claim, through the deed to Brannan and others, have been in the actual occupation of the premises in controversy. The defendants had judgment. The appeal is taken from the judgment and the order denying the plaintiff's motion for a new trial.

The question of the sufficiency of the deed of Mr. and Mrs. Foley to Brannan and others was before the Court in *Ewald v. Corbett*, 32 Cal. 493; and it was there held that Mrs. Foley was at that time the owner of one half of the premises as her separate property, and that the deed was inoperative and void as to her, because of the defective acknowledgment. It is not certified therein that she was examined by the Notary without the hearing of her husband, nor that she was, by the Notary, made acquainted with the contents of the instrument. In each of those respects the acknowledgment is radically defective. The decision in *Ewald v. Corbett* is fully sustained by numerous decisions of this Court, and we are satisfied beyond a doubt of its correctness. We expressly affirm that case on this point, because the Judge of the District Court, after having excluded the deed when offered in evidence, stated when he came to the decision of the cause, that he excluded from consideration both the agreement and the deed, though he was of the opinion that the decision of that point in *Ewald v. Corbett* was incorrect.

The real controversy in the case, is in respect to the title accruing by virtue of the Van Ness Ordinance. The plaintiff claims that it accrued to Mrs. Foley and her two children, Mary Ann and Jacob; and the defendants claim that it accrued to Brannan and the other persons who united with him in the purchase from Mrs. Foley and her husband. Jacob Harmon was in the actual occupation of the premises in 1849. The undivided half of the premises — that is to

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say, the undivided half of the interest therein, which Harmon and wife held immediately preceding his death — vested in Eleonora, either by virtue of the decree of divorce, or the statute of this State providing for the distribution of the common property upon the dissolution of the community by the death of the husband; and the remaining half vested in their two children, but whether by virtue of the will of their father or the statute regulating the distribution of common property, it is unnecessary to determine. That the right and interest in the premises acquired or held by Harmon by virtue of his possession, conceding that they were the lands of the pueblo or the city, would descend to his heirs, if not devised by him, and that the same might be distributed under the statute relating to common property, is beyond all controversy. The decision on the former appeal, and in *Ewald v. Corbett*, would be destitute of all basis if the estate of Jacob Harmon would not descend, or could not be distributed under the statute regulating common property. The rule, in case the title was in the city or the former pueblo, is the same as when the title is in the United States; and this is so thoroughly settled in this State that it is quite useless for counsel to reopen the discussion of the question.

Mrs. Foley and her husband had the actual possession and occupation of the premises from the time of her entry, in 1850, up to their execution of the lease to Commerford in August, 1852. Whether her possession was also the actual possession of her children, is not material to the points necessarily involved in the case.

Both parties treat the lease to Commerford as valid. It is hence unnecessary to determine whether, between his entry and his assignment of the lease, he was either a trespasser or an intruder within the meaning of the Van Ness Ordinance. Up to the time of his assignment of the lease,

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December, 1853, he was Mrs. Foley's tenant, and up to that time all her rights in the premises were fully preserved.

By the instrument executed by Commerford to Brannan and his associates, he purported to "assign, transfer, and surrender" to Brannan and his associates "all my right, title, and interest in the said premises, under and by virtue of the within lease," and he recited therein that Brannan and his associates had become the owners of the premises by purchase. The inquiry here arises — and it is the most important question in the case — as to the legal effect of that instrument. It was not a surrender, unless Brannan and others had become the landlords of Commerford. It is not pretended that they became such, except by purchase from Mrs. Foley. Her deed being invalid, and having been excluded when offered in evidence, there is nothing to show that they acquired the legal title from her. The contract of sale, which, as already stated, was excluded from consideration by the Court below, whether valid or not, under the law then in force, did not convey, or purport to convey, the title; and if it be valid, and the equitable title was acquired thereby, and by means of the payment of the sum of six thousand dollars by Brannan and others to Foley and wife, such equitable title has not been set up in the action. It requires no argument to show that a parol contract of sale, accompanied by the payment of the purchase money, does not transfer the title. For the reasons already suggested, the instrument executed by Commerford did not amount to an attornment to Brannan and others. His alleged holding under them, from the date of the instrument to October, 1854, may have made him, as between themselves, the tenant of Brannan and others; but that fact did not in any manner vary the effect of that instrument, or change the relation subsisting between Mrs. Foley on the one side and Brannan and others and Commerford on the other. That instrument, in our judgment, amounts in legal effect to an assignment of

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the lease. Brannan and others, therefore, became the tenants of Mrs. Foley, and so remained during the residue of the term, which expired January 16th, 1856. From the assignment of the lease to October, 1854, Commerford was the sub-tenant of Brannan and others; and for the succeeding ten months he had charge of the premises as their agent or servant.

There seems to be no question that on the 1st of January, 1855, and from thence to the 20th of June, 1855, there was the requisite actual occupation of the premises to entitle Mrs. Foley, or Brannan and others, to the benefits of the Van Ness Ordinance. Had Commerford remained in possession under the lease, without an assignment of the lease, it is beyond all question that the title, which passed under the operation of the Van Ness Ordinance, and its confirmation by the Legislature in 1858, would have vested in Mrs. Foley; and as Brannan and others, by the assignment of the lease, became the tenants in the place of Commerford, the same result ensued, as there would, had there been no assignment of the lease — that is to say, the title vested in Mrs. Foley. We do not mean to be understood as holding that the title vested in her to the exclusion of her children, but we hold that, to the extent of her interest in the premises, growing out of the possession of Harmon and herself, the decree of divorce, her subsequent possession, and the possession of her tenants, the title vested in her. We deem it unnecessary for the purposes of this case to determine whether Mary Ann and Jacob occupied such a position in respect to the premises as to entitle them to the benefits of the ordinance; because, according to the views already expressed, either Mrs. Foley took the entire title, or she took it in common with her two children; and if the latter took any portion of the title the defendants have not connected themselves with it.

Great reliance is placed by the defendants upon an intima-

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tion which was thrown out in *Brooks v. Hyde*, 37 Cal. 374, that the word *tenant* is used in the ordinance and the statute (Stats. 1858, p. 52), as meaning a *conventional tenant*. But without discussing that intimation or inquiring whether it was intended by the ordinance to exclude cases where the vendor remained in possession, neither by contract nor adversely to the vendee, or where a purchaser had been let into possession pending the treaty of purchase, or held possession under a contract to purchase, after having made default in payment; or where an executor, administrator, or receiver, etc., held the possession, or where the mortgagee was in possession, or other cases of that complexion, it needs only to be said here, that the assignee of the term becomes, by force of the assignment, the tenant of the landlord, and as such falls within the meaning of the word *tenant*, as used in the ordinance.

It is contended that the attempted sale and conveyance by Mrs. Foley to Brannan and others may be regarded as an abandonment by her of the possession of the premises. The elements of an abandonment are quite different from those of a sale; and where for any reason a transaction fails, as a sale, it cannot be converted into an abandonment. There is no such thing as an abandonment to particular persons, or for a consideration. (*Stevens v. Mansfield*, 11 Cal. 365; *Richardson v. McNulty*, 24 Cal. 343.)

It is insisted by the defendants that Brannan and others effected their purchase from Mrs. Foley, and paid the purchase money in entire good faith; and it may be admitted that they had no actual knowledge that they were not obtaining the title. But the papers which the parties executed, showed that the premises were a portion of the Harmon estate; and had there been nothing to put them on inquiry as to the title, it is apparent that Mrs. Foley had not competent power to convey the interests of her children. They, of course, cannot be affected by the utmost good faith on the

Argument for Appellant.

part of the purchasers from their mother. Neither has the question of good faith, anything to do with their purchase, so far as the interest of Mrs. Foley is concerned, for the most perfect good faith on their part will not help out or cure the radically defective acknowledgment of her deed.

Judgment and order reversed, and cause remanded for a new trial.

Mr. Chief Justice WALLACE, being disqualified, did not sit in this case.

Mr. Justice CHOCKETT did not express an opinion.

[No. 2,200.]

PETER DAVERKOSEN v. JOHN W. KELLEY.

STIPULATION AS TO REFERENCE OF CAUSE.—When a case has, by the stipulation of the parties, been referred to a referee, and he reports a judgment which is entered, and the Court grants a new trial, it cannot, without a new consent of the parties, again refer the case to the same or any other referee. Upon the report of the referee, and the entry of the judgment, the stipulation ceased to have further effect.

APPEAL from the District Court of the Fifteenth Judicial District, City and County of San Francisco.

The facts are stated in the opinion.

James Mee, for Appellant.

A new trial is a reëxamination of an issue of fact in the same Court (not before a referee), after a trial and decision by a jury, Court, or referee. (Prac. Act, Sec. 192.)

Howe & Rosenbaum, for Respondent.

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By the Court, NILES, J.:

This was an action for goods sold and delivered. By stipulation of parties the cause was referred to a referee, "to take the evidence and report a judgment." The referee subsequently reported a judgment in favor of the plaintiff for the full amount of his claim. The defendant then filed his statement, and moved for a new trial, and a new trial was granted. Upon motion of the plaintiff, and against the objection of the defendant, the cause was again referred to the same referee, to take the testimony and report a judgment. The defendant appeals from the final judgment rendered upon the second report of the referee, and assigns the last order of reference as error.

The point is well taken. Prior to the last order the referee had taken the testimony and reported a judgment. The powers conferred by the stipulation were then exhausted. When the new trial was granted the parties were restored to the position which they occupied when the issues were originally made. Either party could then demand a trial by jury, or object to a reference, which, in an action at law, can only be made by mutual consent.

Judgment reversed, and cause remanded for a new trial.

[No. 3,319.]

EX PARTE DELANEY.

ORDINANCE AGAINST PROFANE SWEARING.—When the charter of a municipal corporation authorizes the municipal legislative body to enact ordinances, to prohibit practices which are against good morals, or contrary to public decency, and such body determine as a fact that a particular practice, such as the uttering of profane language, is against good morals, and prohibit it by ordinance, the decision of such body on this question is final, and the Court will not review it. **HOLD.**—A municipal legislative body, if empowered by law to prohibit

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or suppress practices against good morals or public decency, may, by ordinance, punish the uttering of profane language, whether uttered frequently or only once by the same person.

OPINION AT COMMON LAW.—At common law profane swearing was not indictable, except when repeated so often and so publicly as to become an annoyance to the public, and thus a public nuisance.

APPLICATION for a writ of habeas corpus.

The facts are stated in the opinion.

Samuel H. Henry, for Petitioner.

Attorney General Love, for the People.

Bishop says "public profane swearing is indictable," (1 Bishop on Criminal Law, 2d ed., Sec. 378; id. 4th ed., Sec. 946.) Yet, on consultation of the authorities cited by him, we find that the use of profane language in public is not alone sufficient.

Single acts of profane swearing are not indictable. (*The State v. Jones*, 9 Iredell, 38; *The State v. Kirby*, 1 Murphy, 254; *The State v. Ellar*, 1 Devereux, 267; *The State v. Baldwin*, 1 Dev. & Battles, 195.)

By the Court, BELCHER, J.:

The petitioner was convicted in the Police Judge's Court of the City and County of San Francisco of the violation of an ordinance of the city which prohibits the utterance of profane language, words, or epithets in the hearing of two or more persons, and sentenced to pay a fine of forty dollars, and in default of payment thereof to be imprisoned in the County Jail for the period of twenty days. Having been imprisoned in pursuance of the judgment, he has sued out this writ, and alleges that his imprisonment is unlawful for the reason: First, that the Board of Supervisors was not authorized by the Legislature to pass any ordinance upon the subject; second, that profane swearing was a misde-

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meanor at common law, and it was not competent for the Board of Supervisors, under any authority claimed to have been given it, to reduce or in any manner change the penalty which the statute has declared upon a conviction of a common law misdemeanor.

1. The third subdivision of section one of the Act under which the ordinance was passed (Stats. 1863, p. 540), is as follows: "Third. To prohibit and suppress, or exclude from certain limits, all houses of ill-fame, prostitution, and gaming; to prohibit, and suppress, or exclude from certain limits, or regulate all occupations, houses, places, pastimes, amusements, exhibitions, and practices which are against good morals, contrary to public order and decency, or dangerous to the public safety."

The Board having acted under the statute and determined that the uttering of profane language, words, or epithets in the hearing of two or more persons is a "practice" which is against good morals, or contrary to public order and decency, we must accept its decision upon the question as final. (*Ex Parte Smith and Keating*, 38 Cal. 709.)

But it is claimed that the ordinance is unauthorized because it punishes a single utterance of profane words, while the word "practices," as used in the statute, necessarily implies an act often repeated by the same person. If this were so an ordinance which should punish the discharge of firearms in a crowded street of the city, or the indecent exposure of one's person, would be nugatory, unless each individual complained of was found to have frequently repeated the same offense.

It is quite evident, we think, that the Legislature intended to authorize the Board to prohibit all such acts and words as might be deemed hurtful to the good order and well-being of society, whether such acts should be performed or words uttered frequently or only once by the same person.

2. It is declared by statute that "every act or offense not

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defined by statute which is a misdemeanor at common law is a misdemeanor in this State." (Stats. 1866, p. 468.) And it is claimed that the offense of which the petitioner was convicted was a misdemeanor at common law.

It is not always easy to tell precisely what was and what was not a misdemeanor at common law. There is no doubt, however, that blasphemy was an offense punishable at common law (4 Black. Com. p. 59), and so it has been said was public profane swearing. (1 Bishop Crim. Law, Sec. 946.) "Blasphemy is any oral or written reproach maliciously cast upon God, His name, attributes, or religion." "It embraces the idea of detraction when used towards the Supreme Being; as 'calumny' usually carries the same idea when applied to an individual." (2 Bishop Cr. Law, Sec. 88.) Profane swearing seems only to have been indictable when the words uttered were repeated so often and so publicly as to become an annoyance to the public and thus a public nuisance.

The words charged to have been uttered by the petitioner, and for uttering which he was convicted, were not blasphemous within the definition given, nor within any definition which we have seen, nor do they appear to have been uttered under such circumstances as to constitute a case of public profane swearing. This disposes of the whole case before us.

The application is denied and the petitioner remanded.

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[No. 2,144.]

ROBERT S. THOMPSON v. MICHAEL LYNCH, ADMINISTRATOR OF THE ESTATE OF CHARLES BROWN, HENRY McDONALD, JEREMIAH KEEF, JOHN MARTIN, FRANK M. PIXLEY, HIRAM PEARSON, AND HIRAM C. WHEELER.

ARRANGEMENT OF TRANSCRIPT.—The proceedings at the trial should be chronologically arranged in the transcript on appeal.

NEW TRIAL — WAIVER.—A failure to file a statement, on motion for a new trial within the time fixed by stipulation, is a waiver of the right to make the motion. The right to give notice of intention is lost when the right to move for a new trial is lost, and the right cannot be restored by an order of the Court.

APPEALABLE ORDER.—The findings and conclusions of law do not constitute an order which is the subject of an appeal.

NEW TRIAL — ORDER NOT APPEALABLE.—An order striking a notice of motion for new trial from the files ceases to be the subject of review after sixty days, and a party cannot move to vacate it and then appeal from the order denying his motion.

MOTION.—A motion to amend the decree and findings of the Court is not proper practice.

APPEAL from the District Court of the Fourth Judicial District, City and County of San Francisco.

E. A. Lawrence, for Appellants.

Elisha Cook, for Respondent.

By the Court, WALLACE, C. J.:

The transcript of the record filed does not comply with the requirements of the sixth rule of practice of this Court. The proceedings are not chronologically arranged. The record is made up, in the main, of motions and counter motions, motions to vacate, orders already entered upon motion, and notice, etc.; and these are thrown into the transcript in a confused mass, and without the slightest attention to their respective dates. Reasonable attention

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upon the part of counsel, in the first instance, to perspicuity of arrangement of the record would greatly lessen the subsequent labors, both of themselves and of the Court.

1. The action having been tried before the Court without a jury, judgment was rendered in favor of the plaintiff on the 18th day of April, 1867. On the twenty-third day of the same month the defendant gave notice of his intention to move for a new trial, and at the same time obtained from the plaintiff a stipulation allowing thirty days from that day in which to file a statement in support of the motion. No statement was filed within the stipulated thirty days, nor was any further extension obtained or sought by defendant. The result was that the right of the defendant to move for a new trial was at that point definitively waived. But on the 25th of September, 1869 — more than one year afterwards — another notice of intention to move for a new trial was served and filed by the defendant; and on the thirtieth day of the same month the Court, by *ex parte* order, allowed the defendant twenty days from that date in which to file a statement in support of the motion — which statement was subsequently, on the nineteenth day of October, and within the time limited in the order, actually filed. But the second notice of intention, and the order of the Court extending the time to file the statement, and the subsequent filing thereof by the defendant, were alike nugatory. The right to give a notice of intention was lost when the right to move for a new trial was lost, and the order of the Court could not restore it.

2. The motion to amend the decree and findings was not proper practice, and was correctly denied.

3. The appeal is taken in part from "the order filed September 15th, 1869." We have searched through the record in vain to find such an order. There is none, unless the appellant meant the findings and conclusions of law, which seem to bear date of that day. These, however, do

Statement of Facts.

defendants must be conducted by their respective attorneys, and the attorney for one defendant cannot give notice of motion, or accept service of notice, or stipulate for another.

WAIVER OF NOTICE OF MOTION FOR NEW TRIAL.—If a party who does not give notice of motion for a new trial files a statement, and the opposite party settles the statement, or files amendments, and the statement is settled, without reserving his right to object for want of notice, he waives the notice.

ENJOINING A JUDGMENT.—A party who recovered a judgment, and assigned it before the commencement of an action to enjoin the collection of the same, brought against him and his assignee, cannot be heard in the Supreme Court, upon alleged errors in the trial, which resulted in granting the injunction. Having no interest in the judgment, he is not injured by the injunction.

APPEAL from the District Court of the Fourth Judicial District, City and County of San Francisco.

As stated in the opinion, the main facts in this case, the character of the action, etc., are found in the report of this case in 28 Cal. 596. It is unnecessary to repeat those facts here. The preliminary injunction was there affirmed, and on the trial it was made perpetual, and this appeal is from the judgment.

On the trial in the Court below, the plaintiffs called Tully R. Wise as a witness. In a former action tried in the Twelfth District Court, in which A. K. Fisher was seeking to enforce a mortgage against the steam-tug "Mary Ann," W. R. Duff was called as a witness before said Wise, the referee in the case. Duff was first sworn on his *voir dire*, and the plaintiffs proposed to prove by Wise what Duff said on his *voir dire*.

In 1857 Fisher brought suit against the Humboldt Lumber Company and others to enforce a mortgage. Judgment was rendered for plaintiff, not only enforcing the mortgage, but for execution for a deficiency, if any existed. This is the judgment referred to in the opinion when it speaks of "the offer to show," etc.

The other facts are stated in the opinion.

Argument for Respondents.

G. F. & W. H. Sharp, and Patterson & Stow, for Appellants.

James McM. Shafter, for Respondents.

In *Grant v. White*, 5 Cal. 55, it was held that the attorney of record is the only person upon whom a notice can be served. The reasons are doubly strong why a stranger should not be permitted to give the notice. (*Bogert v. Bancroft*, 3 Caines, 127.) Notices must be signed by attorney. (*Jerome v. Boeram*, 1 Wend. 293.)

Notice of motion had been given by attorneys on behalf of a defendant. Plaintiffs' attorney objected to hearing the motion, on the ground that defendant had appeared by another attorney. "The notice should have been given in the name of the attorney originally retained, or a regular substitution shown. For that cause the motion is denied, with costs." (*Board of Commissioners v. Younger*, 29 Cal. 147.) The right of the attorney of record to control the action is declared even as against his client—the party. The only redress the party has is to move a substitution. "So long as he remains attorney of record the Court cannot recognize any other as having the management of the case." In *Willson v. Cleveland*, 30 Cal. 192, the same doctrine was affirmed.

The question is squarely presented. When there are several defendants carefully appearing by different attorneys, can any one of these attorneys be permitted to manage the case of all the defendants, or is such client at liberty to claim to be represented solely by his own attorney? Is the other party at liberty and allowed to treat each attorney as having full power over the whole case; to give all notices for everybody; to receive all service for everybody, and to stipulate away the rights of everybody; and this, too, when perhaps the interest of his client is identical with the plaintiff with whom he comes to a friendly agreement; or must he recog-

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nize each attorney as the only representative of the party for whom he appears?

By the Court, RHODES, J.:

A concise and accurate history of the litigation out of which this suit grows, is given in the report of *Hobbs v. Duff*, 28 Cal. 596, which was an appeal from the preliminary injunction, which, by the decree from which this appeal is taken, was made perpetual. On that appeal most of the questions going to the merits of this controversy were decided. It was then held that the plaintiffs were not estopped, either by the judgment in *Duff v. Fisher*, or by the judgment in *Duff v. Hobbs*, or by the judgment in *Duff v. Goddard*, from showing that William R. Duff was only a trustee for Ryan & Duff. It was also held that there was a sufficient consideration to support the assignment of the unsatisfied balance of the judgment of foreclosure in *Fisher v. Ryan*; that this action in equity could be maintained, although in the action at law on the appeal bond—*Duff v. Hobbs*—the defendants attempted, but failed, to set off the balance due on the judgment of foreclosure, against the demand on the appeal bond; that the proceedings in *Duff v. Hobbs* imparted notice to Josephi of the set-off claimed by the present plaintiffs, and that without regard to the question of notice, he took his assignment, subject to the plaintiff's right to such set-off; that if William R. Duff is a mere trustee for Ryan and J. R. Duff, he is not injured by the set-off, and that the latter are not injured, for the set-off satisfies a portion of their indebtedness. Other points were decided, about which no question is now made. The decision on the points above mentioned, became the law of the case.

Objection is taken to the depositions of Buhne *et al.*, on the ground that no notice of their taking was shown. It was

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proven by oral testimony that the notice was given to the attorneys of Wm. R. Duff; and no reason is given why the proof of service may not be made in that manner as well as by affidavit. It is also shown by an affidavit that the notice was served on the attorneys for Wm. R. Duff and Josephi.

The defendants interposed objections to the larger portion of all the questions which were propounded by the plaintiffs to Buhne and others, and they now rely upon all those objections, and specify particularly a number of questions which were asked of each witness; but they do not undertake to show wherein the questions were objectionable. The statement shows that all the objections found in the depositions were presented to the Court, and were overruled. It will suffice to advert to the character of some of those questions, in classes, without taking them up in detail. Questions were asked of the witnesses to show that William R. Duff acquired the title to one of the mills and the steam-tug—portions of the property which was sold at the foreclosure sale. That was the theory of the defendant's case, and it could do them no injury to prove the fact by oral testimony. The record in *Duff v. Fisher*, was better evidence of such fact; but the record was introduced in evidence, and as the oral evidence did not add to, vary, or contradict the record in the respect mentioned, no injury resulted to the defendants from its admission. The testimony of those witnesses, going to show that Wm. R. Duff acquired the possession of such property and that he leased the mill to certain persons, instead of injuring the defendants rather strengthened their position, as it tended to show that he was in fact the owner of the mill. Evidence as to the pecuniary standing and ability of William R. Duff, was competent on the issue, as to whether he was in equity the owner of the property, the title to which was taken in his name. Testimony showing that Ryan and J. R. Duff, or either of them, par-

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ticipated in the treaty for the lease of the mill, or received portions of, or settled for the rent, or superintended matters in respect to the mill, was clearly competent, as tending to prove one of the material issues—which was that they, Ryan and Duff, were the equitable owners of the contract for the purchase of the mill, and of the judgment rendered in proceedings having their origin in that contract. The objections require no further notice.

The objection which is now made to the deposition of Ferguson, was not made when the deposition was offered in evidence; and besides this answer to the objection, it appears by the matters added to the transcript by stipulation, that a notice of the application for a commission to take the deposition was given.

The testimony of Wise was objected to on the ground that it was not the best evidence—that the record of the examination of the witness ought to be produced; but the objection was properly overruled, because the testimony of Wise referred to the testimony of the witness on his *voir dire*, and on the production of the record it did not show that the witness was sworn or gave any testimony on his *voir dire*.

The offer to show that the foreclosure suit was an amicable suit, and that it was agreed that no personal judgment should be rendered, was properly rejected. The invalidity of that feature of the judgment—the personal liability for the deficiency, after the sale of the mortgaged property—could not be proven, unless it had been alleged in the answer, and the answer contains no such allegation. If the judgment was not what it should have been, it can be reformed only in a direct proceeding brought for that purpose. *Carpentier v. Oakland*, 35 Cal. 439, is clear authority that it is not liable to a collateral attack on that ground.

We do not understand that the minutes of the Court in the foreclosure suit show any material fact which is not

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shown by the judgment roll. They were, therefore, immaterial. But if they differ in any material respect from the roll, they were not admissible to vary or contradict the roll.

There is no error in the remaining specifications.

There is a further point which is presented by the plaintiff, which is decisive of this appeal. Josephi, to whom the judgment on the appeal bond was assigned, before the commencement of this action, is the only person who is interested in that judgment. He appeared by Patterson & Stow; G. F. Sharp appeared for William R. Duff, by filing a demurrer, and he is the only defendant for whom the Messrs. Sharp appeared. The notice of motion for a new trial was given by "G. F. & W. H. Sharp, attorneys for defendants." The statement on new trial is signed by G. F. & W. H. Sharp, and Patterson & Stow. The plaintiffs' attorneys stipulated to the correctness of the statement, and in the stipulation reserved "all exceptions and objections to the right to make such statement." The notice of appeal is given on behalf of the *defendants*, and is signed by G. F. & W. H. Sharp and Patterson & Stow. The record does not show a substitution of attorneys for any of the defendants. The plaintiffs insist that the motion for a new trial must be limited to William R. Duff, the only defendant for whom either of the Messrs. Sharp appeared, and we are of the opinion that the point must be sustained. Where there are several defendants to an action, and each appears by his own attorney, the proceedings in the cause on behalf of the defendants must be conducted by their respective attorneys until their authority is revoked, or other attorneys substituted. The attorney for one defendant has no more authority to give a notice for another defendant than he has to accept service of notices or other papers, or enter into stipulations for him, or consent to an order or judgment against him. The settlement by the attorneys of a statement on new trial, filed on behalf of a party who had not given notice of his intention to move for

Points decided.

a new trial, or the proposing of amendments to such statement, if the settlement was made, or the amendments were filed, without objection for the want of such notice, would amount to a waiver of the notice. In this case, however, the objection was made in the manner already mentioned, and the plaintiffs will not be deemed to have waived notice of the motion on the part of Josephi. The only defendant who can be heard on the grounds specified in the statement—they being the only grounds now relied upon—is William R. Duff (*Spangel v. Dellinger*, 42 Cal. 148.) He had assigned the judgment before the commencement of this action, and does not appear to be interested in the litigation, and therefore has no cause to complain of alleged errors, which might have been prejudicial to his assignee or to Josephi.

Judgment and order affirmed.

Mr. Chief Justice WALLACE, being disqualified, did not sit in this case.

Mr. Justice CROCKETT did not sit in this cause.

[No. 2,152.]

**THE PEOPLE OF THE STATE OF CALIFORNIA
v. AUGUSTIN OLVERA, ADMINISTRATOR OF THE ES-
TATE OF SANTIAGO ARGUELLO, DECEASED, AND THE
LANDS OF THE EX-MISSION OF SAN DIEGO.**

TAXES ON ESTATES OF DECEASED PERSONS.—Taxes assessed against the property of an estate, pending administration, and while the property is in the possession and under the control of an administrator, are not claims against the estate, which must be presented to the administrator for allowance, under the provisions of sections one hundred and thirty and one hundred and thirty-one of the Probate Act. The administrator must pay such taxes, as expenses in the care and management of the estate.

SUITS TO COLLECT TAXES.—District Courts have jurisdiction of actions for collection of delinquent taxes, when the tax amounts to more than three hundred dollars, and also, regardless of amount, when it is sought to enforce the lien of the tax.

Opinion of the Court — Belcher, J.

APPEAL from the District Court of the Seventeenth Judicial District, County of San Diego.

The defendants appealed.

The other facts are stated in the opinion.

J. Hartman, for Appellant.

[No brief on file.]

John L. Love, Attorney General, and *W. T. McNealy*, District Attorney of San Diego County, for Respondent.

Taxes assessed against the administrator of an estate are not such claims as are required to be presented. (Probate Act, Sec. 128; *Deck v. Gherke*, 6 Cal. 669; *Fallon v. Butler*, 21 Cal. 82.)

By the Court, *BELCHER, J.*:

This is an action for the collection of delinquent State and county taxes, assessed upon the "lands of the ex-Mission of San Diego" for the year 1869. These lands were the property of the estate of Santiago Arguello, who died intestate in 1862. In 1868 the defendant Olvera, was duly appointed administrator of the estate, and at once qualified and entered upon the discharge of the duties of the trust. In 1869 Olvera had possession of the lands, no division of them having been made among the heirs, and they were assessed to him as the administrator of the estate.

The complaint does not allege the presentation of the claim for taxes to the administrator and its rejection by him.

The defendants demurred to the complaint, and their demurrer being overruled, failed to answer, and judgment was thereupon rendered by default.

It is objected, first, that no action for the collection of a delinquent tax can be brought against the property of an estate until it shall have been presented to the administrator

Opinion of the Court — Bolcher, J.

as a claim against the administrator and rejected by him; and, second, that the District Court has no jurisdiction of the subject matter of the action. Neither of these objections is well taken.

First — Whatever may be the rule when taxes are assessed during the lifetime of the decedent — and we are not called upon to express any opinion in reference to it — it is clear that taxes assessed against the property of an estate, pending administration, and while it is in the possession and under the management and control of an administrator, are not “claims” against the estate which must be presented, supported by an affidavit, and allowed or rejected, under the provisions of sections one hundred and thirty and one hundred and thirty-one of the Probate Act. The undivided property of deceased persons may be listed to administrators, and the taxes assessed are charges upon the property, which should be paid as all necessary expenses in the care, management and settlement of the estate are paid.

Second — That the District Courts have jurisdiction in actions for the collection of delinquent taxes, when the tax amounts to more than three hundred dollars, or when the object of the action is to foreclose the lien of the tax and obtain an order of sale, is declared both by the Constitution and statutes, and has been affirmed many times by this Court. (*People v. Mier*, 24 Cal. 61.)

In this case the tax amounts to more than one thousand dollars, and the prayer of the complaint is for a decree foreclosing the tax lien.

Section four hundred and thirty-five of the Probate Act does not purport to take away this jurisdiction. It simply requires Probate Courts to direct administrators to pay all taxes which have accrued against estates in their hands, and forbids the distribution of the property of estates among the heirs and devisees until all taxes are paid.

The judgment is affirmed.

Opinion of the Court — NILES, J.

[No. 2,791.]

A. GRAEBER v. M. S. DERWIN.

DAMAGES FOR INJURY TO THE PERSON.—A person injured by the fall of an awning, in process of erection in front of a store, and who sues the person who was erecting the same for damages, is not entitled to include in his damages the sum paid for his board during the time he was disabled.

APPEAL from the District Court of the Seventh Judicial District, County of Solano.

The plaintiff recovered judgment, and the defendant appealed.

The other facts are stated in the opinion.

J. G. Lawton and J. McKenna, for Appellant.

Goodwin & Gregory, for Respondent.

By the Court, NILES, J.:

This was an action for damages for personal injuries occasioned by the fall of an awning, in process of erection in front of the store of defendant.

Upon the question of the measure of damages the Court instructed the jury that if they should find for the plaintiff, "they should allow him as damages the value of his time during the period that he was disabled from following his avocations; also, should take into consideration the sums actually paid out, if any, for his board and expenses," etc.

The plaintiff was, no doubt, entitled to compensation for the value of his lost time and the expenses of his cure. These losses were the necessary consequences of the supposed negligence of the defendant. But the sum paid for his board during the time he was disabled was not an expense caused either immediately or remotely by the injury. If it had appeared that the expenses of living were increased by reason of the illness resulting from the injury, there

Opinion of the Court—Wallace, C. J.

would have been plausible ground for claiming the excess as an item of damage. But it seems that the cost of board during the period of his incapacity for labor was less than when he was in perfect health. He would receive double damages if allowed the expense for his living, in addition to the value of his time.

We see no other material errors in the rulings of the Court.

Judgment reversed, and cause remanded for a new trial.

[No. 2,417.]

J. W. WILBER v. C. F. SANDERSON.

DEED INTENDED AS MORTGAGE—SALE BY GRANTEE.—Where property is conveyed to another by deed absolute in form, but under agreement that it shall be only a security by way of mortgage, and the grantee subsequently sells the property as his own, the grantor may, if he so elects, affirm the sale, and sue for the overplus after the payment of the mortgage debt.

APPEAL from the District Court of the Twelfth Judicial District, City and County of San Francisco.

This was an action for money had and received. The plaintiff recovered a judgment. The defendant moved for a new trial, which was denied, and he appealed.

The other facts are stated in the opinion.

E. A. Lawrence and S. W. Sanderson, for Appellant.

Burnell & Burnett, for Respondent.

[No briefs in this case were found on the files of the Court.—REPORTER.]

By the Court, WALLACE, C. J.:

There can be no doubt that a general demurrer to the complaint, had it been interposed, must have been overruled.

Points decided.

It is alleged that the plaintiff was the owner of the lot on Jessie street, San Francisco; that he caused it to be conveyed to the defendant by deed in form absolute; but, by agreement of the parties, only as a security by way of mortgage; that defendant subsequently made sale of the property as his own, and conveyed the title to the purchaser; that the plaintiff might, if he had chosen to do so, have brought an action against Emmal, the purchaser, for the purpose of redeeming the property, and might have succeeded in compelling a reconveyance had he been able to prove that the latter knew that his grantor held the title, not absolutely, but only as security, does not show, or tend to show, that he might not, at his election, and as he has elected to do, affirm the sale, and sue for the overplus after the payment of the mortgage debt.

After an attentive consideration of the evidence, we are of opinion that the judgment ought not to be disturbed here, and that the appeal is without merit.

Judgment affirmed, with twenty per cent damages.

[No. 2,560.]

**PATTERSON C. LANDER v. MANUEL CASTRO,
JUAN BAUTISTA CASTRO, JOSE FRANCISCO
CASTRO, JOSE LEANDRO CASTRO, JEREMIAH
CLARK, AND C. M. HITCHCOCK.**

LIABILITY OF ATTORNEY IN FACT.—Where one, as the attorney in fact of another, executes a note binding the principal to pay money, the attorney in fact is not liable on the note, even if he had no authority from the pretended principal to make the note.

IDEM.—If such attorney in fact is liable, his obligation is created by the wrong he has done in procuring the money for which the note was given, by false representations, and thus committing a fraud, or perhaps the tort may be waived, and he be held as for money loaned.

Argument for Respondents.

LEGAL INTEREST.—One who represents himself as the attorney in fact of another, and borrows money, and gives the lender the note of such other, as his attorney in fact, if liable at all, can be held for legal interest only, on the sum borrowed.

APPEAL from the District Court of the Fifteenth Judicial District, City and County of San Francisco.

The plaintiff appealed. The note was for two thousand dollars, and bore interest at five per cent per month, interest payable at the end of every three months, and if not paid to be compounded, and bear the same rate of interest as the principal.

The other facts are stated in the opinion.

John Currey, for Appellant.

By the making and delivering of the note, and the execution and delivery of the mortgage, by Manuel, in the names of his brothers, Juan Bautista and José Francisco, having no authority from them to do so, he, the said Manuel, became himself bound on those instruments. (*Dusenbury v. Ellis*, 3 Johns. Cas. 70; *Palmer v. Stephens*, 1 Denio, 471; *Rossiter v. Rossiter*, 8 Wend. 494; *White v. Skinner*, 13 Johns. 307; Story on Agency, Sec. 264; *Smout v. Ilberry*, 10 Mees. and Welsby, 1, 9, 10; Story's Agency, Sec. 264, a.)

The Massachusetts cases are not in conflict with the New York cases, as suggested in Note 2 to said Sec. 264 a. (See *Long v. Colburn*, 11 Mass. 97; *Ballou v. Talbot*, 16 Mass. 462; *Emerson v. The Providence Hat Manufacturing Company*, 12 Mass. 237.) Nor are the English cases (*Polhill v. Walker*, 3 Barn. and Adol. 114; 2 Smith's Leading Cases, pp. 223, 223 a; *Rogers v. Coit*, 6 Hill, 323; *Bank of S. C. v. Case*, 8 Barn. & Cress. 427; *Bank of Rochester v. Montcath*, 1 Denio, 402.)

E. Cook and J. Clark, for Respondents.

The note sued on is void, having never been executed by the persons purporting to be the makers of it, viz: J

Opinion of the Court — Rhodes, J.

B. and J. F. Castro. Manuel Castro is not liable as the maker of that note, or in an action *upon it*, but only in an action upon the implied contract, growing out of his representations and his receipt of the two thousand dollars; which implied contract carried only statutory interest, and not the five per cent per month mentioned in the void written contract; and this liability was fully discharged by the payment of five thousand and sixty dollars, in July, 1864. (Story on Agreements, Sec. 264 a; *Long v. Colburn*, 11 Mass. 97; *Ballou v. Talbot*, 16 Mass. 461; *Hopkins v. Mehaffy*, 11 Serg. and R. 129; *Walker v. Bank of New York*, 13 Barb. 639; s. c., 9 New York, 583; *White v. Madison*, 26 New York, 117; *Collin v. Wright*, 7 E. and B. 301, 8 E. and B. 647; *Randall v. Trimen*, 18 C. B. 786; Smith's Leading Cases, vol. 2, p. 414; *Hall v. Crandall*, 29 Cal. 571; 1 Parsons on Contracts, p. 57, Note F; *Lewis v. Nicholson*, 12 id. 430; *Smout v. Ilhiny*, 10 M. and W. 1; *Palhill v. Walter*, 3 B. and Ad. 114; *Jenkins v. Hutchinson*, 18 Ad. and El. N. S. 744; *Jefts v. York*, 4 Cush. 371; s. c., 10 id. 392; *Abby v. Chase*, 6 id. 54; *Stetson v. Potter*, 2 Greenl. 359; *Bank v. Flanders*, 4 N. H. 239; *Woods v. Dennell*, 9 id. 55; *Johnson v. Smith*, 21 Conn. 627; *Ogden v. Raymond*, 22 id. 379; *Paylor v. Shelton*, 30 id. 122; 2 Smith's Leading Cases, 222.)

By the Court, RHODES, J.:

The promissory note and mortgage in suit purport to have been executed by Juan Bautista Castro and José Francisco Castro, by Manuel Castro, their attorney in fact. Both instruments bear date August 27th, 1860, and the money therein mentioned was payable twelve months after date. The action was brought August 26th, 1865, and the first amended complaint was filed January 2d, 1869. Manuel Castro was not made a defendant at the commencement of the action, but was brought in as a defendant by the first

Opinion of the Court — Rhodes, J.

amended complaint. In 1857, as the complaint shows, Manuel was the owner of the mortgaged premises, and during that year conveyed the same to Juan Bautista. He had no authority from Juan Bautista to make the note or execute the mortgage, but he held a power of attorney from José Francisco, authorizing him to execute the mortgage. It is alleged in the amended complaint that the money for which the note was given was loaned to Manuel for his sole use and benefit, and that at the time of the execution of the mortgage he owned the entire beneficial interest and estate in the premises, notwithstanding his conveyance of the legal title to Juan Bautista. After the execution and foreclosure of certain mortgages and the execution of certain conveyances, the legal title to the premises vested in defendant, Jeremiah Clarke; but it is alleged that he is chargeable with notice of the plaintiff's rights in the premises. The interest which accrued on the principal sum mentioned in the mortgage down to September 29th, 1860, was paid, and July 27th, 1864, the further sum of five thousand and sixty dollars was paid, and the balance remains unpaid. It is claimed by the plaintiff that the note was in truth the note of Manuel; that he borrowed the money for his own use, and that as he held the beneficial estate in the land, the mortgage is his mortgage, and that whatever interest or estate Clarke acquired in the premises, is subordinate and subject to the mortgage. Both Clarke and the Castros demurred to the complaint, on the ground that it did not state sufficient facts, and that the plaintiff's remedy was barred by the Statute of Limitations. The demurrer was sustained, and the plaintiff refusing to amend the complaint, judgment was rendered for the defendants.

As José Francisco held no interest in the mortgaged premises, and as it is not claimed that he is liable on the note, he may be dismissed from consideration; and as Juan Bautista is not liable for the money for which the note and

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mortgage were given, and was divested of the legal title to the mortgaged premises before the commencement of the action, the case need not be further considered as to him. Upon the question, as to whether a person who executes a promissory note for another, but has no authority so to do, is himself liable as a maker of the note, the authorities are not entirely agreed. We do not propose at this time to reopen the discussion of the question, for after the ample consideration it has received at the hands of very eminent Judges, no new light could well be shed upon it; but we are content to follow the decision in *Hall v. Crandall*, 29 Cal. 568, which holds that where the note is, in terms, the note of the principal, and not that of the assumed agent, such agent is not liable on the note; but that if liable at all for the money mentioned in the note, his liability depends upon other grounds. Although the opinion, in that case, is very brief on that point, it was *well considered* and was rendered after *a full and careful review of the authorities*.

The liability of Manuel does not arise from any obligation created by the note itself, but from the wrong done in procuring the money from the plaintiff by means of his false representations as to his authority to borrow the money, give the note, and execute the mortgage for and on behalf of Juan Bautista; or perhaps the plaintiff may waive the tort, and hold Manuel responsible as for money loaned. But we need not discuss the question as to the ground of his liability, nor as to whether the plaintiff may, under the allegations of his complaint, rely upon either or both grounds for relief. It is alleged that Manuel procured the money from the plaintiff for his own use, and it is also alleged that "the interest on the principal sum mentioned in said mortgage has been paid down to the 27th day of September, 1860, and that the sum of five thousand and sixty dollars was also paid thereon July 27th, 1864, but that the balance remains wholly due and unpaid." It is not stated

Points decided.

by whom those payments were made, but from the allegations of the complaint it is the fair, and we think, inevitable inference that they were made by Manuel.

If he is liable under the averments of the complaint, as for money loaned, the extent of his liability is the amount loaned with legal interest thereon. As he has not contracted in writing to pay a higher rate of interest, he is liable only for the legal rate; and the payments alleged in the complaint satisfy the demand.

If the complaint is to be considered as stating a case for relief on the ground of fraud—the fraud consisting of the false representations by means of which the money was obtained—and treating the defendant Clarke, and those through whom he claims, as having purchased and taken their mortgages with notice, the result would be the same, for the measure of damages would be the sum obtained, with legal interest thereon.

Judgment affirmed.

[No. 2,405.]

**THE SAN FRANCISCO AND OAKLAND RAILROAD
COMPANY v. THE CITY OF OAKLAND, SAM-
UEL MERRITT, AND WILLIAM H. MARTIN.**

ESTATE CONVEYED BY GRANT.—The word *grant* is effectual to convey an estate in a corporeal hereditament. It has become a generic term, applicable to the transfer of all classes of real property.

VOID ORDINANCE.—If the charter of a city requires any sale or lease of the real estate of such city to be made at public auction to the highest bidder, an ordinance of the Council of the city making a lease of any portion of its realty to a corporation, upon the payment of a rent reserved, is void, and passes no title to the corporation.

APPEAL from the District Court of the Third Judicial District, Alameda County.

The facts are stated in the opinion.

Opinion of the Court — Wallace, C. J.

Wilson & Crittenden, for Appellant.

Williams & Thornton, H. H. Havens & J. F. Havens, for Respondents.

By the Court, WALLACE, C. J.:

The plaintiff, a corporation organized under the laws of this State, brought this action against the City of Oakland, alleging in its complaint that on the 26th day of October, 1867, the Council of the city passed, and on the first day of November following the Mayor approved, an ordinance, as follows:

"SECTION 1. That portion of the water front lying below high-water mark, between the easterly line of Franklin street and the westerly line of Webster street, extended, being three hundred feet in width, and running into the San Antonio Creek for a distance of three hundred and fifty feet, is hereby granted to the San Francisco and Oakland Railroad Company, during the corporate existence of said company, for the purpose of erecting and maintaining a marine railway and wharf, at the annual rent of one hundred dollars, in gold coin, for the first five years, and at the expiration thereof, and every ten years thereafter, the rent shall be fixed by three Commissioners, one to be chosen by the Council, one by said company, and the third shall be appointed by the County Judge of Alameda County; provided that the said company shall not collect tolls, or wharfage, or dockage, for the use of said wharf, without the consent of the Council of the City of Oakland; and provided further, that said marine railway and wharf shall be so constructed as not to interfere with the free navigation, nor to obstruct the channel of said creek.

"SEC. 2. Said company shall commence the construction of said improvements within three months from the date of

Opinion of the Court — Wallace, C. J.

the passage of this ordinance, and complete the same within six months thereafter; and it is made a condition of this grant that said company shall, in good faith, contest any claim made to said premises by any person under the pretended grant of the water front, made by the Board of Trustees of the late Town of Oakland to Horace W. Carpenter, and shall not, upon any terms, compromise such claim; provided, that the time herein provided for commencing and completing said improvements shall be extended for a period equal to the time said work shall be delayed by legal proceedings; and provided further, that said improvements shall be subject to the payment of city taxes as personal property of said company."

The plaintiff alleges that within three months after the passage of the ordinance it entered upon the premises therein named, and commenced the construction of the marine railway and wharf in the ordinance mentioned, and has in all respects complied with the terms and conditions of the ordinance; but that the municipal authorities of the city have employed persons to enter, and are about to enter, upon the premises, and to place structures and drive piles thereon, of such a character and in such a manner as to render the premises totally unfit for the uses of the plaintiff, secured to it under the provisions of the ordinance, etc., and prays for an injunction, etc., against the threatened acts of the city authorities. The city appeared and filed an answer, in which it, among other matters pleaded, denied the existence and validity of the ordinance set forth in the complaint. A trial being had, judgment for the defendant was rendered, from which judgment and an order denying the plaintiff a new trial this appeal is brought, and the principal question presented for determination is the validity of the ordinance relied upon by the plaintiff.

It is clear that the purport of the ordinance was to vest

Opinion of the Court — Wallace, C. J.

an estate in the lands mentioned in the railroad company. "That portion of the water front, etc., is hereby *granted* to the San Francisco and Oakland Railroad Company," etc. That at the present day the word *grant* is effectual to convey an estate in a corporeal hereditament is clear, and had become so in practice long before 1845, when the statute of Victoria provided that corporeal tenements and hereditaments should be deemed to lie in grant as well as in livery. In fact, the distinction of the ancient common law in this respect had probably never obtained in this country. At all events, the word "grant has now become a generic term, applicable to the transfer of all classes of real property." (3 Washb. on Real Property, 163.) The grant here was made to the railroad company, and the estate granted was to continue "during the corporate existence of said company." The duration of the estate thus granted is not material to consider. The capacity of the corporation to take is not doubted, and whether the words used in the ordinance amount to a lease or import an estate in fee simple, or a chattel interest merely, is immaterial, for in any view the transaction would amount to a sale or lease by the Council of property belonging to the city, and would fall within the virtual prohibition contained in the fifty-first section of the Act of 1862 (p. 353), requiring any such sale or lease to be made, if at all, by public auction, and to the highest bidder.

Judgment and order affirmed.

Mr. Justice CHOCKETT did not participate in this case.

Statement of Facts.

[No. 3,028.]

R. E. RAIMOND v. EDWARD ELDRIDGE.

STATUTE OF LIMITATIONS.—To enable a defendant to avail himself of the Statute of Limitations, as a defense, it must appear that he was in the adverse possession of the demanded premises for the period required by the statute to bar the plaintiff's right of action.

ACT OF 1863-4 CONCERNING VAN NESS ORDINANCE.—The Act of March 4th, 1864 (Stats. 1863-4, p. 149), only prohibits a plaintiff in ejectment from relying on the Van Ness Ordinance if he commences his action more than one year after its passage, and has not been in possession within the next preceding five years. It does not prohibit him from recovering on prior possession or paper title.

MONSUIT ON OPENING STATEMENT.—A defendant moving for a nonsuit on the plaintiff's opening statement, upon a specified ground, on which ground alone the motion is granted, will not be allowed to raise the point for the first time in the Supreme Court that the statement was otherwise insufficient.

APPEAL from the District Court of the Fifteenth Judicial District, City and County of San Francisco.

The plaintiff appealed.

The other facts are stated in the opinion.

George F. & W. H. Sharp, for Appellant.

The Court erred in nonsuiting the plaintiff, because it did not appear that the defendants were in a position to avail themselves of the benefit of the Act of 1864; before they could invoke the Act in question they must show that they were in possession at the time of its passage.

There was no evidence or proof of an adverse possession, or of any possession hostile to the plaintiff, other than the admission that defendant was in possession of the land in question at the time of the commencement of this action. Adverse possession is not presumed. (*Sharp v. Daugney*, 33 Cal. 505.)

The plaintiff was only called upon to state a *prima facie* case, and this he did when he offered to prove a right of

Opinion of the Court — Crockett, J.

possession in plaintiff, and a holding adverse to that right by defendant at the time of the commencement of this action. (*Payne v. Treadwell*, 16 Cal. 220.)

B. S. Brooks, for Respondent.

There is nothing in the Act of March 5th, 1864, which limits its operation in favor of those who were in possession of land at the time of its passage. It applies to all actions commenced more than one year after its passage, for lands lying within the limits defined in the Van Ness Ordinance, as this was admitted to be.

We were not called upon to offer proof of adverse possession. When he admitted that he had not been in possession for more than five years before the commencement of this suit, he admitted adverse possession, to say the least. If the plaintiff had title or prior possession, which is the same thing in this view, he was in possession, unless some one was in adverse possession. Admitting himself out of possession for five years, was admitting title or adverse possession in another. It was admission of want of title or want of seizin.

By the Court, CROCKETT, J.:

On motion of the defendant a nonsuit was granted in this case upon the plaintiff's opening statement of the facts which he expected to prove. These facts were: First—That the land in controversy was within the limits of the Van Ness Ordinance. Second—It was admitted that the plaintiff had not been in possession of the demanded premises within five years next before the commencement of the action, and that the action was not commenced within one year next after the passage of the Act of March 5th, 1864. Third—That five years had not elapsed between the time when the title of the city to this land was finally confirmed and the com-

Opinion of the Court — Crockett, J.

mencement of the action. Fourth — That the defendant was in possession when the suit was brought.

The motion for nonsuit was made and granted solely on the ground that the plaintiff had not commenced his action within one year from and after the passage of the Act of March 4th, 1864, and had not been in the actual possession of the premises within five years before the commencement of the suit, and because his action was barred by the Act entitled "An Act to limit the time for the commencement of civil actions in certain cases," passed March 4th, 1864.

In his opening the plaintiff failed to state any title or right of possession in himself, and if the motion for nonsuit had been made on this ground, it ought to have been granted. But the defendant did not see fit to rely on this as a ground of nonsuit. If he had, the Court might have permitted the plaintiff to amend his statement and cure the defect. Having omitted to rely upon this ground of nonsuit in the Court below, he will not be allowed to raise the question for the first time here. We can only review the action of the Court on the defendant's motion as he made it; and I think the Court erred in granting the motion on the grounds stated. To enable the defendant to avail himself of the Statute of Limitations as a defense, it must have appeared that he was in the adverse possession for the period required by the statute, to bar the plaintiff's right of action. This fact was not shown or admitted to be true, but only that the defendant was in possession when the suit was brought. Nor was it any ground of nonsuit, that the action was commenced more than one year after the passage of the Act of March 4th, 1864. (Stats. 1863-4, p. 149.) The Act only provides that if the action shall be commenced more than one year after its passage, and the plaintiff shall not have been in possession within the next preceding five years, he shall not be entitled to rely upon the Van Ness Ordinance as a muniment of title. But it may be that the plaintiff had a perfect

Statement of Facts.

title or right of possession independent of the Van Ness Ordinance. Nothing appeared to the contrary in the plaintiff's opening statement.

Judgment and order reversed, and cause remanded for a new trial.

[No. 2,236.]

**PATRICK PATTEN v. N. B. HICKS, A. S. HICKS,
AND R. HICKS.**

CONTRACT WITHIN THE STATUTE OF FRAUDS.—A verbal contract, by which the plaintiff agrees to cut and deliver to the defendant, at the defendant's mill, saw-logs sufficient to keep the defendant's mill running to its full capacity for two years from its date, is not to be performed within one year, and is therefore void under the Statute of Frauds.

RECOVERY ON VOID CONTRACT.—For labor and services performed under a contract, which is void under the Statute of Frauds, a recovery may be had by declaring a *quantum meruit*, but not by declaring on the contract itself.

'APPEAL from the District Court of the Third Judicial District, Santa Cruz County.

The complaint averred, that on the 10th day of May, 1869, the plaintiff and defendants made an agreement, by which the plaintiff was to cut saw-logs on the defendants' land and deliver at the defendants' sawmill sufficient to keep the defendants' mill running to its full capacity for the period of two years from the date of the contract, and that the defendants were to pay the plaintiff five dollars and fifty cents per thousand feet for all lumber timber so cut and delivered, to be ascertained and measured at the tail of defendants' mill, and to be so paid to plaintiff as fast as so ascertained for said two years; that under said contract the plaintiff had cut and delivered saw-logs and lumber timber to the amount of seven hundred and ninety thousand five hundred and twenty-three feet, which, at five dollars and fifty cents per thousand, amounted to four thousand three

Argument for Respondent.

hundred and forty-seven dollars and eighty-seven cents. The answer denied the contract as alleged, and set up that it was only a contract for the milling season, from April forward seven or nine months, at five dollars per thousand feet, and set up a counterclaim.

It appeared by the testimony that the contract was a verbal one, and no note or memorandum of it was made in writing.

The plaintiff recovered judgment in the Court below and the defendant appealed.

Moore, Laine & Leib, for Appellants.

The contract was void under the twelfth section of the Act concerning fraudulent conveyances and contracts.

The contract was denied, and the statute was, therefore, well pleaded. (Browne on Frauds, Sec. 511; *Fuller v. Reed*, 38 Cal. 99.) Moreover, it was alleged in the answer that the only agreement ever made between the parties was verbal. And, although the question cannot arise in this case, yet we cannot refrain from adding that the rule under the common law, that the statute must be pleaded in order to be taken advantage of, cannot apply under our statute, for by our statute the contract is void, and a void contract cannot be made good by any waiver in pleading or otherwise; nor can it be even made good by an express ratification. By the common law the contract was not void, but it was insufficient to sustain an action—a difference recognized by many able opinions. (See *Seale v. Emerson*, 25 Cal. 294, and *Fuller v. Reed*, 38 Cal. 111.)

Albert Hagan and W. M. De Witt, for Respondent.

The defense of the Statute of Frauds must be pleaded or it will not avail. (*Smith v. Owen*, 21 Cal. 11; *McComb v. Reed*, 28 Cal. 289; *Tynan v. Walker*, 35 Cal. 634; Chitty on Pleading, Vol. 1, p. 559; 4 Bing. 470; *Osborne v. Endicott*, 6 Cal. 149; *Maynard v. Johnson*, 2 Nev. 16.)

Opinion of the Court — Belcher, J.

The contract is not within the Statute of Frauds. The plaintiff could, under the contract, perform his part of it in one month. (2 Kent, 713; *Tolley v. Green*, 2 Sand. C. 91; *Moore v. Fox*, 10 Johns. 244; *McLees v. Hale*, 10 Wend. 426; *Fenton v. Emblers*, 3 Burr. 1278; *Russell v. Slade*, 12 Conn. 455.)

By the Court, BELCHER, J.:

The contract declared on was not to be performed within one year from the making thereof, and the parties having failed to reduce it to writing, or to make any note or memorandum thereof, it is within the Statute of Frauds and void.

For the labor and services performed under this void contract the plaintiff can only recover on a *quantum meruit*.

No such count being found in the complaint, the judgment must be reversed.

When the case is again in the Court below the plaintiff may amend his complaint if he is so advised.

Judgment reversed and cause remanded.

Mr. Justice CROCKETT did not express an opinion.

[No. 2,972.]

**THOMAS W. MOORE v. SAMUEL BESSE, SAMUEL
H. BESSE, AND JAMES WILSON.**

FRAUDULENT SALE OF PROPERTY.—A sale of his land by a debtor, to defraud a creditor, operates as a fraud on the creditor only to the extent of the interest which the creditor would have acquired, by purchase at a sale under execution, of the land fraudulently conveyed.

SALE OF PRE-EMPTION RIGHT UNDER EXECUTION.—A judgment creditor, by a purchase at a sale under execution, of land to which the judgment debtor had only a pre-emption right, obtains no interest in the land which will enable him to procure the title under the pre-emption laws of the United States.

Argument for Respondent.

FRAUD IN THE SALE OF LAND HELD UNDER PRE-EMPTION.—If a judgment debtor sells public land, to which he has a preemption right, for the purpose of defrauding a creditor, and the purchaser then pre-empts the land, and obtains a patent therefor, the creditor cannot, by reason of the fraud, attack the patent, or the title held thereunder.

APPEAL from the District Court of the Twelfth Judicial District, City and County of San Francisco.

The defendants recovered judgment in the Court below, and the plaintiff appealed.

The other facts are stated in the opinion.

W. H. Patterson, for Appellant.

The interest of a party in possession and actual occupancy of land of the United States, open to settlement and pre-emption, is subject to seizure and sale under execution. (*Crandall v. Woods*, 8 Cal. 136; *Houseman v. Chase*, 12 Cal. 290; *Doran v. C. P. R. R. Co.*, 24 Cal. 245; *Merritt v. Judd*, 14 Cal. 59.)

A fraudulent disposition of his property by a debtor, with intent to cheat his creditors, authorizes a creditor's suit after judgment, and *nulla bona* return of execution. (Story's Eq. Jur., Secs. 350, 351, 361.) The subsequent acquisition of the legal title by the fraudulent grantee does not protect him, though money paid for that purpose may be awarded to him out of the avails of the property on a sale. A purchaser from a fraudulent grantee, with notice of the original fraud, stands in the shoes of his grantor, and must abide all the consequences of the just claims of creditors. (*Baker v. Bliss*, 39 N. Y., and cases cited.)

Williams & Thornton, for Respondent.

Samuel H. Besse never owned the land. He had the mere possession, and when he parted with that nothing remained upon which an execution against him could be levied. (*Montgomery v. Whiting*, 40 Cal. 294.)

Opinion of the Court — NILES, J.

If, at the time of the conveyance by Samuel H. to Samuel Besse, there was a secret agreement, that the latter should perfect the title for the benefit of the former, or that the patent, when obtained, should enure to his benefit, then such agreement is an absolute nullity, so declared in all the preëmption laws of the United States; and the patentee of the Government would receive and hold the title free of such incumbrance. (Vide Act of Cong., Sept. 4th, 1841, Secs. 12, 13.)

By the Court, NILES, J.:

The defendant, Samuel H. Besse, being in possession of a portion of the public land of the United States, open to preëmption and settlement, made a conveyance of the land to his father, the defendant, Samuel Besse, without consideration, and in anticipation of a threatened suit against him by the plaintiff, and with the intent to prevent the enforcement of the plaintiff's claim. Soon thereafter the plaintiff commenced suit upon his claim in the District Court against Samuel H. Besse, and recovered judgment. Execution was issued upon this judgment, and returned *nulla bona*. After the conveyance to him, and prior to the date of the judgment, Samuel Besse filed his declaratory statement as a preëmptioner, and in due time received a patent for the land from the United States. Afterward, and more than two years after the docketing of plaintiff's judgment against Samuel H. Besse, Samuel Besse sold and conveyed the land for a valuable consideration, to the defendant Wilson, who had at the time of the conveyance, full notice of all the circumstances of the sale by Samuel H. Besse to his father. The plaintiff now seeks, by a bill in equity, to subject the land to the lien of his judgment.

Opinion of the Court.—NILES, J.

The conveyance from Samuel H. Besse to his father, Samuel Besse, could operate as a fraud upon the plaintiff only to the extent of the interest which the plaintiff would have acquired by purchase at a sale under his execution of the land fraudulently conveyed. This interest could be only that which Samuel H. Besse would have had at the time of the levy of execution, but for the fraudulent conveyance; for the interest of the judgment debtor at the date of the levy in all that passed by sale under execution.

Samuel H. Besse had no title whatever to the land. He had settled upon it, and was in a position to file a declaratory statement, and take other required steps to procure the title of the United States. This was a personal privilege, which he could exercise at his pleasure, but which he was not bound to exercise, either for his own or for the plaintiff's benefit. He could at any time abandon his possession, and deprive himself of his right of preëmption. He did this by his conveyance to Samuel Besse; for, although he could not transfer any right of preëmption arising from his possession so as to vest it in another, he could voluntarily extinguish that right. (*Quinn v. Kenyon*, 38 Cal. 502.)

It is evident that the purchaser at a sale under the plaintiff's judgment could have obtained, by means of his purchase merely, no interest in the land which would have enabled him to procure the title under the preëmption laws of the United States.

It follows that the admitted fraud in the conveyance from Samuel H. Besse to Samuel Besse could not affect the patent which Samuel Besse afterward acquired, and which the plaintiff could not have acquired by proceedings under his judgment.

Judgment affirmed.

Mr. Chief Justice WALLACE, being disqualified, did not sit in this case.

Statement of Facts.

[No. 3,001.]

E. HICKS AND PETER FULKERSON v. R. J. MURRAY, H. W. BRIGGS, J. M. BROWNE, A. LEWIS, AND MRS. AUZELIA LEWIS.

MECHANICS' LIEN LAW — CONSTITUTIONAL OBJECTIONS CONSIDERED.

The mechanics' lien law of 1868 is not open to the objection that it is unconstitutional on the ground that it attempts to appoint agents for private persons, nor that it confiscates property, nor as to the notice required of owners as to responsibility for improvements, nor that it attempts to take away vested rights or to clothe private persons with power to divest citizens of their property.

MECHANICS' LIEN.—If the person who claims a mechanics' lien under the Act of 1868, signs the verification attached to the claim, this is a sufficient signing of the claim within the intent of the Act.

SAME — NAME OF OWNER TO BE STATED.—Under the mechanics' lien law of 1868, it is material that the claim for the benefit of the lien shall state the name of the owner or reputed owner of the premises.

SAME — PLEADING — ALLEGATION AS TO OWNERSHIP.—An allegation in the complaint, that in his claim filed under the mechanics' lien law, the plaintiff described the premises as those purchased and occupied by M., is not a sufficient averment of the ownership of M., because it is not an averment in the complaint that M. owned the property, but an averment that the plaintiff has stated in his claim that M. owned the property, and does not aver who owned the premises at the commencement of the action.

ESSENTIAL FACTS TO BE ALLEGED.—Unless the facts essential to the support of the case be alleged in the pleadings, evidence upon such omitted facts cannot be heard or considered.

IDEM.—Evidence of facts, or stipulations as to the facts of a case, cannot make a case broader than it appears by the allegations of the pleadings, nor do they entitle a party to any relief beyond what the averments entitle him to.

APPEAL from the District Court of the Third Judicial District, Santa Clara County.

This was an action to enforce a mechanics' lien upon premises of which defendant Murray was in possession under a contract of purchase made with defendants A. Lewis and Auzelia Lewis, his wife. The defendants Lewis held a mortgage upon the premises, dated February 10th, 1870,

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and had given a quitclaim conveyance of the same date to Murray.

The defendant Browne, in his answer, set up, by way of cross-complaint, a claim against defendant Murray, and asked to have a lien in his own favor, filed April 30th, 1870, enforced. He averred that in his claim he had described the premises as follows: "The two-story frame or wooden dwelling house or building, divided into eleven rooms, with eighteen doors and eighteen windows, erected upon the lots or lands heretofore named, and here more particularly described as the land purchased by said R. J. Murray of Mrs. A. Lewis, and situated at the junction of Lewis and Railroad streets, in the said Town of Gilroy, and on the east side of said Railroad street, and running sixty-four feet along the same, one hundred and forty feet along the south side of said Lewis street; said building and premises being the same now occupied by the said Murray and his family;" and that the premises are the same as described in the plaintiff's complaint.

Judgment was rendered for the plaintiffs and for the defendants Browne, Briggs, A. Lewis, and Auzelia Lewis — the liens under the mechanics' lien law to have precedence to the mortgage lien of the defendants Lewis. The defendants Lewis appealed.

The other facts are stated in the opinion.

Moore, Laine & Leib, for Appellants.

1. The statute upon which the liens in this case are based is unconstitutional. The first section of the Act in question provides that a party shall be charged for work done and materials furnished to himself or agent, and that the one having the work in charge shall be held to be the agent of the owner. We submit that it is not in the power of the Legislature to say that any one shall be held to be the agent of another without contract or agreement. The matter of

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appointing agents is not left to the Legislature. The law-making power may define who may be agents, or who may be authorized to select an agent, and the mode of selection or appointment, viz: it may prescribe rules or laws in that behalf, but it cannot do the appointing itself. In this case, neither Lewis nor Mrs. Lewis authorized or directed any one to construct this house upon the premises mortgaged to them, and these parties, in reason and justice, could not lessen the value of their security by placing such building there. Yet under this law, appointing and creating an agent for Lewis and wife, their security is lessened, viz: the decree not only operates upon the house, materials, etc., but authorizes and directs a sale of the land itself, and this upon the theory of the agency created by the statute. We submit that the Legislature usurped this power, and the statute is void.

The third section of the Act amounts to a confiscation of property, and that without crime or a hearing. It provides that if A. has a valid mortgage lien on "Black Acre," upon which stands a house worth five hundred dollars, that "B.," the owner of the land, may direct improvements to be made upon the house to the extent of one thousand dollars, and that the party expending this one thousand dollars in repairs shall be preferred in his lien to the mortgage lien of "A.;" in other words, that "A.," without his approbation, knowledge, or consent, can be improved out of his lien. The five hundred dollar house was all there was of any value in the premises to secure "A.'s" mortgage; yet, by this unauthorized repair of one thousand dollars, the whole thing can be sold for the payment of the one thousand dollar improvement, it becomes a preferred claim, and "A." has nothing left but the naked and valueless land; the house as improved is moved off to satisfy the new lien. This, we contend, is beyond legislative power.

The fourth section is, if possible, worse than the ones we

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have already noticed. By that section a party must, within three days after it comes to his knowledge that some one is improving him out of his property or security, give notice that he will not be responsible, by posting a written notice on the land or on the improvement, and if he does not so do, he is held to have authorized the improvement, etc., and be bound by the lien. This section is unbending, and makes no provision for a party having such a matter at a place and time so as to render it impossible that he could give such notice in three days. Suppose a man owns and has a mortgage lien on property at some point in the extreme northern portion of the State, and when he is absent at San Diego he hears that some one is improving him out of it, he cannot, by any possibility, give the notice in the three days, and must lose his property. Certainly this cannot be upheld; the time is unreasonably short. (See Cooley's Constitutional Limitations, p. 366, Note 3, where a kindred matter is considered.) If this falls, the whole statute must fall, under the authority of *Lathrop v. Mills*, 19 Cal. 530.

Again, a mortgage lien having vested prior to the improvement of a building or the like on the mortgaged premises, it is not in the power of the Legislature to compel the mortgagee to commence proceedings, either by notice or suit, before he is required by law to foreclose his lien. He has a vested interest, which the Legislature cannot thus divest. (Cooley, *supra*, p. 366.) This lien law undertakes to give material men, mechanics, and artisans, the power of public officers to divest citizens of their property and securities without their knowledge or consent. This, we submit, is beyond the power of the Legislature. (Cooley, *supra*, p. 563, and Note 1.)

2. Browne's pleading is fatally defective, in not stating that this lien contained the name of the owner, or reputed owner of the premises. He attempted, in his cross-complaint, wherein he seeks to foreclose such lien, to declare on

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this lien, without attaching it to the cross-complaint, or setting it out in *hæc verba*. He must, therefore, have stated the necessary facts which such lien must contain to be valid. But he omits to state that the claim or lien upon which he was attempting to declare, contained or stated the name of the owner, or reputed owner of the premises. (*F. F. Ins. Co.*, 34 Cal. 60; *Green v. Covillaud*, 10 Cal. 382; 20 Barb. 468; 7 Wheat. 522.)

Zuck & Hoover, for Respondents.

The objection to plaintiffs' lien made by appellants, that the claim is for a sum in gross, and does not specify the amount claimed for work and the amount claimed for materials, has unfortunately for them, been already passed upon and decided adversely to them by this Court. (*Heston v. Martin*, 11 Cal. 41; *Brennan v. Swasey*, 16 Cal. 141; *Selden v. Meeks*, 17 Cal. 128; *Davis v. Livingston*, 29 Cal. 283.) And it needs no argument on our part to sustain the justice and reason of those decisions. Plaintiffs' claim is not for one sum for work and another for materials, but for one amount for the whole job.

The next objection to plaintiffs' lien, that it is not signed, is equally unfortunate. By a parity of reasoning, appellants might claim that a simple statement of account would be invalid because the person rendering it failed to sign the balance sheet. The law nowhere requires the claimant to sign the statement of his demand. Section five of the Act prescribes minutely everything the statement shall contain, and it nowhere requires it to be signed, but in any event the verification is a part of the instrument and is signed by plaintiffs and that is all the signature the law requires. The only good a signature would do would be to attest the genuineness of the instrument; the law requires a higher test—the oath of the parties to its correctness.

It is also contended by appellants that Browne's pleading

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is fatally defective in not averring that the lien contained the name of the owner or reputed owner of the premises.

The statute requires the name of the "owner or reputed owner to be stated if known" (Sec. 5). Of course, if the name of the owner was not known it would be impossible to state it in the lien, and it would be absurd to aver that it was so stated. Hence, such an averment is not necessary to state a complete cause of action in declaring on a lien; but if it was an omission, it was merely one of form and not a substantial one, the allegations of the pleading being sufficient to sustain a judgment; and appellants have waived any advantage they might have taken of it by failing to demur.

We are at a loss to see, and appellants have not informed us in their brief, what clause of the Constitution has been violated in letter or in spirit by the provisions of the law they complain of. We certainly insist that it is entirely within the scope of the power of the Legislature to say what shall constitute an agency, and what acts may constitute one man an agent for another.

We deny that the third section of the Act amounts to confiscation of property. In the case cited by appellants, "A." has a complete means afforded by which to avoid the dire disaster with which they would have him overwhelmed. The law provides that by serving a notice on the building that he will not be responsible for the improvement, he can relieve himself and his interest therein from any liability on account of lien.

In reply to their objection to the fourth section, we would suggest that the Legislature is the proper judge of the length of time within which a notice should be given to enable a person interested in the premises to divest his interest therein from responsibility.

Opinion of the Court — Wallace, C. J.

By the Court, WALLACE, C. J.:

First — Upon a careful consideration of the Act of March 30th, 1868, securing a lien to mechanics and others, in connection with the facts of this case, we are of the opinion that the objections made in argument, as to the constitutionality of the Act, cannot be maintained.

Second — The objection that the claim of Browne is not signed by him cannot be supported. His signature to the verification attached thereto is a sufficient signing of the claim within the intent of the Act.

Third — But we think that the amended answer and cross complaint of Browne is radically defective and insufficient to support the judgment he obtained. The statute (section five) requires that the claim for the benefit of the lien shall state, among other matters, the name of the owner or reputed owner of the premises, if known. The statement of the name of the owner or reputed owner is material — not less so than the statement of the amount of the demand after the deduction of just credits and offsets — the statute requires both and makes them equally indispensable. The pleading of Browne wholly omits to aver that his claim as filed contains the required statement upon the point of ownership. The averment, even had there been such, that the premises are those purchased by Murray of Mrs. Lewis, and are the same premises occupied by him, is not in substance an allegation upon the point of ownership or reputed ownership. But there is no such averment in the answer and cross complaint of Browne. The only allegation found there in this respect is an allegation that in his claim as filed he described the premises as those so purchased and occupied by Murray. Upon general demurrer this must have been held insufficient as a substantial allegation of ownership, or reputed ownership, of the premises at the time of the commencement of

Opinion of Crockett, J., dissenting, in part.

the action. It is true that we can see that the statement itself is not defective in the particular of ownership — but this will not aid the pleading upon the point. By the tenth section of the Act the pleadings in such cases as this are required to be the same as in other cases. It has so often been determined that unless the facts essential to the support of the case be alleged upon the record, evidence upon such omitted facts cannot be heard or considered, that a citation of authority upon the point is unnecessary. Evidence of facts, or stipulations as to the facts of a case, cannot make the case broader than it appears by allegation, nor can a party by mere force of facts admitted or proven become entitled to relief to which he would not have been entitled had his case been resisted only by general demurrer interposed to the pleadings upon which he relies.

The judgment is reversed and the cause remanded for further proceedings.

CROCKETT, J., dissenting, in part:

The claims or statements filed in the Recorder's office by the material men and laborers, for the purpose of securing their liens, were substantially in compliance with the statute. When materials are furnished and labor performed under one contract for a gross sum, it is not only unnecessary but would be impossible to specify in the statement or notice of lien how much of the sum due accrued for materials furnished, and how much for labor performed. The contract being that the whole were to be paid for by a gross sum it is unnecessary to apportion the amount between the two. (*Heston v. Martin*, 11 Cal. 41; *Brennan v. Swasey*, 16 Cal. 141; *Selden v. Meeks*, 17 Cal. 128; *Davis v. Livingston*, 29 Cal. 283.) Nor is it necessary that the statement should be signed by the claimant, provided it appears in the body of the statement who the claimant is and by whom the materials were fur-

Opinion of Crockett, J., dissenting, in part.

nished or the labor performed; and provided, also, the statement is verified by the claimant. These would sufficiently identify the claimant and authenticate the statement without the actual signature of the claimant to the body of the statement. No useful purpose could be subserved by his signature to the body of the statement which he verifies with his oath. Nor is it essential that it should appear on the face of the statement in express terms that the materials furnished were actually used in the construction of the building. The language of the first section of the statute is that any person "furnishing materials of any kind to be used in the construction, alteration," etc., "of any building," etc., shall have a lien thereon; and the fifth section prescribes the method by which the lien is to be secured. It requires the person claiming the lien "to file with the County Recorder of the county in which such building or other improvement, or some part thereof, shall be situated, a claim containing a true statement of his demand, after deducting all just credits and offsets, with the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed or to whom he furnished the materials, and also a description of the property to be charged with said lien sufficient for identification, which claim shall be verified by the oath of himself or of some other person. (Stats. 1867-8, p. 589.) In *Davis v. Livingston*, 29 Cal. 283, a similar question arose under the Act of 1862, and it was held that the notice from the material man to the owner need not specify that the materials furnished were actually used in the building. The statute we are considering does not require that the statement shall aver in terms that the materials furnished were actually used in the building. But if it did, I think it sufficiently appears from the verified statement of the defendant Browne that the lumber furnished by him was in fact used in the building. It appears on the face of the statement that he commenced to furnish the lumber in November,

Opinion of Crockett, J., dissenting, in part.

1869, and that the greater portion thereof was furnished before the 10th day of March, 1870, on which day the owner of the building entered into a written contract to pay Browne for all the lumber furnished by him for the building within six months from the 10th day of February, 1870. I think the inference is irresistible that the lumber furnished by Browne was actually used in the building. It is claimed, however, on behalf of the appellants, that the averments in Browne's cross-complaint are so defective, in substance, as not to support the judgment in his favor. The alleged defect consists in the omission to aver in the pleadings that his statement filed in the Recorder's office set forth the name of the owner of the building or land. The agreed statement of facts on which the action was tried, shows that the verified statement was not defective in this particular; and, if the pleading was not as full and explicit as it might, and perhaps should have been, in setting forth the contents of the verified statement in this respect, it is too late, after judgment, to raise this point for the first time in this Court.

The averments of the cross-complaint in respect to the contents of the verified statement filed by Browne are, that it contained "a true statement of his demand against said defendant Murray, after deducting all credits and offsets, with a correct description of the premises to be charged; which said description is as follows, to wit: the two-story frame or wooden dwelling house or building, divided into eleven rooms, with eighteen doors and eighteen windows, erected upon the lots or lands heretofore named, and here more particularly described as the land purchased by said R. J. Murray of Mrs. A. Lewis, and situated at the junction of Lewis and Railroad streets, in said town of Gilroy, and on the east side of said Railroad street, and running sixty-four feet along the same, one hundred and forty feet along the south side of said Lewis street; said building and premises being the same now occupied by the said Murray and

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his family." The cross-complaint, it is true, contains no direct averment that the verified statement set forth the name of Murray as the owner, or reputed owner, or that the owner was unknown; nevertheless, it sets forth the description of the premises as contained in the verified statement in which the lot is described "as the land purchased by said R. J. Murray of Mrs. A. Lewis," and it further shows that "the said building and premises" are "the same now occupied by the said Murray and his family."

The statute prescribes no formula for the verified statement; but simply directs that it shall contain "a true statement of his demand, after deducting all just credits and offsets, with the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed or to whom he furnished the materials, and also a description of the property to be charged with said lien sufficient for identification."

The verified statement, as described in the cross-complaint, sets forth that the lot is the same purchased by him of Mrs. Lewis, and the natural inference is that Murray continued to be the owner; and more particularly when this is coupled with the further fact that Murray caused the building to be erected, and on its completion occupied it with his family, all of which facts appeared from the verified statement as described in the cross-complaint.

If the pleading was defective in the particular referred to, it was defective in form only and not in substance. Such defects can be reached by special demurrer only, and the objection to such a pleading cannot be raised for the first time in this Court. I am, therefore, of opinion that the cross-complaint is sufficient to support the judgment.

We are also urged to hold the Act of March 30th, 1868, securing a lien to mechanics and others, to be unconstitutional in several of its provisions; but after a careful consideration of the argument of counsel, I see no reason to doubt

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the constitutionality of the statute in the particulars which are specified; and even though I entertained a grave doubt on the subject, this would not justify me in holding the Act to be void. Statutes are set aside by the Court as unconstitutional only in clear cases, where there is no room for reasonable doubt.

I am of the opinion that the judgment should be affirmed.

[No. 2572.]

**M. MARQUART AND H. H. BREWER v. JOSEPH
BRADFORD AND JAMES COCKBILL.**

ABANDONMENT.—An estoppel *in pais* does not constitute an element in abandonment, nor is it one of the circumstances from which an abandonment may be found.

ESTOPPEL IN PAIS.—A party cannot be estopped by matters *in pais*, unless at the time the estoppel was worked he held the title.

EVIDENCE OF A PARTY TO AN ACTION.—Before a party in interest can be prevented from testifying to matters which occurred prior to the death of another, on the ground that the opposite party claims under or is the representative of such deceased person, it must be shown clearly that the opposite party occupies such position.

APPEAL from the District Court of the Eleventh Judicial District, El Dorado County.

This was an action of ejectment brought to recover a part of a water ditch. In 1857 John Curran and others constructed a ditch from the falls of the Gold Hill Canal to a mining claim called the "Curran Claim." In 1860-61 Curran, with the assent of the other owners, sold the ditch and claim to defendant Bradford, and one Wm. T. Davis, who died in September, 1868. In 1862 one Charles Aler discovered a mining claim on Starr Hill. He made a verbal agreement with Davis that Davis should give him one half the ditch for one half the claim. Afterwards, in 1863, Davis and Aler agreed to sell one Bingham a fourth interest of

Statement of Facts.

ditch and claim. The claim on Starr Hill was not on the line of the ditch, and in order to get water to the claim it was necessary to construct a flume from the ditch to Starr Hill. This flume was constructed by Davis, Aler, and Bingham, from a point on the ditch at Tinnie's Vineyard; and it is only that portion of the ditch, extending from the falls in the Gold Hill Canal to Tinnie's Vineyard that is in controversy in this action. All that portion of the ditch extending from Tinnie's Vineyard to the Curran Claim is not mentioned in the complaint. The ditch was used up to 1865 by Davis and Bingham, taking out water at Tinnie's Vineyard, and the defendants, taking it at Curran Claim; on the 23d of August, 1867, Davis and Bingham executed a deed to Tie Hoon and Ah Sing of the claim on Starr or Cement Hill; after describing the claim, the deed contains this clause: "embracing a cabin, and all ditches, races, and flumes, etc., now on and used for the working of said claim, including about one mile of flume for the purpose of bringing water to said claim." This one mile of flume was the means used for bringing water from the "Curran Ditch."

On the first of July, 1868, Ah Young and Ah Gee deeded the same property to the plaintiffs, and upon this deed the plaintiffs base their right of action.

Defendant Cockbill, in his answer, alleged that in May, 1865, he purchased said Davis' undivided half of the ditch, in consideration of three hundred dollars, and paid the price, and was placed in possession, and made improvements on the ditch, and had since remained in possession; that Davis promised to make him a deed, but failed to do so, and that the plaintiffs bought, well knowing that he was in possession under a claim of right. He asked that the plaintiffs be compelled to convey to him.

On the trial the defendant Bradford was called as a witness by the attorney for the defendants, and was asked several questions in relation to who had possession of the

Argument for Respondents.

ditch and used it prior to Davis' death. The plaintiffs objected to any evidence on these points being given by Bradford, because they claimed title under Davis. The Court sustained the objection. It did not appear on the trial that Bradford had ever sold his interest in the ditch, and as Davis and Bingham's deed to the Chinamen was a conveyance of the entire property, the plaintiff insisted that his failure at the time to object to Davis's sale, either estopped him or amounted to an abandonment.

The plaintiffs had judgment and the defendants appealed. The other facts are stated in the opinion.

George H. Williams, for Appellants.

Bradford has never sold his interest, and it is that interest which he claims in this action.

The Court must have concluded that the evidence was not strong enough to sustain an *estoppel in pais*, or an abandonment, and therefore in its instruction it mixes the two. This instruction contains a new definition of abandonment. (See *Richardson v. McNulty*, 24 Cal. 345.) The instruction does not correctly define an *estoppel in pais*. (*Davis v. Davis*, 24 Cal. 40.)

Geo. G. Blanchard, Chas. F. Irwin, and Geo. H. Ingham, for Respondents.

The instruction was correct, whether applied to abandonment or estoppel. Bradford relied on prior possession, and an abandonment may be inferred from acts of omission as well as commission. (*Davis v. Perley*, 30 Cal. 637.) The instruction as to estoppel gives the correct rule. (*Davis v. Davis*, 26 Cal. 23.)

Opinion of the Court — Rhodes, J.

By the Court, RHODES, J.:

The second instruction given to the jury at the plaintiff's request is as follows: "Should the jury find from the testimony that Bradford ever had any interest or title in the property, they may take into consideration whether he had divested himself of such title, either by abandonment or otherwise. The question of abandonment is one of intention, of which the jury are the exclusive judges; and in order to determine such intention, they must take into consideration all the facts and circumstances before them; and if they find that Bradford stood by and saw Davis make a sale of the ditch to plaintiffs or their grantors, and made no objection or asserted any title in himself, he is bound by the sale." The instruction is, in our opinion, objectionable. It mingles together, in such manner as to mislead the jury, two legal propositions which are quite distinct and proceed on different principles — abandonment and estoppel *in pais*. It appears to treat an estoppel *in pais* as constituting an element of abandonment, or as one of the circumstances from which it might be found by the jury. But a party cannot be held as estopped by matters *in pais*, to assert title, unless at the time when it is claimed the estoppel was worked, he held the title. If he then held such title, it cannot at the same time be claimed that he lost it by abandonment.

The testimony of defendant, Bradford, as to matters which transpired before the death of Davis, was objected to by the plaintiff on the ground that they are the representatives of Davis within the meaning of section three hundred and ninety-three of the Practice Act. They claim title, as we understand the case, through two deeds: The deed of Davis and Bingham to Tie Hoon and Ah Sing, and the deed of Ah Young and Ah Gee to plaintiff, Marquart. The testimony is not sufficient to show that the grantees in the first, and the

Opinion of the Court — Wallace, C. J.

grantors in the second deed are the same persons. It not appearing that the plaintiffs were the representatives of Davis within the construction of that section, as given in *Davis v. Davis*, 26 Cal. 23, the objection to the testimony should have been overruled.

Judgment and order reversed and cause remanded for a new trial.

[No. 3,292.]

THE PEOPLE OF THE STATE OF CALIFORNIA v.
GEO. C. BROTHERTON AND LEWIS C. BROTH-
ERTON.

IMPLIED BIAS.—An unqualified expression of an opinion, even though the opinion itself be of a qualified character, is ground of challenge for implied bias.

SAME—WHEN CHALLENGE OUGHT TO BE ALLOWED.—When, after proper investigation had, doubts, more or less grave, as to the actual state of mind of the juror still remains, the challenge for implied bias should be allowed.

APPEAL from the Municipal Criminal Court of the City and County of San Francisco.

The facts are stated in the opinion.

G. W. Tyler, for Appellant.

Attorney General Love and District Attorney Murphy, for Respondent.

By the Court, WALLACE, C. J.:

The prisoners, George and Lewis Brotherton, were convicted of the crime of forgery, and their motion for a new trial being denied they appeal from the judgment and from the order denying a new trial.

In impaneling the trial jury, one Butler was called and

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examined as to his competency to sit as a juror. He stated, in answer to questions propounded by counsel for the prisoners, that he had read a newspaper account of a previous trial of the prisoners upon the same indictment; that he formed an opinion at the time that the prisoners were guilty; that he had expressed that opinion, and that he had not heard or read anything since then to change it. In his examination by the counsel for the prosecution, he stated that his opinion was formed not only from reading the newspapers, but also from conversations he had had with different parties, though these persons knew nothing more than what they had learned from general public rumor. Upon being examined by the counsel for the prisoners, he again stated that he had expressed his opinion. The counsel for the prisoners then challenged Butler for implied bias: First, because he had formed an unqualified opinion as to the guilt of the prisoners; second, because he had expressed that opinion. The challenge was overruled by the Court, and Butler was thereupon peremptorily challenged by the prisoners, whose peremptory challenges were exhausted before the jury was completed. It is too late, in this Court at least, to argue, as has been attempted by counsel for the prosecution, that the unqualified expression of an opinion, even though the opinion itself be of a qualified character, is not ground of challenge for implied bias. This position was distinctly taken and as distinctly overruled here fifteen years ago, in *People v. Cottle*, 6 Cal. 227, and the doctrine of that case has ever since then been approved; and in *The People v. Edwards*, 41 Cal. 640, referring to the case of *People v. Cottle*, supra, we used this language: "The statute declares that the unqualified expression of an opinion as to the guilt or innocence of the prisoner is ground of challenge for implied bias. When such challenge is interposed, it is no answer to say that in the mind or thought of the

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party the opinion was qualified, if in the form of expression it was unqualified."

In *People v. Cottle*, 6 Cal. 228, one of the jurors, on his examination as to his competency, said that he had not formed or expressed an unqualified opinion as to the guilt or innocence of the defendant; that he had formed a qualified opinion, founded upon report merely, which opinion he had expressed, but that in expressing it he had not expressed any qualification. In that case Mr. Chief Justice MURRAY said: "It is argued by the Attorney General that there is a difference between expressing an unqualified opinion and the unqualified expression of an opinion, and so there is, if we resort to a verbal criticism, or mere metaphysical disquisition. It was not the intention of the Legislature to leave the rights of parties to rest upon so narrow and dangerous a foundation. Their obvious intention was to exclude from the jury-box every one who had either formed an unqualified opinion, or having formed an opinion, had expressed it without qualification." We are referred to the Act of March 30th, 1868 (Acts of 1867-8, p. 704), as prescribing a new rule on this subject; but upon careful reading of that Act it will be found that it refers to the *state of mind* of the juror alone, and does not touch the question of the effect produced upon his competency by his unqualified expression of an opinion. Under the rule established by the uniform and repeated decisions of this Court upon the point, we are constrained to hold that the overruling of the challenge made against Butler was an error entitling the prisoners to a new trial. It is proper, in this connection, to say that in no cases coming before this Court is there found to be more practical difficulty than in those involving questions of the mere state of mind of a juror upon a challenge for implied bias by reason of an opinion entertained as to the guilt or innocence of the accused. If the opinion, as formed, be qualified, then he is competent as against such a challenge;

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but if unqualified, then he is incompetent. Experience, however, shows that in the majority of instances, even the most intelligent class of jurors are unable to distinguish the one from the other, for it is seen that when questioned by Court or counsel they often readily adopt the views suggested at the moment by either, rendering it difficult, if not impossible, for the trial Court to determine whether the challenge should be allowed or overruled. An inquiry made as to the state of the mind of a person upon a given point or a question as to whether the mind is merely impressed, and to what degree impressed, with the truth or falsity of a given proposition—whether an opinion upon the question has been formed at all, and if formed, whether that opinion is qualified in its character or is fixed and determinate. All these are, in themselves, inquiries of a highly metaphysical character, and when embarrassed, as they usually are, by a want of precision in the answers of the party inquired of, are frequently impossible of exact solution. Under such circumstances, and when after proper investigation had, doubts, more or less grave in their character, as to the actual state of mind of the juror still remain, it is better that the challenge, if insisted upon, be allowed, for by that course injustice can rarely be done the prisoner; and even should there be a technical error committed in allowing the challenge, a new trial will not for that reason alone be directed.

Judgment and order reversed, and cause remanded for a new trial.

Neither Mr. Justice RHODES nor Mr. Justice CHOCKETT participated in this decision.

Argument for Appellant.

[No. 3,129.]

**THE PEOPLE OF THE STATE OF CALIFORNIA v.
E. W. MORSE, AND CERTAIN REAL ESTATE
AND IMPROVEMENTS.**

INTEREST TAX FUND OF SAN DIEGO COUNTY.—The "Interest Tax Fund" mentioned in the Act of March 18th, 1868, "to provide for the government of the County of San Diego," was intended to take the place of the "Interest tax," required to be levied by the Act of May 4th, 1855, "to fund the debt of said county and provide for the payment of the same," and was also intended to pay the interest on the old bonds of the county in case the holders should not choose to accept the terms of payment offered by the said Act of 1868.

COUNTY INDEBTEDNESS.—The Legislature cannot *require* the creditors of a county to surrender their evidences of indebtedness, and accept new ones different in terms from the old, but it may refuse to provide funds to pay any portion of the old indebtedness, unless the creditors will accept new evidences in place of the old, and for a less sum.

IDEM.—There is no constitutional objection to a law which provides a county fund, out of which the holders of county indebtedness can obtain fifty per cent of the nominal value of their demands, whenever they may choose to accept of that sum.

DUTY OF ASSESSORS.—An Assessor may assess and place a valuation on a block in a city, as a whole, when one man owns it, without placing a separate valuation on the several lots into which it is divided.

APPEAL from the District Court of the Seventeenth Judicial District, San Diego County.

The plaintiff appealed.

The other facts are stated in the opinion.

John L. Love, Attorney General, and W. McNealy, District Attorney of San Diego County, for Appellant.

Statutes must be construed, if possible, so as to give effect to each of their provisions, and even where an unconstitutional provision is in the nature of a condition to the main purpose of the law, its invalidity will not necessarily invalidate the whole law, if the remaining provisions are sufficient to effect that main purpose. (*Robinson v. Bidwell*, 22 Cal.

Argument for Respondents.

394; *French v. Teschemaker*, 24 Cal. 539.) Stripping the act in question of that part which declares that none of the unfunded indebtedness shall be a legal and valid claim against the county, unless allowed by the Board of Commissioners created by the Act, and which attempts to force the holders of this indebtedness to submit it to the Board, which has been held to be unconstitutional in the case of *Rose v. Estudillo*, 39 Cal., and giving such a construction to the balance of the Act in order, if possible, to give effect to all its other provisions. The Act would then provide that this Board should examine into all such claims as should be voluntarily submitted to them by parties who desired to avail themselves of the Act, and to allow such as they found to be just, and to draw warrants therefor, which are to be payable out of the Floating Debt Redemption Fund in question.

After these claims had been so funded they became, according to the decision in *Rose v. Estudillo*, 39 Cal. 270, conclusive evidence of being just and legal within the meaning of the act, and could certainly be paid according to its terms.

This in itself is merely a matter of legislative policy, and is certainly not subject to review by the Courts. While that portion of the Act which attempts to force the creditors to accept these terms is unconstitutional, still, when it is left optional with them to accept or not, it is no longer a law impairing the obligation of contracts.

Levi Chase, for Respondents.

The object of the law having ceased to exist, the law must cease to operate. The Legislature cannot declare the legal debts of a county invalid or authorize a commission to do so. The object of the law was to compel the holders of scrip and other evidences of county indebtedness to deliver them up and take therefor what a Board of Commis-

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sioners might determine on. The sections containing such provisions are so blended with the others that they cannot be separated, and must all stand or fall together. (*French v. Teschemaker*, 24 Cal. 546; *Lathrop v. Mills*, 19 Cal. 529.)

The assessment of an entire block was illegal. (Revenue Act of 1861, Sec. 20; *Blackwell on Tax Titles*, 146-148; *Terrill v. Groves*, 18 Cal. 151; *People v. S. F. Savings Union*, 31 Cal. 137; *Levitsky v. Johnson*, 35 Cal. 41; *People v. Pearis*, 37 Cal. 262.)

By the Court, BELCHER, J.:

This is an action for the collection of delinquent taxes for the year 1871.

By the Act of the 18th of March, 1868, to provide for the government of the County of San Diego, the Board of Supervisors was required on the first Monday of April in each year to levy an annual tax of two dollars on every one hundred dollars valuation of real and personal property within the county, "which shall be collected in the manner prescribed by law, and when paid into the County Treasury shall be distributed as follows: * * * Seventeen and one half per cent into an Interest Tax Fund to be used in the payment of the interest on the funded debt of the county; * * * seventeen and one half per cent into a Floating Debt Redemption Fund, to be used in the payment of the unfunded indebtedness of the county outstanding on the 1st day of April, A. D. 1868; and twelve and one half per cent into a Funded Debt Redemption Fund, which shall be used for the redemption of the funded debt of the county in the manner in this Act provided."

By the same Act a Board of Commissioners was appointed whose duty it was to carefully examine into the legality or

illegality of all the unfunded indebtedness of the county which might remain outstanding on the 1st day of April, 1868, and to allow or reject, in whole or in part any or all of such indebtedness, as might appear in the judgment of the Board a legal and just claim against the county or otherwise. Upon the allowance of any such indebtedness the Board was directed to issue to the rightful owner and holder thereof a warrant for the amount found to be a legal and just claim against the county, which was made payable without interest, in the manner, and out of the Floating Debt Redemption Fund, provided for in the Act.

It was also provided that whenever the Floating Debt Redemption Fund should contain the sum of two hundred dollars or more, and whenever the Funded Debt Redemption Fund should contain the sum of five hundred dollars or more, the County Treasurer should give notice that he would at a time named receive sealed bids for the surrender of warrants drawn by the Board of Commissioners, and to be paid out of the first named Fund, and of county bonds which were to be paid out of the last named Fund; that at the time named he should, in public and in the presence of the President of the Board of Supervisors, open the proposals and accept the lowest bid or bids for the surrender of such warrants or bonds, provided that no bid for the surrender of warrants should be accepted for more than thirty-five cents upon the dollar, and no bid for the surrender of bonds should be accepted for more than fifty cents upon the dollar of the face value thereof, exclusive of interest.

It was provided that the Treasurer should pay out no moneys placed in these Funds except in the manner and for the purposes named in the Act. At the trial in the Court below it was admitted that a county tax of two dollars upon every one hundred dollars valuation of real and personal property within the County of San Diego was levied by the Board of Supervisors of said county on the first Monday of

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April, 1870, pursuant to the requirements of the Act before referred to; that all the indebtedness of said county of every nature and kind which was outstanding on the first day of April, and which had been surrendered to the Board of Commissioners created by the above named Act, for the action of said Board, had been acted upon by it, warrants drawn and the same fully paid, prior to the levy of said county tax in controversy in this action; and that there was in each of the Funds designated in said Act as "Interest Tax Fund," "Floating Debt Redemption Fund," and "Funded Debt Redemption Fund," a large sum of money; that there was still outstanding and unpaid a large amount of the indebtedness of said county, both funded and unfunded, which was outstanding on the 1st day of April, 1868, but that the same was held by parties who refused to accept the terms and conditions of payment provided in the said Act.

In *Rose v. Estudillo*, 39 Cal. 270, the constitutionality of this Act was called in question, in so far as it required warrants drawn by the Auditor of the county, and which had been duly presented to the Treasurer for payment, and indorsed "not paid for want of funds," to be presented and passed upon by the Board of Commissioners appointed for that purpose by the Act. It was held that the claim of the petitioner in that case, who held certain warrants of the kind named, was a part of the recognized indebtedness of the county, authenticated and allowed as provided by law, and that it was not competent for the Legislature to pass an Act which would declare such claims invalid, nor could it authorize a commission to do so; that the creditor could not be compelled to accept another and essentially different mode of payment from that provided by his contract—that is to say, by the laws existing at the time he became a creditor of the county. But it was added that as no moneys were provided for the payment of that class of indebtedness to which the claim of the petitioner belonged, except what was

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called the "funding provisions" of the Act, the petitioner was without remedy except to apply to the Legislature to provide the means of paying his debt, unless there were funds in the treasury, which were raised under the provisions of the old law, and by that law were designated to pay his claim.

At the trial in the Court below, it was insisted by the defendant — and his views were adopted by the Court — that so much of the taxes levied against his property in 1870 as were to go into the three Funds named, were illegally levied and could not be collected. This was placed upon two grounds: First — It was said that the object of the levy of the tax for said Funds had ceased to exist prior to the levy, because all of the indebtedness of the county which had been acted upon by the Board of Commissioners and allowed, had been fully paid, leaving a large amount of money in each of the Funds, and because the other creditors of the county refused to accept the terms and conditions of payment provided for in the Act. Second — That so much of the said Act as requires the Supervisors of said county to levy the tax for the several Funds aforesaid is unconstitutional and void.

We cannot accept these views as sound. The Interest Tax Fund is provided for the purpose of paying the interest on the outstanding bonds of the county. It is made to take the place of the "interest tax" required to be levied by the Act of May 4th, 1855, to fund the debt of the County of San Diego and provide for the payment of the same. It was evidently provided by the Legislature to pay the interest on the bonds of the county in case the holders should not choose to accept the terms of payment offered them by the Act of 1868; for if they accept those terms, both principal and interest are made payable out of the Funded Debt Redemption Fund.

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We do not see how it can be said that the occasion for the Floating Debt Redemption Fund has ceased to exist, or that the law providing for it is unconstitutional. It is true the Legislature cannot require the creditors of the county to accept the terms of payment proposed, but it may refuse, as it has refused, to provide funds to pay them in any other way. It might even refuse to provide funds to pay any portion of the indebtedness. This is well settled by the decisions of this Court, and is so declared in *Rose v. Estudillo*. This being so, it is not for the Courts to say that the creditors of the county will never accept a portion of the money due them instead of the whole, or that a law providing means to pay a portion only of their claims is for that reason unconstitutional.

The Funded Debt Redemption Fund was provided for the payment of the outstanding bonds of the county. The Act does not require these bonds to be presented to, or passed upon by the Board of Commissioners. Whenever there are five hundred dollars or more in this Fund, the Treasurer is to call for bids for the surrender of the bonds, and is to accept the lowest bid or bids therefor, provided he can accept none for more than fifty per cent of the face value thereof, exclusive of interest. If these bonds are worth more in the market than the Treasurer is authorized to pay for them, the holders will of course retain them, but if less they will be glad to surrender them on the terms proposed. But whether they be worth more or less, there can be no constitutional objection to the law which provides a Fund out of which the holders can obtain for them fifty per cent of their nominal value whenever they may choose to dispose of them at that rate.

It was also successfully claimed by the defendant, in the Court below, that the assessment of block seventeen and the north half of block eighteen, in Horton's addition to the City of San Diego, was not made in substantial compliance

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with the requirements of the Revenue Act, and did not therefore create any obligation to pay the taxes levied thereon. The alleged illegality of the assessment consisted in the fact that the Assessor placed a valuation upon block seventeen as a whole, and also upon the north half of block eighteen as a whole, and did not place any separate valuation upon the several lots into which those blocks had been divided upon a map of Horton's addition, then on file in the Recorder's office of the county.

Section twenty of the Revenue Act of 1861 requires the Assessor to list or assess the real property situate within the limits of any city or incorporated town, describing by lots or fractions of lots, and also, in a book, to make a map or plan of the various blocks within any incorporated city or town, and to mark thereon the various subdivisions as they are assessed. We are unable to see that the assessment complained of is substantially variant from the requirements of the Act. The intention undoubtedly was to require the Assessors to use the easy and accurate mode of description in common use in cities and incorporated towns. This is usually done by lot, block, and range, having reference to some recorded map or plan of the city or town. But if one man owns and returns a whole block or half block, we see nothing in the language of the statute or in the supposed reasons for its passage, forbidding the Assessor to list and value it as a whole.

Judgment and order reversed, and cause remanded for a new trial.

Mr. Justice CROCKETT did not express an opinion.

Opinion of the Court—NILES, J.

[No. 3,191.]

GEORGE C. JOHNSON v. HUGH MUIR.

MOTION FOR NEW TRIAL ON AFFIDAVITS.—When an application for a new trial is made on affidavits, the affidavits used in the hearing of the motion must be identified, by the indorsement of the Judge or Clerk, made at the time of the hearing, as having been read or referred to on the argument. The ordinary indorsement of filing by the Clerk is not sufficient.

APPEAL from the District Court of the Fifteenth Judicial District, City and County of San Francisco.

The Court below denied the defendant's application for a new trial, and he appealed from the order.

The other facts are stated in the opinion.

Tully R. Wise, for Appellant.

Melville Johnson, William H. Patterson, and Thomas A. Brown, for Respondent.

By the Court, NILES, J.:

The defendant moved for a new trial on two grounds:

First—Accident or surprise, which ordinary prudence could not have guarded against.

Second—Error, in the refusal of the Court to continue the cause on the application of the defendant.

There is no statement upon motion for new trial. The transcript contains a series of affidavits, which appear to have been filed by the Clerk at various times between the rendition of the judgment and the hearing of the motion.

Under the provisions of section one hundred and ninety-five of the Practice Act a statement is unnecessary when the motion is made upon affidavits only. But in such case it is required that the affidavits should be identified by the indorsement of the Judge or Clerk, made at the time of the

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hearing, that they were read or referred to on the hearing.

It is evident that a mere ordinary indorsement of filing is not sufficient to identify the papers as having been used upon the hearing of the motion. They may have been deposited with the clerk for other and quite different purposes. We cannot, therefore, consider the affidavits.

Judgment and order affirmed.

[No. 2,501.]

IN THE MATTER OF THE ESTATE OF BEZER
SIMMONS, DECEASED.

APPOINTMENT OF ATTORNEY FOR HEIRS NOT REPRESENTED.—In proceedings to obtain an order for the sale of real estate belonging to the estate of a deceased person, it is the duty of the Probate Court to appoint an attorney for heirs not represented; and an attorney's fee of fifty dollars for such services is not unusual or excessive.

EMPLOYMENT OF ATTORNEY TO PROCURE LETTERS OF ADMINISTRATION.—The employment of an attorney for the mere purpose of procuring letters of administration is a contract made in advance of any authority on the part of the client to deal with the assets of the estate in anywise; and whether the application be successful or not the estate is not to be charged with the fees of the attorney for the applicant.

EMPLOYMENT OF COUNSEL BY ADMINISTRATOR.—The administrator, after he has become such, has the right, and it is ordinarily his duty, to employ competent counsel to aid him in the management of adversary suits, in which the estate may be involved while under his care, and fees for such services may be allowed from the assets of the estate.

ADMINISTRATOR'S COMMISSIONS.—As affording a basis for the allowance of an administrator's commissions, the value of the estate which has been taken into possession, and having been in possession, has been accounted for, is alone to be regarded.

IDEM.—The Probate Court should not allow an administrator fees or commissions for property which does not come into his hands, but which is in the possession of other parties, who claim title to it adversely to the estate, even though it is appraised and included in the inventory.

IDEM.—If expenses are incurred in attempting to administer, the administrator should be allowed them, so far as they are necessary.

Opinion of the Court — WALLACE, C. J.

APPEAL from the Probate Court of the City and County of San Francisco.

The facts are stated in the opinion.

B. S. Brooks, for Appellant.

Bartlett & Pratt, for Respondent.

By the Court, WALLACE, C. J.:

Orrin Simmons, administrator *de bonis non*, brings this appeal from an order of the Probate Court of the City and County of San Francisco, allowing the final account of Adolphus Hollub, his immediate predecessor in the administration.

It appears that in 1850 the decedent departed this life intestate, and that in November of that year Frederick Billings, his brother-in-law, took out letters of administration upon the estate. In April, 1853, he presented his petition to the Probate Court, setting forth that no estate of any description had ever reached his hands, or was likely to do so; and upon his application in May following he was discharged by the Court from his trust.

In 1860 Hollub, then Public Administrator, presented his petition to the Probate Court, in which petition he substantially set forth these proceedings of Billings, and alleged that the decedent had left valuable real estate, which had not been theretofore administered upon; and upon his application he was appointed administrator *de bonis non* in February, 1861. In May following Hollub filed an inventory and appraisement of the property of the estate, in which it appeared that the decedent died seized of certain real estate, situate in Sacramento City, of the appraised value of one thousand six hundred and eighty dollars.

In September, 1861, a claim against the estate for some fifteen thousand dollars was allowed; and in April, 1869,

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Hollub filed another inventory and appraisement of the Sacramento property, in which a more detailed description of the lots was set forth, and their aggregate value, with a good title, stated to be upwards of forty-four thousand dollars.

It was at the same time reported to the Court, however, by Hollub, that the title of the estate to the property was in dispute, that its possession was then held adversely to the estate, and that neither he nor the former administrator had ever been in its possession, and that the appraisement of forty-four thousand six hundred and fifty dollars represented "the present cash value of the property with a good title." Subsequently, on the 30th day of April, 1869, Hollub presented his petition in the usual form, praying an order of sale of the Sacramento property to pay the claim he had allowed and expenses of administration. The petition, in addition to the allegations usual in such cases, also set forth that the title of the estate to the property was still in dispute, and the property itself in the possession of parties holding adversely, and that possession, if it could be obtained at all, could only be obtained after expensive and protracted litigation, and that the estate had no funds with which to carry on such litigation, nor if it had would such litigation be advisable.

It was also alleged in the petition, that the estate is largely insolvent, and that its creditors unanimously favored the sale of whatever interest it might have in the property.

A notice of this application for an order of sale having been published, the appellant, Orrin Simmons, a brother and heir at law of the deceased, thereupon appeared and presented a petition, in which he prayed that the letters of Hollub might be revoked and letters of administration issued to himself, and after a hearing an order to that effect was

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entered by the Court in November, 1869; the petition of Hollub, for an order of sale, being at the same time dismissed. The order by which the letters of Hollub were revoked, directed the newly appointed administrator to pay to the retiring administrator what might be due him for his services and expenses, and for proper compensation of his counsel and attorney, the amounts to be thereafter ascertained and allowed by the Probate Judge.

The final account of Hollub was thereupon filed, setting forth the several items which he claimed should be allowed him, and among them the following:

"Paid H. J. Labatt, attorney's fees, obtaining letters of administration, fifty dollars."

The account also stated, that Hollub had incurred the following liabilities in the administration, to wit:

"Bartlett & Pratt, attorney's fees, seven hundred dollars; Theodore Hittell, attorney for absent heirs, services in Probate Court on application to sell real estate, fifty dollars;" and that Hollub had himself performed services reasonably worth the sum of one thousand five hundred dollars.

These services of Hollub are referred to in the account as being those set forth in the written response filed by him in resisting the application of the appellant Simmons for letters of administration. They are in substance, that being informed in 1860 of the claim the estate held to the lands in Sacramento City, and that the parties then in adverse possession of the property would pay something for that claim, he, at the instance of creditors of the estate, applied for letters of administration thereon; that he caused an inventory of the property to be prepared and filed, and the title to be searched, and obtained the services of counsel in its investigation, with a view to the institution of legal proceedings for its recovery, if deemed advisable; that about this time the flood in Sacramento City depressed the market value of the property, and the proceedings concerning it were

therefore temporarily suspended; that in April, 1869, the prices of real estate in Sacramento having in the meantime materially advanced, he caused another inventory to be made out and filed, and he thereupon employed and retained other counsel to recover the property or procure a sale of the interest of the estate therein, etc.

The correctness of each of the several items which we have enumerated was contested by the appellant, but upon the hearing his objections were in all respects overruled, except that the compensation of Hollub was reduced from the sum of one thousand five hundred dollars, claimed by him, to one thousand three hundred and thirty-nine dollars and fifty cents, "*that sum (in the language of the order) being three per cent upon forty-four thousand six hundred and fifty dollars, the appraised value of the said estate.*"

First — The allowance of a fee of fifty dollars for the services of the attorney of the absent heirs, appointed by the Court to represent them in the proceedings to obtain an order for the sale of the real estate, is attacked here as being "unfounded and excessive." It can hardly be said to be unfounded, for the statute has in such case made it the duty of the Court to appoint an attorney for heirs not represented (Sec. 159); nor does the amount allowed in this instance seem unusual or excessive in any wise. The evidence as to the services rendered by the attorney is not found in the record here — and we must presume, in support of the order of the Court below, that the case presented there justified the allowance — we could hardly be expected to hold that the allowance of fifty dollars amounts to error *per se*.

Second — But the compensation allowed to an attorney for services in obtaining letters of administration for Hollub cannot be supported. The statutes regulating the settlement of estates of deceased persons, provides for the employment of attorneys in the Probate Court, at the expense of the estate, in certain enumerated instances only, and in

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those instances it will be found that the attorneys do not represent the administrator — they are appointed by the Court, and their general duties are not to aid the administrator but rather to resist his proceedings in so far as such proceedings may appear to be hurtful to the interests of the estate, or not warranted by the rules of law.

But the employment of an attorney, for the mere purpose of procuring letters of administration, is a contract made in advance of any authority on the part of the client to deal with the assets of the estate in anywise. His application may not be successful, and in that case it would hardly be pretended that the estate is to be bound for the attorney's fees. Where a bona fide contest as to the right to administer has arisen and been determined, in which the employment of counsel was necessary, it may be in the discretion of the Court to allow the necessary expenses of all the parties concerned, including a reasonable counsel fee; but this has no reference to the mere ordinary proceedings to obtain letters of administration, in which no such circumstances appear, and, whether the application be successful or not, the estate is not to be charged with the fees of the attorney for the applicant.

Third — Of course the administrator, after he has become such, does not undertake to personally conduct without the aid of counsel, the management of adversary suits in which the estate may become involved while under his care. He has a right, and it is ordinarily his duty, to employ counsel competent for that purpose. He does not undertake, in accepting letters of administration, that he is possessed of a sufficient degree of learning in the principles and practice of the law to enable him to personally manage a lawsuit in Court. The allowance of a fee to counsel rendering services in such a case is, therefore, not objectionable in itself, and we can not, upon principles already adverted to, undertake to say that the amount allowed to Bartlett & Pratt for their

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professional services was excessive; for, though witnesses appear to have testified before the Probate Court, the record here is silent as to the proof adduced in support of the claim of Bartlett & Pratt.

Fourth—The Court below determined that Hollub was entitled to compensation, and adopted the second appraisal of the property of the estate as a basis by which to arrive at the amount of that compensation. The statute fixes the compensation of an administrator at a named percentage upon the value of the estate administered upon. It does not follow, however, in any case, that the appraisal on file is necessarily to constitute the basis upon which the compensation is to be allowed. The inventory is required to set forth all the estate which shall have come to the *knowledge* as well as that which shall have come to the possession of the administrator. (Sec. 105.) But he is to be charged in his account with only such portion of the estate as may come to his *possession* at the value of the appraisal. (Sec. 216.) This is for the purpose of fixing the measure of his accountability in the event it be afterwards lost through his fault. The inventory may or may not afford a basis of calculation for the purpose of allowance of commissions upon property taken into possession and accounted for; but if resorted to in making such allowance, it cannot in any case amount to more than *prima facie* evidence of value, and the value should be left open to inquiry, if the inventoried value be not satisfactory to all parties concerned.

It has been seen that the order of the Court fixed the compensation of the administration "*at three per cent upon the appraised value of the estate, ascertained in the last inventory and appraisal on file,*" etc. But this last inventory and appraisal did not show, nor purport to show, the value of the estate. No one pretends that it did. The appraisers certified the cash value of each of the lots, it is true, but

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Hollub, in his report indorsed on the appraisement, certifies in substance that the appraisement shows the value of the property with a good title, and the allegations contained in his petition for an order of sale show that the title of the estate was not considered to be good or sufficient. It is there set forth that while it is certain that expensive and protracted litigation must ensue if the title be asserted by suit, it is not certain that possession could even then be had. But commissions were allowed to Hollub, as though he had received into his possession and accounted for an estate of the value of forty-four thousand six hundred and fifty dollars, and this in the face of the fact that nothing whatever had been received, and of course nothing actually accounted for as assets of the estate. Alarming results might follow if an administrator were to be allowed a percentage upon the actual cash value of what might turn out to be the property of other persons, and which had never been in his possession or in that of the intestate, merely because he, as administrator, had chosen to assert a claim to such property in behalf of the estate and had caused it to be returned in an inventory, or, as here, in a supplemental inventory. The entire available assets of an estate might be conveniently absorbed in paying the percentage upon the cash value of property held only by this imaginary title — a title resting in the mere assertion of the administrator himself.

The commissions to be allowed to an administrator are fixed by the statute. (Sec. 221.) They are a designated percentage "*upon the amount of the whole estate accounted for by him.*" We are of opinion that an administrator cannot be said to have "accounted for" an estate, in the sense of the statute, unless he shall first have taken it into possession. He is charged by the statute, as we have already seen, with the value of "the whole of the estate of the deceased which may come into his possession," etc. (Sec. 216); and it is made his duty to "take into his possession all the estate of

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the deceased, real and personal." (Sec. 194.) When he shall have taken the property into possession and accounted for it, he is entitled to compensation by way of commissions upon its value. Unless he take it into possession, he is not charged in his account with its value. He may, and doubtless would, incur a responsibility, should he fail to take it into possession when he lawfully might, if by such failure it should become ultimately lost to those entitled to its benefits; but as affording a basis for the allowance of commissions, the value of the estate which has been taken into possession, and having been in possession has been accounted for, is alone regarded. Whether the failure to obtain possession be his fault or misfortune, is not material. Unless this view be the correct view, then there is no reason why the administrator might not receive a percentage upon debts claimed to be due the estate, but never collected or realized. Such a claim might be as well supported as the one allowed below, resting, as it does, upon an alleged title to real estate which has not only not been successfully asserted, but seems to have been of such an unreliable character that the counsel employed by the administrator themselves had little or no confidence in it, and therefore "determined against bringing any suits to recover the property." We are of opinion that there was error in awarding compensation to Hollub upon the basis of percentage upon the supplementary inventory and appraisement.

It appears that, in his attempt to administer, Hollub has incurred some expenses. These, of course, must be allowed him (Sec. 219), so far as they were, or fairly seemed to be, necessary.

The order of the Probate Court, in so far as it allows the fee of Labatt, and the claim of Hollub for commission, is reversed. In all other respects it is affirmed, and the cause

Argument for Appellants.

is remanded for further proceedings not inconsistent with this opinion.

Neither Mr. Justice CROCKETT nor Mr. Justice BELOHER expressed an opinion.

[No. 3,181.]

THE PEOPLE OF THE STATE OF CALIFORNIA
v. PANCHE VALENCIA AND GUADALUPE VA-
LENCIA.

INDICTMENT FOR MURDER.—An indictment against two persons for murder may charge in one count, one as principal, and the other as accessory, and in another count the latter as principal, and the former as accessory.

IDEM.—Such indictment does not charge each defendant with two offenses, nor are the two counts repugnant.

MURDER IN THE FIRST DEGREE.—The willful and felonious killing of another does not constitute murder in the first degree, but there must be also deliberation and premeditation.

INSTRUCTIONS TO JURY IN CRIMINAL CASE.—Where, on a trial for murder, two parts of the charge of the Court to the jury are contradictory, and one is correct and the other is erroneous, the judgment of conviction will be reversed, even though the appellate Court may be satisfied from the evidence that the jury ought to have found the defendant guilty.

PROVINCE OF THE JURY IN CRIMINAL TRIAL.—On a trial for murder, the questions of deliberation and premeditation are peculiarly the province of the jury to determine.

APPEAL from the District Court of the Seventh Judicial District, Solano County.

The defendants were convicted in the Court below, and appealed.

The other facts are stated in the opinion.

A. Teague, for Appellants.

A party cannot be charged as principal and accessory in the same indictment.

The definition of murder given in the charge, willfully

Argument for Appellants.

and violently killing, would make every grade of killing murder in the first degree.

Southard & Deuprey, and *A. Teagus*, also for Appellants.

It is laid down that, under our Criminal Practice Act, though an accessory before the fact is liable to the same punishment as the principal, he must be indicted and charged as an accessory and not as a principal. (*People v. Campbell*, 40 Cal. 129; *People v. Trim*, 39 Cal. 75; *People v. Schwartz*, 32 Cal. 160.)

The law is equally well established in this State that the principal may be acquitted and the accessory to the same crime found guilty. (*People v. Newberry*, 20 Cal. 489.) Also, that the accessory may be found guilty in a county far removed from the scene of the execution of the crime for which he is charged. By these rulings it is evident that principal and accessory are not so allied, in a criminal light, as to allow of the merger of the one into the other, and the charging one person with murder, and aiding and abetting the same, at one and the same instant.

How could the Valencias determine of which crime they must answer, accessory or principal? Were they to consider, what is impossible, that they were both principals, both accessories?

Where one material part of an indictment is repugnant to another, the whole is void, is a familiar rule of criminal pleading. (See Archibald's *Crim. Pleadings*, Vol. 1, pp. 54, 66; 2 East P. C. 985.)

In the indictment aforesaid, two offenses so different in grade, as, to our mind, to be entirely repugnant to each other, are charged against one and the same person; we therefore contend that said indictment contains such repugnance as to vitiate the whole document.

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John L. Love, Attorney General, and J. W. Coffroth, for the People.

The offense charged was murder, and the second count distinctly refers to the first. The pleading clearly shows upon its face that the matters and things set forth in the different counts are descriptive of one and the same transaction. (*People v. Thompson*, 28 Cal. 216; *People v. King*, 27 Cal. 509; *People v. Murphy*, 39 Cal. 55; *People v. Schwartz*, 32 Cal. 164.)

Section eleven of the Act concerning crimes and punishments says that an accessory before the fact "shall be deemed and considered as principal, and punished accordingly." In close connection with this definition of an accessory follows section two hundred and fifty-five of the Criminal Practice Act, declaring that "no distinction shall exist between an accessory before the fact and a principal," and that "all persons concerned in the commission of a felony shall hereafter be indicted, tried, and punished as principals." The text books are full of cases sustaining the form of the present indictment. (1 Archibald Cr. Pl. 309, Sec. 94.)

Where two persons were indicted for murder, A. in the first count being indicted as principal, and B. present, aiding and abetting, and in the second count B. was indicted as principal, and A. with being present, aiding, and abetting, the indictment was held to be good. (1 Archibald Cr. Pl. 319; *R. v. Downing*, 1 Dennison's Crown Cases.)

By the Court, RHODES, J.:

The defendants were indicted for murder. The indictment contains two counts. The first charges Pancho Valencia as the principal, and Guadalupe Valencia as an accessory; and the second charges Guadalupe as the principal, and

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Pancho as an accessory. The demurrer to the indictment was overruled, and, we think, correctly. The point now urged is that the indictment does not conform to sections two hundred and thirty-eight and two hundred and thirty-nine of the Criminal Practice Act, because it charges each defendant with two offenses, and because the two counts are repugnant. It is apparent that only one offense is charged, which is the murder of Hewitt. The principal and the accessory are alike guilty of the same offense; but the rules of pleading require that an accessory shall be charged as such, and not as a principal. Had only one of the defendants been indicted, if it were doubtful whether the evidence would show that he was the principal or an accessory, he should be charged in one count as the principal, and in another count as an accessory. There would be neither two offenses charged in the indictment, nor would the two counts be inconsistent. (*People v. Schwartz*, 32 Cal. 164; *People v. Trim*, 39 Cal. 75; *People v. Campbell*, 40 Cal. 129.) The same rule would obtain where two or more are charged in the same indictment.

The Court in charging the jury, after having read from the statute the definition of murder in the first and murder in the second degree, malice, etc., proceeded as follows: "I charge you further, if you are satisfied from the evidence that on or about the 3d day of March, 1871, in the County of Solano, the defendant Pancho Valencia willfully and feloniously took the life of Joseph Hewitt by means of shooting, and that the defendant Guadalupe Valencia stood by, aided, abetted, or assisted in the killing, then it is your duty to find the defendants guilty of murder in the first degree."

It is not doubted that that part of the charge is erroneous, as it omits from the definition of murder in the first degree the essential qualities of deliberation and premeditation; but it is contended by the prosecution that as the Court had

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correctly defined murder in the first degree, and as the jury would consider together all the parts or propositions of the charge, the error in the part above cited is cured by the correct definition which had already been given. The two parts of the charge are contradictory, and the jury would not be able to say that the Court intended that the former rather than the latter should be received by them as the correct definition of murder in the first degree. There is no doubt that the jury would always give greater heed to a charge delivered in the language of the Judge, in which only the particular manner in which it is claimed by the prosecution that the murder was committed is mentioned, than to the statutory definition in which are enumerated several different kinds of murder, as constituting murder in the first degree. We are not justified in saying that the error was productive of no injury to the defendants, because we may be satisfied that the jury ought to have found from the evidence, as they did, that the defendants are guilty of murder in the first degree. The question as to the deliberation and premeditation of the defendants is one which is peculiarly the province of the jury to determine; and should we sustain the charge of the Court, because of the apparently satisfactory character of the evidence, that question would virtually be withdrawn from the jury.

Judgment reversed, and cause remanded for a new trial.

Opinion of the Court — Wallace, C. J.

[No. 3,274.]

**THE PEOPLE OF THE STATE OF CALIFORNIA v.
MILES GIBBONS.**

PRELIMINARY EXAMINATION OF PERSON ACCUSED OF CRIME.—The Act of 1851, to regulate proceedings before committing magistrates, contains no provision authorising or permitting an oath to be administered to the person accused. He is not to be examined generally, nor cross-examined at all; only the five questions specified are to be put to him, and his answers thereto must be committed to writing.

ISSUE — EVIDENCE OF JUSTICE INADMISSIBLE.—The evidence of the committing magistrate, as to the statement made by the prisoner on his preliminary examination, is not admissible on the trial.

ISSUE — ACT NOT APPLICABLE.—The Act of 1866, authorising accused persons to become witnesses in their own behalf, is not applicable to preliminary examinations before committing magistrates.

APPEAL from the County Court of Santa Cruz County.

The defendant was convicted, and appealed.

The other facts are stated in the opinion.

W. M. De Witt and *J. W. Coffroth*, for Appellant.

J. L. Love, Attorney General, and *Julius Lee*, for Respondents.

By the Court, WALLACE, C. J.:

The prisoner was tried in September, 1871, in the County Court of Santa Cruz County, upon an indictment for grand larceny in stealing an ox of one Peterson, and was convicted. Before the indictment was found he had been arrested and brought before a Justice of the Peace for examination into the charges made against him. He appeared there without counsel, and upon being inquired of by the Justice if he desired counsel, he answered that he did not. The Justice thereupon examined the witnesses for the prosecution and then put this question to the prisoner: "Will you make a statement or be sworn in your own behalf?" The prisoner

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answered that he would be sworn; and thereupon he was sworn "to tell the truth, the whole truth, and nothing but the truth, in regard to the charge against him." The prisoner is said to have then testified in substance that he had stolen the ox of Peterson.

On the trial had upon the indictment in the County Court the prosecution called the Justice of the Peace as a witness, and were permitted, against the objection of the prisoner, to prove the substance of his alleged testimony thus given before the Justice.

The Act of 1851 (Hitt. General Laws, Sec. 1742), especially regulates the proceedings to be had before committing magistrates upon preliminary examinations concerning the commission of public offenses. It contains no provision authorizing or permitting an oath to be administered to the person accused. It provides, it is true, that he may, if he so desire, make a statement in relation to the charge against him, but such statement is not permitted, but is forbidden, to be made under the sanction of a corporal oath. The point of time in the course of the proceedings, at which he may make or decline to make this statement, is fixed by the statute; it must be after the depositions of the witnesses, upon which the warrant was issued, have been read to him, and when the examination of the witnesses on the part of the people, had in the presence of the accused, is closed. He must then be distinctly informed by the magistrate that it is his right to make a statement in relation to the charge against him if he see fit, but that he is at entire liberty to waive making such statement, and that his waiver cannot be used against him on the trial. This requirement is important to be observed as removing possible apprehensions lingering in his mind, calculated to disturb, or, it may be, to overrule his more deliberate judgment, and so impelling him to speak to the charge, though he would otherwise desire to remain silent. If he elect, however, to make a

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statement, it is to be taken in writing. The prisoner, in making the statement, is not to be exposed to the danger of willful misrepresentation, inattention, or forgetfulness upon the part of the persons present, who may afterwards appear as witnesses against him, testifying as to what he did or did not say in making his statement concerning the charge. Nor is he to be examined generally, nor cross-examined at all, in making his statement. Five designated questions are to be put to him by the magistrate — these are given in the statute, and none others are permitted. His answer to each question is to be distinctly read to him as it was taken down to each, and it is to be corrected, if he desire it, until it is made to express what it is his purpose to state. Numerous other and like provisions are added, carefully detailing the steps to be pursued in receiving and authenticating the statement made — all of them designed to assure the utmost freedom of the accused from restraint or influence from any quarter in making his statement, and intended to provide against the danger of misapprehension or misunderstanding in any respect. It is easy to discern, in the provisions of the statute, the beneficent spirit of the common law embodied in its great maxim: "*Nemo tenetur seipsum accusare.*"

We are of opinion that, under the provisions of the statute referred to, there was no authority conferred upon the Justice to administer an oath to the prisoner upon his preliminary examination, nor to hear or receive testimony from the mouth of the accused in that proceeding, and that the statements made by the prisoner and detailed by the Justice were improperly admitted.

Nor do we think that the subsequent Act of April 2, 1866 (p. 865), authorizing accused persons to become witnesses in their own behalf, has any applicability to mere preliminary examinations had before committing magistrates. The statute speaks of *trials* of indictments, complaints, and other proceedings, and provides that the credibility of the testi-

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mony given by the accused shall be left to the determination of the jury, etc. We find nothing, either in its letter or context, evincing a purpose to interfere in any respect with the statute specially regulating the subject of the preliminary examination of persons charged with the commission of public offenses.

Judgment reversed and cause remanded for a new trial.

[No. 3,015.]

THE PEOPLE OF THE STATE OF CALIFORNIA v.
H. H. BURT.

REPEAL OF ACT.—When an Act is repugnant to a prior Act, it repeals the prior Act, without any repealing clause.

PASSAGE OF A BILL THROUGH THE LEGISLATURE.—If an Act is properly enrolled and authenticated, and is deposited with the Secretary of State, it is conclusive evidence of the legislative will at the time of its passage, and Courts will not look into the Journals of the Legislature to see whether or how the bill passed.

LAWS REPUGNANT TO EACH OTHER.—If there are two Acts for the assessment and collection of a tax, and by one a notice of the election to vote it, must be posted ten days, and published two weeks, and the tax is not to exceed one dollar and fifty cents on the hundred dollars, and by the other, the notice is to be posted twenty days, and published three weeks, and the rate of taxation is not to exceed seventy cents on the hundred dollars, the two Acts are repugnant, and the latter repeals the former.

APPEAL from the District Court of the Second Judicial District, Tehama County.

The defendant recovered judgment in the Court below and the plaintiff appealed.

The other facts are stated in the opinion.

Jo Hamilton and *P. B. Nagle*, for Appellant.

W. H. Jones, for Respondent.

Opinion of the Court—Belcher, J.

By the Court, BELCHER, J.:

This is an action for the collection of a delinquent school tax, alleged to have been duly assessed in pursuance of the provisions of an Act entitled an Act to authorize a tax to be levied upon the taxable property of Red Bluff School District, Tehama County, for building purposes, approved March 25th, 1870. The object of the Act was to call an election and submit to the qualified electors of the district the question whether a tax should be levied on the property of the district for the purpose of erecting a school house therein. It provided that the "election shall be called by posting notices in three of the most public places in the district for ten days, and by publication in some newspaper in the district for two weeks. Said notices shall contain the time and place of holding the election and the rate per cent proposed to be levied on the property of the district, which shall not exceed one dollar and fifty cents upon the one hundred dollars."

Sections three and five are as follows:

"SEC. 3. At such election the ballots shall contain the words, 'Tax—Yes,' or 'Tax—No,' and also the name of one person as Assessor and Tax Collector. If a majority of the votes cast are 'Tax—Yes,' the officers of the election shall certify the fact to the Board of Trustees, and also the name of the person receiving the plurality of votes for Assessor and Tax Collector, and the Trustees shall issue to such person a certificate of election."

"SEC. 5. For the purposes of equalizing the assessment the Board of Trustees shall have all the power conferred by law upon County Boards of Equalization. The rate per cent voted at such election shall be and is hereby levied and assessed to, on, or against the persons and property named

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and described in said roll so equalized; and it shall be a lien on all such property until the tax is paid; and the said tax, if not paid within thirty days from the date of such equalization, shall be recovered by suit in the same manner and with the same costs as delinquent State and county taxes."

It is claimed by the defendant that this Act was in conflict with and was repealed by the Act of April 4th, 1870, entitled an Act to amend an Act to provide for a system of common schools.

Section ninety-one of the last named Act provides:

"The Board of Trustees of any district may, when in their judgment it is advisable, call an election and submit to the qualified electors of the district the question whether a tax shall be raised * * * for building one or more school houses. * * * Such election shall be called by posting notices in three of the most public places in the district for twenty days; and also, if there is a newspaper in the county, by advertisement therein once a week for three weeks. Said notices shall contain the time and place of holding the election. The amount of money proposed to be raised, and the purpose or purposes for which it is intended to be used. * * * At such elections the ballots shall contain the words 'Tax—Yes,' or 'Tax—No,' and also the name of one person as Assessor and one as Tax Collector. * * * If a majority of the votes cast are 'Tax—Yes,' the officers of the election shall certify the fact to the Trustees, and shall also certify the names of the person or persons having the plurality of votes for Assessor and Collector. The Trustees shall issue certificates of election, and the Assessor shall, on receiving his, forthwith ascertain and enroll, in the manner provided for County Assessors, all the taxable persons and property in the district; and within thirty days he shall return his roll, footed up, to the Trustees. The Trustees, upon receiving the roll, shall deduct fifteen per cent there-

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from for anticipated delinquencies, and then, by dividing the sum voted, together with the estimated cost of assessing and collecting added thereto, by the remainder of the roll, ascertain the rate per cent required; and the rate so ascertained (using the full cent on each hundred dollars in place of any fraction) shall be and is hereby levied and assessed to, on, or against the persons or property named and described in said roll. * * * The maximum rate of tax levied by a district tax in any one year for building purposes shall not exceed seventy cents on each hundred dollars. * * * The trustees, upon receiving any assessment roll from the Assessor, shall give five days notice thereof by posting a notice in three public places in the district, and shall sit for at least three days as a Board of Equalization."

Section one hundred and fifteen repeals "all Acts and parts of Acts conflicting with the provisions of this Act."

The last Act is general and applies to all the school districts in this State. It follows, if both of these Acts are to stand, that they had in Red Bluff School District when this tax was levied two Acts under which they were authorized to raise money to build a school house. By one the notice calling an election was directed to be posted ten days and published two weeks, and by the other it was to be posted twenty days and published three weeks; by one the notice was to contain the rate per cent proposed to be levied on the property of the district, "which shall not exceed one dollar and fifty cents upon the one hundred dollars," and by the other it was to contain the aggregate amount of money proposed to be raised, but the maximum rate of tax levied by a district in any one year, for building purposes, "shall not exceed seventy cents on each hundred dollars."

It is manifest that these provisions — and there are others of a similar character — are in conflict and cannot stand together. They are repugnant and irreconcilable, "and it is

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well settled that where a subsequent Act is repugnant to a prior one, the last operates, without any repealing clause, as a repeal of the first." (*Pierpont v. Crouch*, 10 Cal. 315.)

Counsel for the plaintiff call our attention to the fact that it appears from the Senate and Assembly Journals that the bill for the special Act was introduced and passed in the Senate on the 4th March, 1870, and was passed in the Assembly on the 14th March, 1870, while the bill for the general Act was introduced in the Assembly on the 18th of December, 1869; and they ask: "How is it possible that the Legislature intended on the 18th December, 1869, to repeal a statute to be introduced and passed into a law between the 4th and 25th of March, 1870?" The plain answer is that we cannot look into the Journals of the Legislature to see when a bill was introduced in or how it passed through the two Houses. If an Act is properly enrolled, authenticated, and deposited with the Secretary of State, it is conclusive evidence of the legislative will at the time of its passage. (*Sherman v. Storey*, 30 Cal. 253.)

The judgment is affirmed.

[No. 2,463.]

JO. GORDON v. GEORGE W. SWAN AND H. M. KOLLOCK.

CONTRACT WITH STOCKHOLDERS OF A CORPORATION.—A contract made by the stockholders of a mining corporation as parties of the first part, with parties of the second part, by which the stockholders agree to assign their stock to trustees, to be by the trustees conveyed to the parties of the second part, upon the payment by them of a certain sum of money to the parties of the first part, through the trustees, accompanied by a resolution of the Board of Directors of the corporation authorizing their President to convey the mine to the parties of the second part, upon the payment of the money, is substantially as if the contract had been made with the corporation instead of the stockholders

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CONDITIONAL CONTRACT TO BUY A MINE.—A contract with the owners of the stock of a mining corporation, as parties of the first part, reciting that the parties of the second part are desirous of buying the stock and mine, if the tests they make prove satisfactory, and shall take possession of the mine, and make improvements on it, and that the stockholders shall assign the stock to trustees, and that the parties of the second part shall pay at a time fixed a certain sum to the trustees for the stockholders and have the stock, but forfeit their improvements and redeliver possession if they fail to pay, accompanied by a resolution of the Board of Directors to convey the mine to the parties of the second part if the payment is made, merely gives the parties of the second part the option of purchasing, and by their failure to pay they lose the privilege of buying, but do not become liable for the amount they were to pay.

APPEAL from the District Court of the Fourth Judicial District, City and County of San Francisco.

The stock of the corporation was divided into one thousand shares, of which M. G. Griffith and W. N. Muffley, the assignors of the plaintiff, owned ninety-one and two thirds shares. Stockholders owning about nine hundred and sixty shares signed the contract. The resolution of the Board of Directors authorized the President and Secretary of the mine to deliver possession of the same, and to execute a deed thereof to the defendants. The Court below sustained the demurrer to the complaint, and final judgment was rendered for the defendants, and the plaintiff appealed.

The other facts are stated in the opinion.

C. A. Tuttle, for Appellant.

W. H. L. Barnes, for Respondents.

By the Court, NILES, J.:

The plaintiff sues as the assignee of Griffith & Muffley of their interest in a contract made between them and a number of other persons, stockholders of the "Cosumnes Copper Mining Company," of the one part, and the defendants of the other part. The complaint sets forth the contract

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in *hæc verba*, and the sufficiency of the complaint must be determined by an inspection of the instrument.

The contract recited that the corporation was the owner of a vein of copper ore; that the parties of the first part were stockholders in the corporation and desirous of selling their respective shares; that the parties of the second part (defendants) were "desirous of making certain improvements on the said mine, and erecting smelting works for the purpose of reducing the ores of said mine, and of eventually making a purchase of the shares of stock of the parties of the first part and of the mine, if the tests which they shall cause to be made prove satisfactory."

The stockholders, upon their part, agreed that they would assign their stock to John Sime & Co., to be held by that firm "in trust, to reassign and return the same to the parties of the first part if the parties of the second part fail to perform their part of this agreement; and if the parties of the second part fulfill their part of this agreement, and pay the money agreed to be paid, then to assign and deliver said certificates of stock to the parties of the second part," etc.

The defendants, upon their part, agreed to immediately construct a road to the mine, and within a specified time erect a furnace and smelting works for the reduction of the ores.

They further agreed "to pay" * * * "to the parties of the first part, by paying the same to the said trustees for them, the sum of fifty thousand dollars at the end of six months from the time this agreement is signed and possession of the mine taken;" and, in similar terms, agreed to make two further payments of fifty thousand dollars each, at intervals of six months.

It was then provided that "if the parties of the second part fail to fulfill any of the agreements herein contained to be by them performed, they shall forfeit whatever improvements they may have made in and about the mine, and all

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moneys paid in accordance with this agreement, and all machinery connected therewith (except the said furnace and machinery connected therewith, and tools)."

And in case of such failure the parties of the first part were "to take peaceable possession of said mine and all improvements, except as reserved, without any recourse at law."

A resolution of the Board of Directors of the corporation, which was also set forth in the complaint, authorized the delivery of possession of the property to the defendants, and a conveyance to them, when they should have fulfilled their contract with the stockholders, and should surrender up the stock held by Sime & Co. in trust.

Immediately after the execution of the contract, the stockholders transferred their stock to Sime & Co., and the defendants entered into possession of the mine, and erected a portion of the works required for testing the ore; but they failed to pay the first installment of fifty thousand dollars. Plaintiff sues to recover the proportion of this sum alleged to be due to him as assignee of Griffith & Muffley.

The defendants demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action.

In construing the contract, the first question naturally presented is, what was the consideration for the defendants' agreement to pay the sum of one hundred and fifty thousand dollars? The fifth clause of the contract which contains the agreement to pay, does not specify any consideration for the payment; and, as a consideration is needed to uphold the promise, we must look for it without the clause which contains the promise only.

We think it is very evident that this amount was to form the consideration for the purchase of the stock, which, if purchased, would, by the action of the Board of Directors, result in a conveyance of the mine to the defendants. It

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was a device by which the defendants could acquire the title to the mine, and the stockholders could receive their several proportions of the purchase money directly, and without the trouble and delay of the proceedings for its distribution which the statute would otherwise require.

It cannot be claimed that it was the true import of the contract that this large sum of money was to be paid for a brief possession of the mine, or for the privilege of erecting furnaces and testing the value of the ore. It was intended as the purchase money of the property itself, and it is substantially as if the contract had been made with the corporation instead of the stockholders.

The contract contains no obligation on the part of the defendants to purchase the stock. On the contrary, it seems to be clear, from the terms of the instrument, that the purchase should be at defendants' option. It recites that the defendants are desirous "of eventually making a purchase of the shares of stock * * * and of the mine, *if the tests which they shall cause to be made prove satisfactory.*" The trustees were to assign the stock to the defendants if they performed their part of the agreement—otherwise, to reassign it to the stockholders. The contract provided for a peaceable repossession of the mine by the stockholders in case of defendants' failure to perform, and a forfeiture of all moneys paid or improvements made by them. It was one of a class of contracts, common among miners, by which the mine owner gives to another person the privilege of prospecting the mine for a certain time, and the option of purchasing at a fixed price, or perfecting the improvements made by him. The defendants, by their failure to pay the first installment of the purchase money, exercised their choice, and so lost the privilege of purchase, and forfeited their improvements; but did not become liable for the amount, which, by a reasonable construction of the instru-

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ment, they were to pay only in the event of their election to consummate the purchase and receive the title to the mine.
Judgment affirmed.

[No. 2,514.]

WILLIAM BORLAND v. S. S. LEWIS.

FORFEITURE OF SWAMP AND OVERFLOWED LAND.—A failure to pay the interest annually, and to pay the principal at the end of five years, on a swamp and overflowed land purchase, made under the Act of 1855, works a forfeiture, and the State may resell, as if no purchase had been made.

ISSUE.—A State may waive a forfeiture; but if, after a forfeiture, and before a waiver, the State resells the land forfeited, the waiver will not have the effect to divest the rights acquired by the second purchase.

APPEAL from the District Court of the Fifth Judicial District, County of San Joaquin.

The defendant had judgment in the Court below.
The other facts are stated in the opinion.

George Cadwalader, for Appellant.

The construction which we place on section six is that the "forfeiture" is not, in fact, worked until it is judicially declared as against the holder of a certificate of purchase. The Act of April 9th, 1861 (1 Hittell, 4102), goes exclusively on this theory. By its first section the Register of the State Land office was directed to notify delinquent purchasers to pay up within thirty days. By the succeeding section it was made the duty of the District Attorney of the county where the land was situate to bring suit against the holders of certificates of purchase for the cancellation of the same. By section three payment within twenty days after decree of cancellation ended the proceeding, and restored the purchaser "to his rights in the land, the same as

Argument for Respondent

if no neglect or forfeiture had been made." By section five the State waived part of the cause of forfeiture — i. e., that which related to the reclamation of one half of the land. By section six it was provided that no second certificate of purchase should issue until the rights of the first purchaser had been judicially canceled. By section nine an additional credit of two years was given for the payment of the principal. By a law passed April 10th, 1862, entitled "An Act for the relief of purchasers of swamp and overflowed, salt marsh, and tide lands," one year's interest was remitted; and by the Act of March 31st, 1863, a second year's interest was likewise remitted. The State undoubtedly was competent to waive the assertion of her right of forfeiture; and this, we deem, she did by the Acts aforesaid. The plaintiff's certificate, instead of being annulled by failure to pay the agreed interest in advance, was, in 1859, declared to be prima facie evidence of title. (Stats. 1859, p. 227.)

Terry & Carr, for Respondent.

By the terms of the statute of 1855 the payment of the purchase money was a condition precedent, and no title could vest in a purchaser until full compliance with all the requirements of the Act. (*Montgomery v. Kasson*, 16 Cal. 193; 1 Washburn on Real Property, 468.) The conditions being precedent, no act on the part of the grantor was necessary to divest the title of the purchaser, for the sufficient reason that no title had ever vested. But if the entry is held to be a grant upon condition subsequent the plaintiff is in no better position. In the latter case the condition might be waived by the vendor's failure to enter for condition broken, or to take steps to declare a forfeiture. At common law an entry is necessary to forfeit an estate for condition broken. But "if the grantor is himself in possession of the premises when the breach happens, the estate reverts in him at once, without any formal act on his part; and he

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will be presumed, after the breach, to hold for the purpose of enforcing a forfeiture." (1 Washburn on Real Property, 475; *Willard v. Henry*, 2 N. H. 120; *Hamilton v. Elliott*, 5 S. & R. 375; *Andrews v. Senter*, 32 Me. 394.)

The plaintiff was never in possession of the land — the possession after his purchase remained as before, in the State, by virtue of its sovereignty; and upon the occurrence of the breach the forfeiture was enforced, without the necessity of any formal act. The Acts of the Legislature, passed subsequent to the entry of plaintiff, did not affect his interest, or relieve him from the consequences of his failure to perform his contract.

By the Court, RHODES, J.:

Ejectment to recover a parcel of swamp and overflowed land. The plaintiff appealed from the judgment. It appears from the findings that the plaintiff purchased the land in 1855; that in 1856 he paid one year's interest and received a certificate of purchase; that he made no further payment until 1865, when he paid all the interest which had accrued, except for two years, which the Legislature had remitted. The plaintiff never had the possession of the premises in controversy. Traverse, the defendant's grantor, made application to purchase the land January 4th, 1858; caused a survey to be made; received and recorded a certified copy thereof; paid one year's interest on the purchase money; and he, and the defendant after his purchase, paid the interest for several succeeding years; but neither Traverse nor the defendant received a certificate of purchase. It also appears that in 1861 Traverse conveyed the premises to the defendant; that Traverse, from his purchase to his conveyance to the defendant, had the possession of the premises, and that thereafter the defendant was in possession.

The purchase of each party was made under the provis-

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ions of the swamp land Act of 1855 (Stats. 1855, p. 189). It was provided by section five that a person might purchase such lands on a credit of five years, by paying to the County Treasurer the interest for one year in advance. Thereafter the interest was required to be paid annually in advance. It was made the duty of the County Treasurer to pay over the money to the Treasurer of State, at the times when the State revenues were required to be paid, and transmit a certificate showing the purchase; and it was made the duty of the Treasurer of State to certify the same to the Secretary of State, who was required to issue a certificate of purchase. The sixth section provided, that "if any person or persons, purchasing lands upon a credit of five years, as provided in section five of this Act, shall fail or neglect to pay the principal and interest within the said term of five years from the date of the certificate of purchase, or shall fail or neglect to pay the interest, as required by this Act, for the space of one year from the time such interest may become due, or shall fail or neglect to reclaim at least one half of the land so purchased within the said term of five years, such neglect or failure shall work a forfeiture of such lands, and the same shall be resold as if no purchase had been made."

The plaintiff argues that there is no forfeiture in fact, because of his failure to pay the annual interest, until it is so judicially declared by a competent tribunal; that the statute merely specified certain facts, which, being proved, furnish the basis for a judgment or forfeiture. In our judgment it was intended, by the sixth section, to make the failure to pay the interest for one year after it became due operate as a complete forfeiture of the purchaser's rights in and to the land. Had it been designed that the officers charged with the sale of these lands should delay further action until the forfeiture had been judicially determined, it would have been so expressed in the Act; but, on the contrary, that

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section provides that a failure on the part of the purchaser to pay the interest, etc., "shall work a forfeiture of such lands, and the same shall be resold as if no purchase had been made." The last clause would be useless if the resale could not be made until the forfeiture had been pronounced by a Court, for that would effectually rescind and put an end to the contract, when, of course, the lands would be subject to sale without further directions.

It requires no argument to prove that the State may waive a forfeiture—as it is contended by the plaintiff was done by the Act of April 9th, 1861 (p. 140)—and it is equally clear that if the State, after the forfeiture and before the waiver, resells the land, the waiver will not have the effect to divest the rights acquired by the second purchase.

Judgment affirmed.

Mr. Justice CROCKETT did not participate in this decision.

[No. 2546.]

PETER DONAHUE v. J. GALLAVAN ET AL.

POSSESSION OF LAND.—If one who is in the actual possession of a portion of a tract of land, claiming the whole, makes a conveyance of the whole, and the grantee enters into actual possession of such part, claiming the whole, such entry, under the deed, gives the grantee constructive possession of the whole tract.

EVIDENCE IN EJECTMENT.—Proof that a person entered into the actual possession of a part of a tract of land, claiming the whole, under a deed describing the whole, is *prima facie* proof, under an issue of prior possession, and sufficient to go to the jury.

POSSESSION OF LOTS AND BLOCKS IN A CITY.—The rule that one who enters into the actual possession of a part of a tract of land, claiming the whole, under a deed describing the whole, is in constructive possession of the whole, applies to land in San Francisco, within the district covered by the Van Ness Ordinance, and to city lots.

EVIDENCE IN EJECTMENT.—In ejectment, when the issue is prior possession, proof by plaintiff that he was in possession by his servants, of houses

Argument for Appellant.

on the demanded premises, makes a prima facie case sufficient to go to the jury.

STATEMENT ON APPEAL AFTER NONSUIT.—The question presented on a motion for a nonsuit is a question of law, and in a statement on a motion for a new trial, after nonsuit, the decision of the Court should be specified as an error of law. The specification need not embody the evidence.

APPEAL from the District Court of the Fourth Judicial District, City and County of San Francisco.

Ejectment to recover possession of a part of block twenty-five, mentioned in the opinion. This land lies within the territory in San Francisco covered by the Van Ness Ordinance. The court below held, that the rule laid down in *Hicks v. Coleman*, mentioned in the opinion, did not apply to land within the territory covered by the Van Ness Ordinance, and that the rule had no application to city lots.

The plaintiff moved for a new trial, and made the following specification on the question of nonsuit: "The Court erred in granting defendants' motion for a nonsuit and in granting a nonsuit."

The plaintiff appealed.

The other facts are stated in the opinion.

Sharp & Lloyd, W. H. Patterson, and M. H. Myrick, for Appellant.

It was error for the Court below to say as it did say by granting the nonsuit, that there was no evidence of actual occupation by plaintiff's grantors. (*San Francisco v. Beideman*, 17 Cal. 443; *Hubbard v. Barry*, 21 Cal. 321; *Welch v. Sullivan*, 8 Cal. 201; *Townsend v. Greeley*, 5 Wallace, 326; *Satterlee v. Bliss*, 36 Cal. 489, 512-13; *Brooks v. Hyde*, 37 Cal. 366.) The evidence tended to show, and did show, prior possession in plaintiff's grantors, and that the title thereby acquired had vested in plaintiff by regular mesne conveyances; and that plaintiff had been ousted by defendants. (*Hicks v. Coleman*, 25 Cal. 122; *Hoag v. Pierce*, 28

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Cal. 187; *McKee v. Greene*, 31 Cal. 418; *Ayres v. Bensley*, 32 Cal. 620; *Wolfskill v. Mallachowitz*, 39 Cal. 276.)

John Reynolds, for Respondents.

No title was shown under the Van Ness Ordinance. (*Wolf v. Baldwin*, 19 Cal. 306; *Polack v. McGrath*, 32 Cal. 15.) The possession of the gardens was not sufficient to extend the possession, so as to embrace the premises in controversy. *Brummagin v. Bradshaw*, 39 Cal. 24; *Wolfskill v. Mallachowitz*, 39 Cal. 276; *Walsh v. Hill*, 38 Cal. 481.)

By the Court, RHODES, J.:

The premises in controversy form a part of Mission Addition block number twenty-five, in the City of San Francisco. In 1850 or 1851 Clark, Wilson & Stock entered upon a tract of land composed of blocks twenty-five and twenty-eight, and small portions of adjacent blocks and the intervening streets, which were not then laid out, and reduced some portions thereof to their actual possession. Wilson & Stock conveyed the tract to Dehon, who entered under the deed into the actual possession of a part of the tract. The plaintiff claims under that deed. It also appears that the plaintiff, by his servants, was in the possession of certain houses situated on the premises in controversy, at the time of the entry of the defendants. The defendants moved for a nonsuit on the ground that the plaintiff had not shown such possession as would give him title under the Van Ness Ordinance, and that he had not shown such prior possession as would entitle him to recover, and the motion was granted on both grounds. The entry of Dehon under the deed of Wilson & Stock had the effect to give him the constructive possession of the whole tract. (*Hicks v. Coleman*, 25 Cal. 122; *Ayres v. Bensley*, 32 Cal. 620.) That evidence, together with the fact that the title of Dehon had vested in the plaintiff, was sufficient to

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go to the jury, upon the issue of prior possession. We see nothing in the facts of this case, to prevent the application of the rule in those cases, to the tract of land described in that deed. The occupation of the houses by the servants of the plaintiff, as already mentioned, was also competent evidence on the question of prior possession, and should have been submitted to the jury. It is unnecessary, at this stage of the case, to express any opinion as to whether there was such an occupation of the premises as to entitle the occupant to the benefits of the Van Ness Ordinance.

The defendants insist, that as these questions were presented on the motion for a new trial, they cannot be considered, because there was not a sufficient specification of the grounds of the motion within the requirements of section one hundred and ninety-five of the Practice Act. This objection is untenable. The question presented on a motion for a nonsuit is a question of law, and in the statement on new trial the decision of the motion should be specified as an error of law. Were this not the correct practice, the party complaining of the granting of a nonsuit would be compelled, after stating the evidence, to restate it in his specifications, in order to show that it was insufficient to justify the decision — or in other words, that it was sufficient to make a *prima facie* case to go to the jury.

Judgment and order reversed and case remanded for a new trial.

Mr. Justice CROCKETT did not express an opinion.

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[No. 2,218.]

GEORGE F. SHARP v. JOHN H. BAIRD, ISAAC N. THORNE, I. E. THORNE, CHARLES J. BRENHAM, AND JOHN DOE.

ATTACHMENT — SHERIFF'S DEED.— A Sheriff's deed, executed in pursuance of a judgment obtained in an attachment suit, takes effect by relation as of the date at which the attachment was levied, and overreaches any deed made subsequent to such date.

SERVICE OF ATTACHMENT OF REAL PROPERTY.— It is the duty of the Sheriff, in serving an attachment of real property, to deliver a copy of the attachment to the occupant, if there be one; or if there be no occupant, then to post a copy of the attachment in a conspicuous place on the premises.

INDORSEMENT ON ATTACHMENT.— It is the duty of the Sheriff, when returning an attachment of real property, to indorse thereon what acts he performed in serving the writ, and it will be presumed that he states all that he did towards making the service.

INVALID ATTACHMENT.— A service of an attachment on real estate, made by posting a "notice" instead of a copy of the attachment on the most public part of the property attached, is not valid, and creates no lien on the property.

APPEAL from the District Court of the Fifteenth Judicial District, City and County of San Francisco.

The plaintiff had judgment, and the defendants appealed. The other facts are stated in the opinion.

Wilson & Crittenden, for Appellants.

George F. & William H. Sharp, for Respondent.

By the Court, CROCKETT, J.:

It was admitted on the trial that on the 5th day of November, 1855, Sanders and Brenham, under whom both parties claim, were the owners in fee, and entitled to the possession of the demanded premises; and the case shows that on that day several attachments were issued against

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them, which the plaintiff claims were duly levied on this property. It further appears that the attachment suits soon afterwards ripened into judgments, on which executions subsequently issued, under which the property was purchased by the plaintiff at Sheriff's sale, and for which, in due time, he obtained the Sheriff's deed. This is the plaintiff's title.

But it further appears that on the same day on which the attachments are alleged to have been levied, Brenham commenced an action against Sanders for the dissolution of their copartnership, alleging that the firm was insolvent, and praying for a settlement of its affairs, the appointment of a Receiver, and the application of the partnership property towards the payment of the partnership debts.

On the same day Sanders filed his answer, admitting the allegations of the complaint, and consenting to a decree as prayed for. Thereupon the Court, on the same day, appointed Bernhard Peyton, Receiver, and entered an order directing Sanders and Brenham to convey and deliver to the Receiver all their partnership property of every description.

In obedience to this order Sanders and Brenham, on the same day, by a deed in due form, conveyed to Peyton, as Receiver, all the real estate of the firm, including these premises.

Peyton afterwards resigned his trust as Receiver, and conveyed the property to his successor; and the defendant Baird, who is the present Receiver, now holds this title in his capacity of Receiver, the action of *Brenham v. Sanders* being still pending. The present action is ejectment, and the plaintiff cannot recover unless he holds the legal title.

The deed from Sanders and Brenham to Peyton was long prior in date to the Sheriff's deed, under which the plaintiff claims. But the plaintiff contends that the Sheriff's deed took effect by relation, as of the date at which the attachments were levied, and, therefore, overreaches the deed to

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Peyton, which, though made on the same day, was subsequent in time to the levy of the attachments.

If the legal principle involved in this proposition be conceded to be correct, of which there is no doubt, it becomes material to inquire whether the attachments were, in fact, levied on the property so as to create a valid lien thereon.

Section one hundred and twenty-five of the code, as it stood in 1855, provided that, in levying an attachment on real property, the Sheriff shall deliver a copy of the attachment to the occupant, if there be one, and if there be no occupant, that he shall post a copy in a conspicuous place on the premises, and shall file a copy in the office of the Recorder, together with a description of the property attached. On each of these attachments the Sheriff returned that, by virtue of the writ, he had attached all the right, title, and interest of Sanders and Brenham in and to the property — describing it — “and that he posted a notice on the most public part of said described property, and filed and recorded a copy of the writ and of the above description with the County Recorder of the City and County of San Francisco, on November 7th, 1855.” This return does not show a valid service of the attachment. It was the duty of the officer to deliver a copy of the attachment to the occupant, if there was one; and if there was no occupant, then to post a *copy of the attachment* in a conspicuous place on the premises. These returns do not show whether or not there was an occupant of the premises; and if we were at liberty to infer that there was no occupant, on the ground that we are to presume the Sheriff did his duty, and would have delivered a copy to the occupant, if there had been one; and if we assume that there was, in fact, no occupant, then it was the duty of the Sheriff to post on the premises a *copy of the attachment*. The return does not show that this was done, but only that a “notice” was posted on the premises. The purport of this “notice” does not appear; but if it did, the Sheriff had no

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authority to substitute a notice for the copy which the statute required to be posted.

Section one hundred and forty-one of the code requires the Sheriff to return an attachment "with a certificate of his proceedings indorsed thereon, or attached thereto." It is his duty to state in his return what acts he performed in serving the writ, in order that the Court may be enabled to decide upon its sufficiency to constitute a valid service.

We must assume, therefore, that in these returns the Sheriff stated all he did toward making the service; and as these acts did not constitute a valid service, there was no lien created by the attachments.

In *Main v. Tappener*, ante, 206, we held that, in order to create a lien, the requisite acts must not only be performed by the officer, but that they must be performed in the order prescribed by the statute.

It results from these views that the attachments under which the plaintiff claims created no lien on the property; and the judgments, on which the executions issued, not having been docketed until after the deed to Peyton was executed and delivered, there was no judgment lien, to which the Sheriff's deed could relate, so as to overreach the legal title then held by Peyton, and now vested in the defendant, Baird.

I am, therefore, of opinion that the plaintiff is not entitled to recover in this form of action.

This view of the case renders it unnecessary to decide the other questions presented on the appeal.

Judgment reversed and cause remanded for a new trial.

Statement of Facts.

[No. 2,735.]

**ELIZABETH H. LORD v. OLIVE S. HOUGH, AND AS
D. NUDD, J. B. WOOSTER, AND W. W. KNIGHT,
EXECUTORS OF THE LAST WILL OF CHARLES S. LORD,
DECEASED.**

DEED OF GIFT.—A deed of gift of a portion of the community property, made by the husband, is not void *per se*.

IDEM.—If such deed be made with the intent of defeating the claims of the wife in the community property, the transaction is tainted with fraud.

IDEM.—In the absence of fraudulent intent, a voluntary disposition of a portion of the community property, reasonable in reference to the whole amount, may be made by the husband.

IDEM.—The pendency of a suit for divorce does not of itself interrupt the husband's powers in relation to his right of sale of the community property, although he cannot, with the intent to deprive the wife of her claims, in anticipation of a divorce, make a voluntary conveyance of any portion of the community property.

DEED OF GIFT BY HUSBAND TO HIS MOTHER.—A deed of gift of community property, of the value of four thousand dollars, made by a husband worth one hundred thousand dollars, to his mother, in consideration of love and affection, is not unreasonable in amount.

IDEM.—If a husband, pending a suit for a divorce, procures his mother to live with him, and take charge of his infant children, on a promise of providing for her, and makes her a deed of a portion of the community property, these circumstances show that he is not actuated by a fraudulent intent towards his wife in making the deed.

APPEAL from the District Court of the Fourth Judicial District, City and County of San Francisco.

In the divorce suit spoken of in the opinion, C. S. Lord obtained a divorce in 1867, and the Court, in its decree, awarded him the custody of his three infant children, and decreed that he pay his wife one hundred dollars per month during her natural life, or in lieu thereof, the sum of ten thousand dollars, at his election. Afterwards, and September 21st, 1867, the Court granted the defendant a new trial, and the plaintiff appealed to the Supreme Court from the order granting the new trial. This appeal was pending at the time of his death.

Argument for Appellant.

September 30th, 1867, Lord made the will spoken of in the opinion, in which he devised his property to his executors, to hold in trust; among other things, to pay the sum decreed by the Court to his wife, if the order granting a new trial was reversed, and the judgment remained in force. The will also confided the care and custody of his infant children to his mother.

This action was brought to have the deed of Lord to his mother declared fraudulent and void, and to have the same canceled. The defendant had judgment in the Court below, and the plaintiff appealed.

The other facts are stated in the opinion.

Quint & Hardy, for Appellant.

The right of the husband to dispose of the common property is restricted to the ordinary cases of sales for proper consideration. (*In re Buchanan's Estate*, 8 Cal. 507; *Smith v. Smith et al.*, 12 Cal. 224.)

The fact that the suit for divorce was pending placed all the common property in custody of the law, and while it may be conceded for the purposes of this case that the husband might have changed the character of the property—i. e., might have converted lands into money or stocks or securities—it seems to us manifest that the wife would have been entitled at the termination of that action to such a share of all the common property owned when the suit was brought as the Court might then have determined to be proper. (Hittell's Dig., Art. 3574.)

If the husband cannot make a bequest of more than half of the common property, to take effect at his death, by what rule shall we say that he can make a gift to take effect before his death? As we understand the law, the husband is the trustee of the wife, and by authority of the statute is permitted to manage her estate. He may exchange it—may convert her money into lands, or sell her lands for money.

Argument for Respondents.

This he may very well do, because the wife may always be able to secure an equivalent for her property. But when the husband undertakes to dispose of her property by gift he is acting in violation of the trust. (*Swaine v. Perrine*, 5 John. Ch. 488; *Black v. Jones*, 1 A. K. Marshall, 312; *Petty v. Petty*, 4 B. Monroe, 215; *Quistet v. Quistet*, Wright's Ohio Rep. 492.)

This conveyance was in fraud of the rights of the wife for the following reasons: The husband and wife were living apart from each other, and he was prosecuting a suit against her for a divorce. His conduct towards his wife proved his disposition to injure her. His testamentary disposition of all the community property shows that it was his purpose to deprive her of the whole of the real estate belonging to the community. The attempt to deprive the appellant of the custody of her children shows the animus of the husband in making the conveyance.

McRae & Rhodes, for Respondents.

A wife's interest, during the coverture, in the common property, like an heir's, is a mere expectancy. The husband can sell, mortgage, manage, and control it to any extent (barring actual fraud), and the wife has no remedy; error of judgment is no ground for the interference of a Court. (1 Hitt. Dig., Art. 3571, Sec. 9; *Van Dusen v. Johnson*, 15 Cal. 310; citing *Grice v. Lawrence*, 2 La. An. 226.)

A deed is not void if founded on consideration when it conveys community property, even after suit for divorce has been commenced, provided there be estate enough left to compensate the wife for her half interest in the estate so given away; and this in the face of an express statute law to the contrary. (*Hagerty v. Harwell*, 16 Tex. 663.)

We ask this Court to inspect the above case especially. It shows conclusively that the deed of the husband cannot be attacked, even in case of fraud; but the remedy of the wife

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is to sue the executors for the amount of the difference, to which by law she would be entitled. (*Monroe v. Leigh*, 15 Tex. 579; *Grice v. Lawrence*, 2 La. An. 226; *Hagerty v. Harwell*, 16 Tex. 663; *Peck v. Brummagin*, 31 Cal. 440; *Wright v. Hays*, 10 Tex. 130; *Stamler v. Coe*, 16 Tex. 663.)

By the Court, NILES, J.:

The plaintiff was the widow of C. S. Lord, deceased. C. S. Lord died in July, 1868, leaving estate of the value of from one hundred thousand to two hundred thousand dollars, all of which was common property of plaintiff and deceased; and a will, appointing the defendants, Wooster, Knight, and Nudd, his executors. On the 7th of April, 1868, Lord conveyed to his mother, Olive S. Hough, one of the defendants, a parcel of land at Menlo Park, containing about six and three quarter acres, and then of the value of about four thousand dollars. The deed purported to be in consideration of natural affection.

Prior to the execution of the deed, C. S. Lord had instituted proceedings for a divorce against the plaintiff, and had obtained, by order of the District Court, the temporary custody of the three infant children of the marriage. This suit was pending when he died.

In November, 1867, he visited his mother, then a resident of the State of New York, and agreed with her that if she would leave her then residence and go to California, and take charge of the children, he would provide liberally for her support. She consented, and came to this State in March, 1868, and from that time had the entire charge and care of the children, and resided upon the premises afterwards conveyed to her.

The plaintiff claims that the conveyance should be decreed to be void, as being voluntary and in derogation of her rights in the common property.

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A deed of gift of a portion of the common property by the husband is not void *per se*. If the gift be made with the intent of defeating the claims of the wife in the common property, the transaction would be tainted with fraud. In the absence of such fraudulent intent, a voluntary disposition of a portion of the property, reasonable in reference to the whole amount, is authorized by the statute which gives to the husband the absolute power of disposition of the common property as of his own separate estate. This doctrine was recognized, although not expressly decided, in the cases of *Smith v. Smith*, 12 Cal. 225; and *Peck v. Brummagin*, 31 Cal. 446.

The pendency of proceedings for a divorce does not, of itself, interrupt the exercise of the husband's powers. The property does not come into the custody of the Court by the institution of the suit. The husband has still the control of it and full power of disposition of it. He is held to equal good faith in all transactions relating to it, as before the commencement of the suit. He is subject to the same restrictions in its disposal. He cannot make a voluntary conveyance of any portion of the property with the intent to deprive the wife of her claims, in anticipation of the divorce, any more than he could make such fraudulent disposition in anticipation of her widowhood.

The circumstances surrounding the transaction afford no sufficient evidence of fraudulent intent upon the part of Lord. No inference of such intent can be drawn from the relative values of the land conveyed by him to the defendant, and of the entire property. A gift of four thousand dollars to his mother, by a man worth over one hundred thousand dollars, is certainly not unreasonable in amount. Nor do the terms of the will of Lord show any fraudulent design in the conveyance to the defendant. Whatever fraudulent intent he may have had at the time he made the

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will was consummated so far as he could consummate it by the execution of that instrument. We cannot assume that it affected every subsequent act in relation to the property. His intent in making the conveyance must be determined from the circumstances attending that transaction, and the intent evinced by his act of six months before could aid but little in such determination.

On the other hand, the agreed facts show the utmost good faith upon the part of Lord. The care and management of the infant children, which was being exercised by the defendant when the conveyance was made, and which continued thereafter, would constitute a valuable consideration, if it clearly appeared that the property was given in exchange for these services. At least these circumstances are sufficient to show that Lord was not actuated by fraudulent motives in the transaction, but by a laudable desire to make provision for the care of his children, who were dependant upon him for support.

Judgment affirmed.

[No. 2,089.]

JOHN A. CARDINELL v. J. P. O'DOWD, P. J. McMAHON, M. NOLAN, AND PATRICK DURKIN.

STATEMENT ON APPEAL.—A statement made in view of a motion for a new trial may be considered on an appeal from the judgment, if the parties stipulate "that the statement may be used as settled statement on motion for new trial and on appeal to the Supreme Court."

APPLICATION OF PAYMENTS MADE ON INDEBTEDNESS.—If a party who is indebted on several promissory notes, all held by the same person, makes a payment of money to the holder and directs it to be applied on one of the notes, but the holder applies it on other notes than the one directed, and the payor afterwards acquiesces and takes the notes upon which the application was made, this is a ratification of the application made by the creditor.

Argument for Respondents.

APPEAL from the District Court of the Fourth Judicial District, City and County of San Francisco.

The note sued on was given for seven hundred and eighty dollars, but the complaint alleged that there was due on it four hundred and fifty-eight dollars and thirty-five cents, with interest from October 6th, 1869, at one and one quarter per cent per month.

Judgment was rendered for the defendants December 8th, 1870, and the plaintiff appealed from the judgment. The statement filed contained this heading:

"Statement on motion for a new trial and on appeal, should said motion be overruled."

The other facts are stated in the opinion.

Quint & Hardy, for Appellant.

It may be conceded that a debtor at the time of making a payment has the right to direct as to the particular indebtedness to which such payment shall be applied; but when the creditor does not so apply the payment, but does subsequently make an application which is acquiesced in and agreed to by the debtor, he is bound by the application made with his assent and concurrence. (American Leading Cases, p. 288, and cases there cited; *Sturgis v. Robbins*, 7 Mass. 301; *Brewer v. Knapp*, 1 Pick. 332; *Logan v. Mason*, 6 Watts and Serg. 9; *Moss v. Adams*, 4 Iredell Eq. 42.)

J. C. Bates, for Respondents.

The cases cited by appellant have not the slightest application to the facts of this case.

"A party paying is not allowed so to appropriate as to effect the relative right of his sureties." (Parsons on Bills and Notes, pp. 222, 223; *Merrimack Co. Bank v. Brown*, 12 N. H. 320; *Myers v. United States*, 1 McLean, 493; *Postmaster General v. Norvell*, 1 Gilp. 106.)

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And *a fortiori* such party would not be allowed subsequently to do any act by way of acquiescence or ratification to revive the liabilities of his indorsers or sureties.

By the Court, BELCHER, J.:

The objection that the statement was made in view of a motion for a new trial and therefore cannot be considered on an appeal from the judgment, is not well taken. The parties stipulated that the statement might be "used as settled statement on motion for new trial and on appeal to the Supreme Court." It was held in *Hastings v. Halleck*, 13 Cal. 203, that a similar stipulation was "sufficiently broad to include any appeal which plaintiff should elect to prosecute in the cause."

The action is upon a promissory note, and the defendants plead payment made by Nolan. At the time of the alleged payment the note was held by the City Bank of Savings, Loan, and Discount, as were also three other notes upon which Nolan was liable as maker or indorser. In September Nolan paid to the bank four hundred dollars, and in October, five hundred dollars. He instructed the clerk who received the money, he says, to apply the payments on the note in suit, so far as was necessary to pay it in full, and the balance on the other notes. All of the four hundred dollars was applied to the payment of the other notes, and a portion of the five hundred dollars. The other notes were delivered up to him, but according to his testimony, not till December, when he says: "I did not want to accept them, but he put them on the counter and I took them away."

Murphy, a witness on the part of the plaintiff and President of the bank, testified that "Nolan came in with either four hundred dollars or five hundred dollars, and he wanted to pay some money on this note; I asked why he did not pay his own notes; he then took one or two of his own notes;

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Kenny handed me his notes; I think it was two; I saw him take the notes at the time the money was paid; think it was in September or October; I don't know whether it was four hundred dollars or five hundred dollars he paid at the time; I cannot state whether it was the first or second payment the other notes were delivered." On cross-examination he said: "I think it was about the first of October; I recollect I was in the bank and saw Nolan paying once; all his notes were then handed, in my presence, to him."

There was other testimony tending to show that Murphy was not present when the second payment was made.

Counsel for plaintiff asked the Court to instruct the jury in reference to the first payment of four hundred dollars, "That if, at the time said payment was made by Nolan, it was paid on other notes and the notes given up to him at the time, then no part of said four hundred dollars could apply on this note. And that though Nolan did direct the application of this money to the payment of the note in question, yet that the holder did not so apply it, but applied it to the payment of other notes against Nolan, and he afterwards received it and acquiesced in such application, and took and received the notes upon which such application was made and paid. Then, and in that event, it would be a ratification of the application made by the creditor."

The Court refused to give the instruction, and this is the principal error relied on for a reversal of the judgment.

It is clear that the first portion of the proposed instruction, if it had stood alone, and there was testimony to warrant it, should have been given. Counsel object that there was no such testimony, but they overlook the testimony of Murphy, which at least tended to show the exact state of facts supposed.

The rule invoked in the second proposition of the instruction is thus stated by Mr. Greenleaf: "After a payment has been rightfully ascribed to one of several debts, it is not in

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the power of either party alone to change it. But if both parties consent, the ascription may be changed to another; in which case the indebtedment discharged by the former appropriation of the money is revived." (2 Greenl. Ev., Sec. 532 a.)

We think the instruction should have been given as asked. Judgment reversed and cause remanded for a new trial.

[No. 1962.]

JAMES LICK v. ALEXANDER AUSTIN; AND CHRISTIAN REIS AND GUSTAVE REIS v. ALEXANDER AUSTIN.

DOUBLE TAXATION.—If land subject to a mortgage is taxed, and the debt secured by the mortgage is also taxed, and the tax on the debt is paid by the mortgagee, the mortgagor cannot complain of double taxation.

ASSESSMENT FOR TAXES.—In assessing land for taxation, the Assessor cannot deduct from its value the amount due on mortgages by which it is incumbered, and call the remainder its assessed value.

IDEM.—*Query?* Is the statute allowing the Assessor to deduct from solvent debts due the taxpayer, the amount of his indebtedness, constitutional?

IDEM.—Choses in action are property subject to taxation, even when secured by mortgage.

APPEAL from the District Court of the Twelfth Judicial District, City and County of San Francisco.

The plaintiffs appealed.

The other facts are stated in the opinion.

Jackson Temple, for Appellants.

In the case of *The People v. McCreery*, the Court was asked to hold that the lender or mortgagee was subject to double taxation, because he was taxed the full amount of his mortgage, and the mortgagor the full amount of the property mortgaged. This Court intimated that the mortgagor was subjected to double taxation, but declined to pass

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upon the question, for the reason that the mortgagor alone could complain of it, and intimated also that there was no difference between the case of a mortgagor and any other debtor. We now present the case on the part of the mortgagor and debtor — the party which this Court in the *McCreery* case have said can complain of the assessment, if any one can.

It is double taxation.

This proposition can hardly be made plainer by argument or illustration. If property is taxed at its full value, and then the credit it gives the owner, one of its attributes, is also taxed, it is evident that there is double taxation somewhere. The common illustration is this: A. loans B. one hundred dollars. B. purchases a horse of C. for the money. A. is taxed one hundred dollars because B. owes it to him. B. is taxed one hundred dollars, the value of the horse. C. is taxed one hundred dollars for the money in his hands.

The injustice of this system of taxation is not noticed for the first time in California; the same conflict of interest has been carried on in other States, and will continue until a more just and enlightened system is adopted. In other States, however, where the power of the Legislature is not restricted as in California, the question has been solved by merely asserting the omnipotence of the Legislature, although the injustice of the system is acknowledged. (*People v. Worthington*, 21 Ill. 171; *The State v. Bronin*, 3 Zabriskie, 494; 4 Zabriskie, 255; 7 Hill, 268-286; 10 Mass. 514.)

These unjust laws would probably never have existed but for two ideas which, in my opinion, are radically erroneous. The mistake is made by Legislatures and by the Courts in considering a chose in action property, within the meaning of the Revenue Law. At first a chose in action was not considered property. It was not assignable. It is a mere right of action to recover something. It is not a right to the thing itself. Property, strictly, is ownership of the thing

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owned. A right of action is neither, and must not for a moment be confounded with a right to recover property which a party owns but is not possessed of. A right resting in contract is not a right to any specific thing; when money is loaned, the title to the property loaned passes to the borrower, who must convert the property in order to use it. It is apparent upon slight reflection that, if no chose in action were assessed or taxed, still all the wealth of the country would be taxed at its full value. All property possessing value in itself would be taxed, but the State would not tax property at its full value and the credit it gives also; or, in other words, would not tax property to one person, and the right of action to acquire the ownership of the same property, to another. And I think this system would distribute the burdens of government equally. But one other theory of taxation occurs to me which would distribute the burdens of taxation equally, and that is to tax every one in proportion to the value of his estate — for what he is worth. This is the theory of the *McCreery* case, as I understand it.

The question whether the amount of the incumbrance should be deducted from the value of the mortgaged property, or the total indebtedness of the taxpayer should be deducted from the aggregate valuation of his estate, is not very material. The result would be the same in either case, and the pleadings in this case are so framed as to meet either view.

The constitutional provision requires all property to be taxed at its value — that is to say, at its market value, for there is no other rule. The market value is what it will bring in its present condition. Whenever real estate which is mortgaged is sold, the vendor is required to have the mortgaged discharged, or the amount due upon the mortgage is invariably deducted from the purchase money, or else the property is sold for an amount less than it otherwise would be, just equal to the mortgage debt. The market value of

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the property, therefore, is obviously just the amount of the debt less than it otherwise would be.

Joseph M. Nougues, for Respondent.

The only provision of the Constitution supposed to bear upon the questions presented by the pleadings is found in section thirteen of Article XI, which provides that "taxation shall be equal and uniform throughout the State. All property in this State shall be taxed in proportion to its value, to be ascertained as directed by law." Turning to the statute, we find that in section five (Hittell's Digest, Sec. 6154) the property which is the subject of taxation is clearly defined, and the method of ascertaining its value for the purposes of taxation is directed. Among this property which is the subject of taxation is real estate; and no provision is made for deducting from the sum of its assessed value any indebtedness of the owner in possession. In Article 6289 of Hittell's Digest we find a provision, as follows:

"* * * In the case of a mortgage of real estate the mortgagor shall pay the taxes on the value of the property."

It must be apparent that under the clause of the Constitution to which we have referred the power to ascertain valuations for purposes of taxation is given to the Legislature — "ascertained as directed by law" is the phrase; that is to say, ascertained as directed by the statute. That is the only law meant, for the Constitution does not, in itself, attempt to point out the method by which such valuation shall be ascertained.

By the Court, RHODES, J.:

These actions were brought against the Tax Collector to enjoin the sale of certain real estate for the non-payment of

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taxes. It is alleged in the complaints that the real estate, when it was assessed, was subject to certain mortgages; that the Assessor was duly informed of that fact, but that he assessed the real estate without regard to, or making any deduction on account of, the mortgages; that applications were made to the Board of Equalization to reduce the assessment in each case, on account of the mortgages, but the applications were refused; and that in each case the plaintiff tendered to the Collector the amount that would be due for taxes on the valuation of the property, as made by the Assessor, less the amount of the mortgages upon the real estate, but the tender was refused. The demurrer to each complaint was sustained.

The question discussed by counsel is whether the facts alleged in the complaint show cases of double taxation. It is not alleged that the valuation, as made by the Assessor, of the several parcels of land, was in excess of their real value. It is not, therefore, double taxation, in view of the real value of the land. It is not alleged that the taxes on the mortgages were paid; but if they were paid by the respective mortgagors, they were so paid, not by virtue of any statutory requirements, but voluntarily, or by virtue of a contract, and, therefore, the mortgagors could not complain either of the law or its administration in that respect by the revenue officers. If the taxes on the mortgages were paid by the mortgagees, the mortgagors cannot complain that their land was subject to double taxation. It was held in *People v. McCreery*, 34 Cal. 482, that a solvent debt secured by a mortgage is property, within the meaning of the constitutional provision in respect to taxation, and as such was subject to taxation as the property of the mortgagees. It being the duty of the mortgagee to pay the taxes assessed upon the mortgage debt, the mortgagor, when assessed for the land, has no legal cause of complaint, that the mortgagee has paid, or is liable for the payment of, the taxes on the mortgage debt.

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The only plausible ground assumed by the plaintiffs, is that real estate subject to a mortgage should be assessed at its value, less the amount of the mortgaged debt, because the excess, if any, of the value of the land over the mortgage debt is the true value of the mortgagor's interest in the land. The Constitution and laws might have been so framed as to work that result, but they were not. The Constitution, section thirteen, Article XI, provides that all property shall be taxed in proportion to its value; and the revenue law provides that the Assessor shall ascertain the value of each parcel of property, etc.; but it is nowhere provided that the aggregate amount of the taxpayer's debts shall be deducted from the valuation of his property, nor that his indebtedness shall be deducted from the valuation of any of his property, except from his solvent debts. Whether that provision of the statute is valid is not a question in this case; but assuming that the statute in that respect is valid, it clearly shows that the solvent debts of the taxpayer are the only property from which he is permitted to deduct his indebtedness.

The plaintiffs have favored us with an able argument, to show that choses in action are not *property*, within the sense of that term, as used in section thirteen, Article XI, of the Constitution. By tracing the law back to an early day in the history of the common law, it will be found, as is claimed by the plaintiffs, that choses in action were not regarded as property; and not far from the same period it will be found that a mortgage was regarded as a conveyance of the legal title to real estate; but in the progress of commerce, aided by a more enlightened system of jurisprudence, both rules have been revised, and now a mortgage is regarded as a mere security for the payment of a debt; and a chose in action has been so much elevated above its former status that the mortgage debt is regarded as the principal thing and the mortgage scarcely more than its attendant shadow. Indeed, choses in action have assumed such dignity, that we now

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find cases in which a plea of payment is held to be sustained by proof of the assignment of a bill or promissory note. Had the plaintiffs succeeded in sustaining their position, it is not perceived how it would aid them in maintaining their point as to double taxation. If the mortgage debts are not property, and if, notwithstanding that, the mortgagees have been assessed for their nominal value, and have paid the taxes thereon, the mortgagors are no more affected thereby, and have no greater cause of complaint, than they would have had the mortgagees been taxed for the assumed value of something which never had any existence. *People v. Kohl*, 40 Cal. 127, is not in point, for there the owner of the land was taxed, in the same fiscal year, on the value of the land and on the purchase money — the promissory note -- received on the sale of the land.

In our opinion the real estate of the plaintiffs was properly assessed at its full value, without any regard to mortgages which were liens thereon, or without deducting the mortgage debts from the valuation of the real estate.

Judgment affirmed.

Mr. Chief Justice WALLACE, having been of counsel in the Court below, did not sit in this cause.

Mr. Justice CROCKETT did not express an opinion.

Points decided.

[No. 3,029.]

CHARLES B. DAVENPORT v. J. W. TURPIN, M. WILCOX, A. WILCOX, A. S. HAWLEY, AND SAMUEL POORMAN.

LEGAL TITLE NOT DIVESTED BY FORECLOSURE SALE.—A proceeding in foreclosure instituted against a mortgagor alone, cannot overreach or affect the title of a vendee of the mortgagor, vesting intermediate the delivery of the mortgage and the commencement of the action to foreclose it.

ACTION DISMISSED WITHOUT TRIAL.—An action merely commenced and then dismissed without trial, determines nothing and concludes no one.

ABANDONMENT OF LAND.—A party holding the legal title to land as the vendee of a mortgagor cannot divest himself of the title by abandonment, nor by any mere parol disclaimer.

ESTOPPEL IN PARS.—Where H., being the owner of the undivided half of a parcel of land, and believing that he was the owner of the other half, entered thereon, and M., who held the legal title to the other half, but believed the title was in H., withdrew from the possession; and it appeared that M. did not attempt to practice any deception upon H. in surrendering the possession, but H. was as well informed of the state of the title as M., and did not rely upon any admission or conduct of M.: *Held*, that the withdrawal of M. did not estop him from afterwards asserting his title at any time within the period fixed by the Statute of Limitations.

MORTGAGE MERGED IN DECREE.—A mortgage is merged in the decree of foreclosure, and a party who enters under the decree cannot be regarded as a mortgagee in possession.

MORTGAGEE IN POSSESSION BY AGREEMENT.—If a party holding a Sheriff's deed to land, executed under a foreclosure sale, enters upon it as mortgagee in possession, by agreement with the mortgagor, neither such agreement, nor the entry in pursuance of it, can affect the title of a vendee of the mortgagor acquired intermediate the delivery of the mortgage and the commencement of the action to foreclose it.

DEED AS MORTGAGE.—Under a plea of the general issue in ejectment, a deed absolute in form cannot be attacked on the ground that it was in fact intended to be a mortgage.

APPEAL from the District Court of the Sixth Judicial District, Sacramento County.

This was an action of ejectment to recover the undivided half of lot number three in the block bounded by I and J, and Front and Second streets, in the City of Sacramento.

Statement of Facts.

In August, 1849, John S. Fowler, the owner of the lot, conveyed an undivided half of it to Samuel Brannan. In September following Brannan leased to Fowler his half of the lot, together with the City Hotel thereon, for one year, at an annual rental of twenty-five thousand dollars, and at the same time executed to Brannan a mortgage upon his half of the property to secure the payment of the rent, which mortgage was duly recorded. On the 10th of June, 1850, Brannan sold and conveyed his interest in the lot to Talbot H. Green, and on the sixth of August following, sold and transferred the lease and mortgage to Green. During the term of the lease—from October 1st, 1849, to October 1st, 1850—Fowler carried on the business of a hotel in the building situated on the lot, and W. R. McCracken was his clerk. Three days after the lease had expired, the rent being in part unpaid, Green commenced an action to foreclose the mortgage. At that date McCracken had in his possession an unrecorded deed from Fowler of his interest in the premises, dated September 10th, 1850, taken as security for the payment of his services as clerk. He was not made a party defendant in the foreclosure suit. He had the deed recorded December 5th, 1850. Green obtained a judgment in the foreclosure suit for nine thousand six hundred and eighty-seven dollars, and at the sale thereunder he was the purchaser, bidding four thousand dollars, and receiving from the Sheriff a deed for Fowler's interest in the property. In April, 1851, Green deeded the lot to W. D. M. Howard; and in the ensuing month Howard commenced an action against Fowler and McCracken to recover possession of the premises. The defendants appeared and denied the title of the plaintiff in that action, but they afterwards surrendered the possession to Howard, and on motion of the plaintiff the action was dismissed. Howard soon afterwards made valuable improvements upon the property, and remained in possession until he died in 1856. The defendants are tenants of Howard's heirs. In

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1867 McCracken executed a deed conveying all his interest in the lot to the plaintiff Davenport, having taken no previous steps to assist his title.

This action was commenced in October, 1867. At the trial the defendants introduced evidence tending to prove the existence of a copartnership between Howard and Green in 1849-50, and that the mortgage assigned to Green by name was in fact an assignment to the firm.

The plaintiff had judgment and the defendants appealed.

This case was before the Supreme Court at the January Term, 1871, on appeal from a judgment in favor of the defendants. (See 41 Cal. 101.)

The other facts are stated in the opinion.

A. P. Catlin, for Appellants.

The delivery of possession was as effectual in equity as if in the suit then pending judgment had gone against McCracken. In that suit Howard might have recovered by proving just what McCracken stated the fact to be, connected with his deed from Fowler, namely: that his deed was only a mortgage to secure payment for his services as Fowler's clerk. Such a recovery would have been a good record estoppel against McCracken. Why, then, do not his acts, voluntarily executing the same thing, with full knowledge of the condition of his own title, constitute an estoppel *in pais*? This transaction has all the elements of an estoppel *in pais*. If McCracken had not abandoned his claim, and delivered over the property, Howard could have had the sale under the foreclosure set aside, the decree opened, McCracken made a party, and his interest sold. Howard was led to waive these steps, which would have extinguished McCracken's interest. Assuming the latter to have held the legal title, would it not be a fraud on his part to lie by until it was too late for Howard to avail himself of his remedy, and then assert his title? The act of McCracken in aban-

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doing the only claim which he said he had on the property, to wit: his claim for his services, in delivering possession to Howard, and in acquiescing therein until Howard's remedy was barred, was a continuing act by which the latter was placed in a worse position than he otherwise would have been. (*Bowman v. Cudworth*, 31 Cal. 148.) McCracken also put himself in a better position by acting as he did, because he thereby obtained a much longer lease of time in which he might redeem. Howard became a mortgagee in possession by consent of the mortgagor, and was entitled to retain such possession until satisfaction of the mortgage debt, or at least until a demand for an accounting and a refusal to account. A mortgagee in possession cannot be evicted by the mortgagor or any one claiming under him until the debt is paid. (*Waring v. Smythe*, 2 Barb. Ch. 135; *Friesche v. Kramer*, 16 Ohio, 125; *Walson v. Spence*, 20 Wend. 260; *Smith v. Smith*, 15 N. H. 55; *Dutton v. Warschauer*, 21 Cal. 609; *Skinner v. Buck*, 29 Cal. 253; 2 Halst. 178.)

W. S. Mesick, and Beatty & Denson, for Respondents.

There was no turpitude in this case, and therefore it does not come within the definition of estoppel *in pais*. (*Biddle Boggs v. Merced Mining Co.*, 14 Cal. 279; *Davis v. Davis*, 26 Cal. 40.)

The mortgage debt was merged in the judgment and sale. The relation of mortgagor and mortgagee no longer existed after the sale. Howard, in fact, had nothing to do with the mortgage. (*Naglee v. Macy*, 9 Cal. 426; *Johnson v. Sherman*, 15 Cal. 293; *Robinson v. Russell*, 24 Cal. 472; *Smith v. Shaw*, 16 Cal. 88; *Bolton v. Landers*, 27 Cal. 104.)

By the Court, WALLACE, C. J.:

Both parties attempt to deraign title to the undivided half of the premises in contest from John S. Fowler—the

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plaintiff, through the conveyance of Fowler, made to McCracken in September, 1850, recorded in December following, and the defendants, through the foreclosure of the mortgage to Brannan, made by Fowler, and recorded in September, 1849. The action to foreclose the mortgage was brought in October, 1850, after the delivery of the deed to McCracken. It was brought against Fowler alone, and the deed to McCracken was already of record before the decree of foreclosure was rendered, and, of course, before the Sheriff's sale thereunder was made. That the legal title thus vested in McCracken was not divested by the foreclosure sale and Sheriff's deed is clear and unquestionable, for it is settled in this State that a proceeding in foreclosure, instituted against a mortgagor alone, cannot overreach or affect the title of a vendee of the mortgagor vesting intermediate the delivery of the mortgage and the commencement of the action to foreclose it. (*Carpentier v. Williamson*, 25 Cal. 161, and cases there cited.)

But the defense mostly relied upon is of an equitable character. It is alleged that McCracken, the grantee of Fowler, surrendered possession to the holder of the Sheriff's deed in foreclosure, and so abandoned his claim, and that ever since then, during a period of many years, the possession has been held under the foreclosure title without challenge or objection. The principal facts upon this point are that the holder of the Sheriff's deed (being at the time the undisputed owner of the other undivided half of the premises) brought an action against Fowler and McCracken as being in possession, in which he sought to recover the entire premises. In that action both defendants appeared and filed an answer, in which they denied the title of the plaintiff there. No trial was had, nor judgment rendered upon the merits; but the action was dismissed, and the defendants

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defendants therefore established the existence of the copartnership between Howard and Green in 1849-50, and so proven that the mortgage assigned to Green by name was thus really assigned to Howard and Green, it would not have aided them in the defense.

It is lastly claimed that the judgment cannot be supported, because, as is said, it is clearly shown that the instrument from Fowler to McCracken, purporting to be a deed of conveyance, was, in fact, a conveyance by way of mortgage merely—and this point is much discussed by counsel on each side. I am of opinion, however, that it does not arise in the case. Under the general issue pleaded it was not competent to the defendants to attack the McCracken deed on the alleged ground that it was a mortgage, and for the purpose of defeating its otherwise legal effect as being an absolute deed of conveyance, which it purports upon its face to be. This point must be considered as settled here by the case of *Hughes v. Davis*, 40 Cal. 117. If the defendants had therefore had an interest in making it appear that the McCracken deed was a mortgage, they must have resorted to the equity side of the Court for that purpose; and applying there they must, of course, have averred it to be such in the pleading. We have searched in vain to find any such allegation in the defense here pleaded by these defendants. There is no attempt made in that direction; on the contrary, the distinct averment of the defendants is, that the McCracken deed was *a conveyance of the title* of Fowler, and was intended by the parties *as such*; a conveyance by which, as they allege, the title was vested in the grantee in secret trust for the grantor and to defraud the creditors of the grantor.

In view of this state of the pleadings, no question could be made as to whether or not the McCracken deed was intended as a mortgage.

Points decided.

I think the judgment and order denying a new trial must be affirmed, and it is so ordered.

Mr. Justice BELCHER did not express an opinion.

[No. 3,125.]

JOHN COWELL v. WM. H. MARTIN, O. F. GRAVES,
W. J. PATTERSON, AND JOHN BALLARD.

INJUNCTION RESTRAINING CONSTRUCTION OF WHARF.—A person who is the owner of, and in possession of a private wharf, is entitled to a perpetual injunction, restraining the construction of another wharf in front of his, which will cut his wharf off from the navigable waters of the bay, unless the persons constructing the same show a lawful right, proceeding from competent authority, to erect the proposed wharf.

PROCEEDINGS OF OFFICERS UNDER SPECIAL STATUTES.—When a statute prescribes the particular method in which a public officer, acting under a special authority, shall perform his duties, the mode is the measure of power.

BUILDING WHARVES BY HARBOR COMMISSIONERS.—The Board of State Harbor Commissioners, in letting a contract for the construction of a wharf, must pursue strictly the provisions of the statute. The advertisement for proposals must contain an accurate description of the work, the materials, and all the details.

IDEM.—Unless the statute is substantially complied with, the Commissioners acquire no jurisdiction to make a contract, and the same is void.

ENJOINING ERECTION OF WHARF IN SAN FRANCISCO.—A party attempting to erect a wharf in the navigable waters of the Bay of San Francisco, within or beyond the red line of 1851, under a contract with the Board of Harbor Commissioners, and in front of a private wharf, should be enjoined, at the suit of the owner of the private wharf, if the Commissioners, in letting the contract, have not followed substantially the provisions of the statute.

APPEAL from the District Court of the Twelfth Judicial District, City and County of San Francisco.

March 24th, 1848, T. M. Leavenworth, the then Alcalde of San Francisco, granted to Jacob D. Hoppe the one hundred vara lot described as follows:

“A lot of land containing one hundred varas square, in

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the vicinity of the Town of San Francisco, and bounded by the extension of the following streets: South by Union street, west by Battery street, north by Filbert street, and east by a line parallel with Battery street, one hundred varas eastward from the same."

On the 13th of June, 1849, Hoppe conveyed the same to the plaintiff. Said grant was included in the provisions of section two of the Act passed March 26th, 1851, entitled an Act to provide for the disposition of certain property in the State of California. The plaintiff purchased the same property from the State of California, at the sale made under the provisions of "An Act to provide for the sale of the interest of the State of California in the property within the water line front of the City of San Francisco," approved May 18th, 1853, and received a deed therefor November 2d, 1854, from the Board of Land Commissionera. The deed of the State described the property as follows:

"Commencing at the southwest corner of Front and Filbert streets; thence westerly along Filbert street two hundred and seventy-five feet to Battery street; thence at right angles southerly along Battery street, two hundred and seventy-five feet to Union street; thence at right angles easterly along Union street two hundred and seventy-five feet to Front street; thence at right angles northerly along Front street, two hundred and seventy-five feet to the place of beginning; being lots 373, 374, 375, 376, 377, 378, 391, 392, 393, 394, 395, and 396, in the block bounded by Filbert, Battery, Union, and Front streets, as subdivided by the Board of California Land Commissioners. Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, which are or may hereafter be the property of the State of California; and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, which may be due or become due to the

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State of California; and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in, or to the above described premises, and every part and parcel thereof, with the appurtenances as aforesaid. To have and to hold, all and singular, the above mentioned and described premises, together with the appurtenances as aforesaid, unto the said party of the second part, his heirs and assigns forever."

At the time of the commencement of this suit the plaintiff was in the possession of said premises, by his tenants, and this action was commenced in February, 1871, for the purpose of restraining a nuisance and injury to his reversionary estate.

In the year 1852, plaintiff erected on the premises a large warehouse for the storage of merchandise, and built a wharf thereon, which from time to time he enlarged and improved, of some eighty feet in width, and between two hundred and three hundred feet in length. From the year 1852 till the commencement of this suit, the plaintiff and his tenants had continuously used said wharf for docking and berthing vessels of all sizes, engaged in foreign and inter-State commerce, which came directly and without impediment up to said wharf, and were in the enjoyment of large sums of money therefrom for dockage and wharfage, and used said warehouse, in connection therewith, for the storage of merchandise. A large trade had been drawn to said wharf, and the yearly income from its receipts was in excess of five thousand dollars.

Front street has never been actually used or constructed as a street, highway, or thoroughfare, or extended northwardly beyond the southerly line of Union street. The Board of Supervisors of the city and county had not, up to the time of the commencement of this action, nor at any

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time since, ordered or directed any portion of Front street as projected northerly beyond the southerly line of Union street, to be extended or constructed as a thoroughfare, street, or highway; and when vessels were berthed at plaintiff's wharf they were at the foot of Front street, and occupying what would be a portion of Front street when extended northerly to Filbert street. The value of said wharf as a means of commerce is fifteen thousand dollars; and without an open frontage on the navigable waters of the Bay of San Francisco, would be valueless. Up to the time of the alleged wrongs complained of by plaintiff, his said wharf and premises had always enjoyed an open and unobstructed water frontage on said bay.

Prior to the commencement of this action, no compensation or tender or offer of compensation for depriving plaintiff of the beneficial use of his property had been made, or in any manner secured to him by any one.

The wharf which defendants in their answer aver they were about to construct, would, if built to Battery street, completely inclose and shut out the said wharf and premises of plaintiff from all communication by means of water craft, with the navigable waters of said bay.

On the 12th day of January, 1871, John J. Marks, Jasper O'Farrell, and Washington Bartlett, the State Harbor Commissioners, entered into a contract with the defendants to construct a wharf in the navigable waters of the bay, in front of the plaintiff's wharf. It was the construction of this wharf the plaintiff sought in this action to enjoin. The defendants, in their answer, relied on their contract with the State Harbor Commissioners as a defense. The Court below granted a perpetual injunction as to so much of the wharf proposed to be erected by the defendants as was within the red or water front line of the City and County of San Francisco, established by an Act of the Legislature of the State

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of California entitled "An Act to provide for the disposition of certain property of the State of California," passed March 26th, 1851.

The Court denied the injunction as to the construction of so much of said wharf as was outside of said red or water front line of 1851—that is to say, "as to so much of the same as surrounds the premises of plaintiff, commencing at the northerly line of Union street, running thence to the northerly line of Greenwich street, thence westerly at right angles along Greenwich street, to the easterly or red line of Battery street." From that portion of the judgment denying the injunction the plaintiff appealed.

The other facts are stated in the opinion.

Hambleton & Gordon, for Appellants.

The establishment of the permanent water front of the City of San Francisco by the Act of March 26th, 1851, was a contract between the public and the property owners, and could not be changed or destroyed, except by the assertion of the right of eminent domain, followed by legal condemnation and compensation. The deed from the State of California, whereby was merged in the plaintiff the leasehold and revisionary estate of these premises in fee simple absolute, operated by way of estoppel, to preclude the State from subsequently destroying their ordinary and beneficial use without compensation. As to the State of California, the plaintiff was a riparian proprietor, and as such, has a right (though his strict legal title is bounded by the premises conveyed) to the water as appurtenant thereto.

The fencing in of the premises of plaintiff by the contemplated pier, is such a taking of private property, without just compensation, as is prohibited by our Constitution; and the damage to arise from such a barrier is not consequential

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or casual to the property, but a necessary and direct confiscation of the same, and cannot be justified by the maxim of *damnum absque injuria*. The power to obstruct navigation or travel must be clearly given, and when not given or transcended, the obstruction will be a nuisance. (*Attorney General v. Stevens*, Saxton N. J. 369; *Newark Plank Road Co. v. Elmer*, 1 Stockton Ch. N. J. 754; *Attorney General v. Hudson River R. R. Co.*, 1 Stockton Ch. N. J. 527; *Fletcher v. The Auburn R. R. Co.*, 25 Wend. 463; *Hughes v. Providence R. Co.*, 2 Rhode Island, 493.)

The Court below having found so much of the projected pier as fell within the water front line illegal, and the contract therefor, *ultra vires*, should have restrained the whole proceeding, both by interlocutory order and final decree. The Court held a portion of this wharf, and the contract therefor, illegal, for the manifest reason that the Board had no power, within the water front line of 1851, for such purpose. But its relief should not have been stayed here. The resolutions of the Board and the advertisement look to but one entire contract, and the contract itself is indivisible and entire. Upon defendants' part, they were to build a pier of specified dimensions, and not otherwise. Upon the other part, the Board were to pay one single sum for the whole work. There was no such thing legally possible as an apportionment, either of the work or the relative price therefor. The whole contract must stand or fall together. (*El Dorado County v. Davidson*, 30 Cal. 523.)

Baron v. Mayor of Baltimore, 2 American Jurist, 203, is very similar in character to the litigation in hand, and the defense, so far as pleading State authorization, was identical. The owner of a wharf, in the harbor of Baltimore, sued the city authorities, acting under their charter, for shoaling the water around his wharf, by reason of introducing into the bay a large amount of drainage from their public works. The Court held that his easement in the navigable waters

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adjacent, was property of which he could not be deprived, without just compensation; that he was entitled of right to the benefits flowing from contiguity or adjacency to navigable waters—to pass and repass with vessels, and receive compensation for dockage, etc. (*Brainbridge v. Sherlock*, 29 Ind. 372; *Ryan v. Brown*, 18 Mich. 196; *City of Chicago v. Laffin*, 49 Ill. 172; *Frink v. Lawrence*, 20 Conn. 121; *Murray v. Sharp*, 1 Bosworth, 556; *Crenshaw v. Slate River Co.*, 6 Randolph, Va. 245; *Gardner v. Trustees, etc.*, 2 Johns. Ch. 162; *Morgan v. King*, 35 N. Y. 454; *Brazos R. R. Co. v. Ferris*, 26 Texas, 602.)

Thomas P. Ryan, for Respondents.

By the last section of the Act of 1851, it is provided that “nothing in this Act shall be construed as a surrender by the State of its right to regulate the construction of wharves or other improvements, so that they shall not interfere with the shipping and commercial interests of the Bay and Harbor of San Francisco.” It seems to us that under that provision the city retained the right to build wharves, not only running at right angles with the city front, but parallel with it, and that to build a wharf on the outer seventy-five feet and parallel or longitudinal along the water front would be no violation of the faith of the State.

Appellant is not a riparian owner. “A riparian proprietor is one who owns land bordering upon a watercourse.” (2 *Bouvier’s Law Dictionary*, 447.)

To maintain his pretension to riparian rights, appellant must show: First—that he is the owner of land. Second—That said land borders upon a watercourse. Third—That said watercourse is a fresh water stream. Fourth—That the description of said land contained in the grant, or deed thereof, entitles him to riparian rights. (3 *Kent’s Com.* 411 et seq.; *Pollard v. Hagan*, 3 How. 212; *Child v.*

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Starr, 4 Hill N. Y. 372; *Dana v. Jackson Street Wharf Co.*, 31 Cal. 120; *Eldridge v. Cowell*, 4 Cal. 80.)

Grants to land below high-water mark, being made by a trustee for the public, should be construed strictly as against the grantee. (3 Kent's Com. 432; *Storer v. Freeman*, 6 Mass. 438; *Cortelyou v. Van Brandt*, 2 Johns. 357.)

The right of a grantor to limit his grantee to certain boundaries, and to cut him off from all riparian rights, is established by numerous authorities. (3 Kent's Com. 434; *Den v. Wright*, Peters C. C. R. 64; *Dunlap v. Stetson*, 4 Mason, 349; *Child v. Starr*, 4 Hill N. Y. 372.)

Appellant is estopped by the description in his deeds from denying the existence of "Front street." (*Parker v. Smith*, 17 Mass 411; *Hammond v. McLachlan*, 1 Sand. N. Y. 328.)

Acts complained of are not *damnum absque injuria*.

"Any proper exercise of the powers of government which does not directly encroach upon the property of an individual, or disturb him in its possession or enjoyment, will not entitle him to compensation, or give him a right of action." (*Zimmerman v. Union Canal Co.*, 1 W. & S. 346; *Shrunk v. Schuylkill Navigation Co.*, 14 S. & R. 71; *Monongahela Navigation v. Coons*, 6 W. & S. 101; *Davidson v. Boston & Maine R. R. Co.*, 3 Cush. 91; *Gould v. Hudson River R. R. Co.*, 12 Barb. 616; *Gould v. Hudson River R. R. Co.*, 6 N. Y., Selden, 522; *Radcliff v. Mayor, etc., of Brooklyn*, 4 N. Y., Comstock, 195; *Murray v. Menifee*, 20 Ark. 561; *Hooker v. New Haven and Northampton Co.*, 14 Conn. 146.)

By the Court, CROCKETT, J.:

The plaintiff, being the owner in possession of a private wharf, which would be rendered useless and valueless by the erection of the proposed wharf or landing place by the defendants, in the navigable waters of the bay, is entitled to a perpetual injunction, unless the defendants have shown a

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lawful right, derived from competent authority, to proceed with the contemplated work. The only authority which they produce is a contract entered into by them with the Board of State Harbor Commissioners, whereby they were employed to construct the proposed wharf. It is incumbent on the defendants to show affirmatively, not only that the Board had competent authority to order the work to be done, but that in awarding the contract for doing it they have substantially pursued the statute. Section nine of the Act of April 24th, 1863 (Stats. 1863, p. 406), organizing the Board of State Harbor Commissioners, requires that, in inviting bids for work to be done in the erection of wharves, "the advertisement for proposals shall contain an accurate description of the work to be done, with a full description of the materials to be used, and such other details as may be necessary to a correct understanding of the entire work to be performed." In the advertisement under which this contract was let, the Commissioners did not pursue the statute in several important particulars. It did not contain an accurate description of the work to be done, nor any description of the materials to be used, nor did the contract conform to the advertisement. On the contrary, a portion of the wharf, for which proposals were invited, was to be sixty-eight feet wide, whereas in the contract this portion was to be only forty feet wide. These departures from the requirements of the statute are fatal to the contract. The Commissioners derived their authority wholly from the statute, and the mode prescribed for performing their duties in letting contracts, is the measure of their power. They acquired no jurisdiction to enter into a contract for the performance of this work until they had, substantially at least, complied with the statute in the mode of inviting proposals. The provision requiring the advertisement to contain an accurate description of the work to be done, and a full description of the materials to be used, was intended not only to promote com-

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petition in bidding, but also to prevent collusion and an abuse of their authority by the Commissioners. It was intended to be not merely directory and to be disregarded by the Commissioners at their option, but is an imperative requirement, without a compliance with which they had no power or jurisdiction to let the contract, which was therefore void for want of authority to enter into it. It is well settled in this State and elsewhere, that when a statute prescribes the particular method in which a public officer, acting under a special authority, shall perform his duties, the mode is the measure of the power.

It is said, however, that this is a matter which does not concern the plaintiff, and that no person, except the parties to the contract or the State, can object to the contract on this ground. But this is a mistake. When one justifies what would otherwise be a trespass or a nuisance, under a license, permission, or power, derived from competent authority, it is incumbent on him to show affirmatively: first, that the authority was competent; second, that the license or power was duly granted. If he fails to show either, his defense fails. The defendants having failed to show any valid authority for erecting the wharf, the injunction was improperly dissolved as to any portion of the proposed work, and should have been made perpetual as to the whole.

Judgment and order dissolving the injunction reversed and cause remanded, with an order to the Court below to modify its judgment in accordance with this opinion.

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[No. 2,517.]

J. W. HILL v. GEORGE KIDD.

BETS ON ELECTIONS — Wagers upon the result of public elections are illegal and void, upon grounds of public policy.

ACTION ON CONTRACT OF WAGER.—An action to obtain affirmative relief, upon a contract of wager made upon the result of a public election, cannot be maintained.

APPEAL from the District Court of the Fifth Judicial District, County of San Joaquin.

The facts are stated in the opinion.

Hall & Montgomery, for Appellant.

Byers & Elliott, for Respondent.

By the Court, **BELCHER, J.:**

This is an action to recover the sum of one thousand dollars, alleged to be in the hands of the defendant, as the stakeholder of a wager made between the plaintiff and one McMullen upon the result of the Presidential election of 1868, in the State of California.

The wager was made on the 31st day of October, 1868, and the agreement was that each party should deposit — and each party did then deposit — in the hands of the defendant, the sum of one thousand dollars, to be held by him as stakeholder until after the Presidential election of that year, when, if it should be found that Seymour had received more votes in the State of California than Grant for the office of President of the United States, the stakes were to be paid to McMullen; and if Grant had received more votes than Seymour, the stakes were to be paid to the plaintiff.

The election was held on the third day of November, and Grant received the greater number of votes.

Upon demand, after the result of the election was made

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known, the defendant paid to the plaintiff one thousand dollars of the stakes, but refused to pay him the other one thousand dollars.

The defendant demurred to the complaint, upon the ground that it did not state facts sufficient to constitute a cause of action, and the Court overruled the demurrer. The defendant then answered, and, admitting that the wager was made substantially as stated in the complaint, alleged, among other things, that McMullen died on the 13th day of November, 1868, and that thereafter, upon demand, the defendant paid to his legal representatives the one thousand dollars deposited by him.

The answer was stricken out by the Court, on motion of plaintiff, "upon the ground that the event had occurred and been decided before notice of repudiation was served upon the defendant."

Judgment was then ordered, and entered for the plaintiff upon the complaint.

It is settled by all the cases where the question has arisen, so far as we know, that wagers upon the result of public elections are illegal and void, upon grounds of public policy.

It is equally well settled that no action in *affirmance* of an illegal contract can be maintained. When parties make such contracts they must rely upon the good faith of those with whom they deal for their performance, and that failing they are denied all redress. "The Courts," as was said in *Martin v. Wade*, 37 Cal. 168, "refusing to defile their hands with these transactions, deny the parties all relief in respect to the contract, or anything incidental to it, or growing out of it."

The case of *Johnston v. Russell*, 37 Cal. 670, is not authority for the plaintiff. In that case it was held that one may *disaffirm* a wagering contract at any time before the event in respect to which the wager is made has happened, and the result became known, but not afterwards. If he disaffirms he may recover back his stake; but "after

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the money has been lost and won, and the result is generally known, neither party ought to be heard in a Court of justice." (See, also, *Rust v. Goff*, 9 Cow: 169.)

The judgment is reversed, and the Court below is directed to enter an order dismissing the complaint.

Mr. Justice RHODES did not express an opinion.

[No. 2,486.]

GEORGE SCHMITT v. PEDRO GIOVANARI.

CONFIRMATION OF MEXICAN GRANT.—A confirmation of a grant of land made by Mexico, under the provisions of the Act of Congress of March 3d, 1851, necessarily requires a confirmee, and, although the confirmation may inure in law or in equity to the benefit of other persons than the confirmee, yet the person whose claim is confirmed is the confirmee.

SALE OF LAND UNDER SPANISH LAW.—By the Spanish law, the vendor of land was under the implied obligation to make his sale and conveyance effective, and a title afterwards acquired by him inured to the benefit of the vendee.

PERFECT TITLE ACQUIRED BY MEXICAN GRANT.—A grant of land by Mexico did not convey a perfect title, unless there was a segregation and a judicial delivery of the possession of the quantity of land granted.

PASSING TITLE TO MEXICAN LANDS.—The Spanish word "cedo" was the ordinary word used in Mexican conveyances to pass title to lands.

CONVEYANCE OF LAND UNDER MEXICAN LAW.—By the Mexican law, before the acquisition of California by the United States, it was not necessary that an instrument conveying land should express a consideration in order to pass the title of the vendor.

CONSTRUING DECREE CONFIRMING MEXICAN GRANT.—The construction given by the Supreme Court of the United States to its decree confirming a Mexican grant of land in California, is of binding authority in the State Courts.

EFFECT OF DECREE CONFIRMING MEXICAN GRANT.—A decree of a Court of the United States confirming a Mexican grant to one who had purchased from the original grantee, and which declared that the confirmation should be without prejudice to the legal representatives of the original grantee, and should inure to the benefit of any person who owned the land by any title derived from the original grantee, gives a

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perfect title to a purchaser from the conferee, who bought from him before he presented his petition for a confirmation to the Commissioners appointed under the Act of Congress of March 3d, 1851, as against one who bought from him after the confirmation.

PURCHASER FROM GRANTEE OF MEXICAN GRANT.—One who bought land included in a Mexican grant before the presentation of a petition for its confirmation, became entitled to have a confirmation of his claim, but if he neglected to apply for the same, and suffered his grantor to present a petition and have a confirmation made to such grantor, he must, in order to obtain the benefit of the confirmation, so far as the legal title is concerned, rely on the estoppel springing from his vendor's deed, unless there is a clause in the decree of confirmation giving him the benefit of the same.

APPEAL from the District Court of the Seventh Judicial District, Sonoma County.

The defendant recovered judgment in the Court below, and the plaintiff appealed.

The other facts are stated in the opinion.

William D. Bliss, for Appellant.

The grant made by Governor Alvarado to Peña was of a specific tract of land, with defined boundaries. Under that grant and the decree of the Departmental Assembly of the Californias, and the Treaty of Guadalupe Hidalgo, Peña and those holding under him acquired a perfect title in fee simple to all the land within those boundaries, including the premises in controversy. (*Minturn v. Brower*, 24 Cal. 644.)

The deed from Peña to Vallejo conveyed the title to the entire rancho.

The deed from Vallejo to Andres Hoepfner, dated August 12th, 1846, was sufficient, under the law then in force in California, to transfer the title to the land and the right of possession. (*Havens v. Dale*, 18 Cal. 359; *Merle v. Matthews*, 26 Cal. 455.)

As the deed was made to Hoepfner after his marriage, and for a valuable consideration, the land was acquired by onerous title, and became a part of the common property under the Mexican law. (*Fuller v. Ferguson*, 26 Cal. 546.)

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Upon the death of Andres Hoepfner, intestate and without issue, the whole title to the land passed to his surviving wife. (Statute of Husband and Wife, 1850, Sec. 11.)

The deed from Anna Hoepfner to James R. Travers, and the conveyance from Travers to plaintiff, conveyed to plaintiff one undivided half of the rancho, and entitled him to a recovery against the defendant. (*Collier v. Corbett*, 15 Cal. 183; *Stark v. Barrett*, 15 Cal. 361.)

B. S. Brooks, for Respondent.

The grant was an inchoate one, and the fee remained in the Government.

The instrument purporting to be a conveyance from Vallejo to Hoepfner, did not convey the title. On this point the ancient common law of England and that of Spain were almost identical. (See *Schott v. Burton*, 13 Barb. 173, and cases there cited.)

No authority can be cited to show that under the Spanish law the instrument would operate as a deed. (Febrero Novissimo 1, Tit. VI, Cap. 2; De los Instrumentos, ib., Lib. 2, Tit. IV, Cap. 2, Sec. 3; *Hoen v. Simmons*, 1 Cal. 121; Domat's Civil Law, Cushing's ed., Vol. 1, Art. 145.)

Hoepfner did not present his claim for confirmation, and so far as he was concerned the land became a part of the public domain. The whole grant was confirmed to Vallejo.

The object of the decree of the Supreme Court of the United States was to approve so much of the decree of the District Court as confirmed the claim presented, and to strike out the proviso added to it in the District Court, as matter over which the Board of Land Commissioners had no jurisdiction, and which they had often said could not be adjudicated in these proceedings. (*United States v. Sutter*, 21 How. S. C. R. 170; *Townsend v. Greely*, 5 Wallace, 535; *United States v. Covillaud*, 1 Black, 341.)

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But the proviso could not, if it had any effect, inure to the benefit of the plaintiff. It went upon the supposed inefficacy of the deed from Peña to Vallejo, because Peña could not deed what he had not, and his deed did not convey the after-acquired title.

We believe it to be also established that the decree of confirmation vests the legal fee in the confirmee, and in him alone; that he is entitled to the possession of the land, and that any rights which others may claim through the same source of title must be asserted in a Court of equity; and that all claims of an imperfect or inchoate character, founded on Spanish or Mexican grants, not presented for confirmation, are extinguished. (*Estrada v. Murphy*, 19 Cal. 272; *Touchard v. Crow*, 20 Cal. 160; *Castro v. Hendricks*, 23 How. U. S. 441.)

By the Court, RHODES, J.:

Action of ejectment to recover possession of a portion of the Agua Caliente Rancho, which was granted to Lazaro Peña on the 13th day of July, 1840, by the Governor of California. On the 14th of December, 1839, Peña executed to M. G. Vallejo a formal conveyance, purporting to convey to him the rancho; and on the 12th of August, 1846, Vallejo executed and delivered to Andres Hoeppner an instrument in writing, which the plaintiff relies upon as a conveyance of the rancho. Hoeppner was then married to Anna Hoeppner, but between 1855 and 1858 he died intestate and without issue. Anna Hoeppner, December 21st, 1858, conveyed all her right, title, and interest in the rancho to Travers; and the plaintiff claims title to the undivided half of the rancho under that deed. Vallejo filed with the Board of Land Commissioners his petition for the confirmation of his claim to the rancho, and such proceedings were had in the matter that the claim was confirmed by the District Court in 1859;

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and in 1862 the decree was affirmed by the Supreme Court. The difference between the language of the decree of the District Court and the mandate of the Supreme Court will hereafter be noticed. It may, however, be remarked here, that a confirmation of a claim or title under the provisions of the Act of Congress of March 3d, 1851, necessarily requires a confirnee. Vallejo was the only petitioner; and although the confirmation may inure in law or in equity to the benefit of other persons, either by the terms of the decree of the District Court or by operation of law, the decree confirmed the claim of Vallejo, and he will be regarded as the confirnee. The defendants deraign title through two deeds executed by Vallejo in 1863 and 1864; and they also claim through another deed, which it is unnecessary now to notice. The defendants had judgment, and the plaintiff appeals from the judgment and the order denying a new trial.

The date of the conveyance of Peña to Vallejo is 1839, while that of the grant is 1840. In confirming the grant the Supreme Court treated the date — 1839 — as a clerical error for 1840, and that must have been the view also of the District Court, for the claim of a petitioner will not be confirmed unless he show a *prima facie* title; and we are of the opinion that it must be regarded as a clerical error, and that 1840 was the true date of the execution of the conveyance.

If, however, we are wrong in this, then the operation of the deed, which was very full and formal, caused the title, when the grant was afterwards made to Peña, to inure to the benefit of Vallejo. Under the Spanish law the vendor was under the implied obligation to make his sale and conveyance effective. He was bound to defend the title, if notified of a suit brought against the purchaser, and if unsuccessful in this he was required to indemnify the purchaser. (See Schmidt, Civ. Law of Spain and Mex., 135; *Fuero Juzgo*. Law 9, Book 5, Title 4; *Partidas*, 5, Law 32, Title 5.)

It is insisted by the plaintiff that the grant to Peña con-

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veyed a perfect title, and reliance is placed on the authority of *Minturn v. Brower*, 24 Cal. 644, to show that such title needed no confirmation under the Act of Congress of March 3d, 1851, and was unaffected by the confirmation to Vallejo. In that case it *was conceded* by the parties that a perfect title had been granted to Peralta, but we have not found in any subsequent case, in which that doctrine has been invoked, that the grantee acquired a perfect title. In this case it does not appear that the amount of land which was granted did not exceed the area within the boundaries mentioned, and the contrary will be inferred from the decree of the Departmental Assembly, by which the grant is approved "to the extent of two and a half leagues in length by a quarter of a league in width." A segregation and a judicial delivery of the possession of the quantity of land granted became essential to the vesting of a perfect title.

The plaintiff claims that the confirmation, whether it be regarded as a confirmation of the title granted by the Mexican Government, or only a confirmation of the claim of Vallejo, inured to the benefit of the vendees of Vallejo; and he relies not only upon the terms of the decree of the District Court, but also upon the rule in *Estrada v. Murphy*, 19 Cal. 272; *Clark v. Lockwood*, 21 Cal. 222; *Wilson v. Castro*, 31 Cal. 438, and other cases, that the confirmation of a claim under the provisions of the Act of Congress of March 3d, 1851, inures to the benefit of the grantees of the confirmee, so far as the legal title is concerned. In each of the cases referred to, in which that rule was applied, the conveyance was executed intermediate the filing of the petition and the confirmation; and in such case it is immaterial whether the deed conveyed the land or only the right, title, and interest of the confirmee; for in either form it transferred all the rights of the confirmee in or to the land — one of which was the right to have a confirmation of his claim or title, a segregation of the land which had been granted, and a release or

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conveyance on the part of the United States. But where, as in this case, the conveyance was prior to the filing of the petition, other rules would be applicable. The Act of 1851 (Sec. 13) provides that all lands, the claims to which shall not have been presented to the Commissioners within two years from the date of the Act, shall be deemed held and considered as a part of the public domain of the United States; and as the claim of the vendee would be barred by his failure to present his claim as provided by the Act, he must, in order to obtain the benefit of the confirmation of the claim of his vendor, so far as the legal title is concerned, rely on the estoppel springing from his deed. It is unnecessary, however, for the purposes of this case, to determine whether the instrument executed by Vallejo to Hoeppner was, under the law in force at the time of its execution, sufficient to create an estoppel of such a character that the after-acquired title of Vallejo would feed the estoppel, and thus inure to the benefit of his vendees; for, if that instrument amounts to a conveyance, the decree of confirmation of the District Court settles the question as to the transmission of the title.

That instrument, as translated from the Spanish language, is as follows:

“He who subscribes; certifies that having bought lawfully and in due form of the citizen, Lazaro Peña, the land of Agua Caliente, to which the preceding approval of the Departmental Assembly of Alta California refers, I cede and transfer all the rights which I have to the said land, in favor of Don Andres Hoeppner, who will make the use of it which most suits him. And for the necessary ends and uses I give this in Sonoma, the 12th of August, 1846.

“M. G. VALLEJO.”

“Witnesses: A. A. HENDERSON, Asst. Surgeon U. S. ship Portsmouth; JACOB PLESE.”

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The instrument was indorsed upon the decree of the Departmental Assembly, and delivered to Hoeppner. It was proven that its consideration was an agreement on the part of Hoeppner to teach music to the family of Vallejo, but that he failed to fully perform his agreement. There is no evidence in the record that Vallejo delivered the possession of the rancho to Hoeppner, except what is found in the testimony of Dr. Leavenworth, who purchased of Hoeppner a portion of the rancho, in 1848, or the early part of 1849. He testified that when he went to see the land, after his purchase, he found Anna Hoeppner, the wife of Andres Hoeppner, in possession.

In *Mulford v. Le Franc*, 26 Cal. 108, it was held that the word "cedo"—here translated "I cede"—was the ordinary word used in Mexican conveyances to pass title to lands; and we see no reason to doubt the correctness of that decision.

It is also objected that the instrument is insufficient as a conveyance, because it does not express a consideration, but we hold, upon the authority of *Havens v. Dale*, 18 Cal. 366, and *Merle v. Matthews*, 26 Cal. 455, that it is not essential that the instrument, intended as a conveyance, should express the consideration or the price of the land. This instrument was before the Supreme Court of the United States, in *Steinbach v. Stewart*, 11 Wall. 566, and the Court pronounced it a conveyance of the title to the rancho. The larger portion of the instruments intended as conveyances, which were executed in California about the date of this instrument, were as devoid of form as this one, and in holding that this instrument amounts to a conveyance, we only follow the current of the authorities in this State.

The decree of confirmation of the District Court contains the following proviso: "Provided that this confirmation of the above land to the said M. G. Vallejo shall be without prejudice to the legal representative of Lazaro Peña, the original grantee, or whoever may be entitled to said lands

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under him; and said confirmation to said Vallejo shall inure to the benefit of any person or persons who may own or be entitled to the said land by any title, either at law or in equity, derived from the original grantee by deed, devise, descent, or otherwise."

The decree of the Supreme Court is "that the decree of the said District Court in this cause, in so far as it confirms the original grant, be and the same is hereby affirmed." In *Steinbach v. Stewart*, supra, it was argued on the part of the plaintiff that the proviso in the decree of the District Court was annulled by the decree of the Supreme Court; but it was held that no portion of the decree of the District Court was reversed, and that that decree was left in force to its full extent. The construction given to those decrees in that case is of binding authority here; and we accordingly hold that the confirmation inured to the benefit of those holding title under or through the conveyance executed by Vallejo to Hoepfner, and vested in them the legal title to the rancho.

Judgment reversed, and cause remanded for a new trial.

[No. 2,061.]

JAMES REGAN v. OWEN McMAHON, THEODORA HIGUERA DE SANCHEZ, WIDOW OF FRANCISCO SANCHEZ, DECEASED, AND THIRTY OTHERS.

APPEAL FROM INTERLOCUTORY DECREE IN PARTITION.—An appeal from a preliminary decree in partition must be taken within sixty days from the entry of the decree in the minutes of the Court.

ERRORS OF PRELIMINARY DECREE NOT TO BE REVIEWED ON APPEAL FROM FINAL DECREE.—Supposed errors in the preliminary decree in partition cannot be reviewed through an appeal taken from the final decree.

MOTION FOR NEW TRIAL IN PARTITION.—A motion for a new trial may be resorted to for the purpose of correcting the errors in a preliminary decree of partition; but it must be made within the proper time.

Opinion of the Court — WALLACE, C. J.

APPEAL from the District Court of the Twelfth Judicial District, City and County of San Francisco.

The facts are stated in the opinion.

[This case was before the Supreme Court at the July Term, 1871, upon an appeal by defendant Sharp. See 41 Cal. 679.]

E. A. Lawrence, for Appellant.

Hoge & Harmon, for Respondents.

By the Court, WALLACE, C. J.:

This action was brought to obtain partition of the Rancho San Pedro.

The parties having appeared in the Court below, such proceedings were had that on the 27th day of December, 1869, a decree was entered determining their several rights and directing a partition to be made. Referees having been appointed to make partition accordingly, and their report in that behalf being confirmed, it was afterward, and on the 16th day of December, 1870, decreed that the partition by them made and reported to the Court be held valid and effectual forever. It appears that on the 14th day of December, 1870, a statement on motion for a new trial was filed by some of the parties who are the appellants here, and the statement having been settled, the motion for a new trial was denied on the 3d day of April, 1871, and on the second day of June following this appeal was taken from the decree of 1869, that of 1870, and from the order denying the new trial.

First — The statute (1864, p. 223) provides for a direct appeal from such a decree as that of 1869, in partition cases. Another statute, however, limits the time within which an appeal may be taken to the period of sixty days from the entry of the decree in the minutes of the Court. (Practice

Opinion of the Court — Wallace, C. J.

Act, Sec. 336, Subd. 3.) The appeal in this case taken from the decree of 1869, not having been taken within the prescribed time, cannot be entertained.

Second — Nor can the supposed errors of the decree of 1869 be reviewed through the appeal taken from that of 1870. The former decree, being in itself a distinct subject of appeal, is taken out of the category of orders examinable upon appeal from the final judgment. In *McCourtney v. Fortune*, 42 Cal. 387, we used this language: "Upon appeal from a final judgment, an order made in the cause which is itself by the statute made the subject of a distinct appeal, cannot be reviewed."

Third — The motion for a new trial was correctly denied. We have no doubt that such a motion, if made within proper time, may be resorted to for the purpose of correcting the errors in a preliminary decree of partition. The statute authorizing an appeal from such a decree, it is true, does not expressly provide for such a motion, neither does it expressly provide for a statement on appeal, but it was unhesitatingly assumed here, and we think correctly assumed, in *Gates v. Salmon*, 28 Cal. 320, that the appellant might upon an appeal in such case, annex to the record a statement on appeal. It might, and generally would be difficult, if not impossible, for him to present the errors complained of, unless he were permitted to resort to such a statement or to a bill of exceptions, which might under some circumstances perform the office of a statement on appeal. We think, upon the same reasoning, that he should be allowed to move for a new trial — it would often be impossible to effectually pursue the appeal which the statute (1864, p. 323) has allowed in such cases as this, except by a resort to a motion in the Court below for a new trial — supported in the usual way. Accident or surprise may have occurred, irregularity intervened, or material evidence been newly discovered. The purpose of the statute was to place the interlocutory decree beyond

Points decided.

attack or question, after the lapse of sixty days from its entry, if no step had been taken in the meantime to assail it; its aim was to save to parties in partition suits the costs, often so ruinous, of a repartition necessitated by reason of some error of the preliminary decree, ascertained only after partition actually had. That a party would have the right to move for a new trial at some stage of the cause will not be controverted; that the proceedings of the Court had anterior to and resulting in the interlocutory decree, by which the respective interests of the parties are to be judicially ascertained, are, at some point of time, examinable through a motion for a new trial, is undeniable. If, after partition actually had and confirmed by final decree, such a motion may still be availed of to agitate questions lying behind, and having their determination in the interlocutory decree, then the sole purpose of the statute is seen to be defeated, and the particular mischief against which it was directed still remains. But the motion for a new trial made in this instance was clearly too late, and the right to make it was waived by the neglect of the parties.

The appeal taken from the decree of 1869 must be dismissed, and the decree of 1870 and the order denying a new trial must be affirmed, and it is so ordered.

Mr. Justice NILES did not express an opinion.

[No. 2,805.]

CHARLES J. KING, JAMES F. CROSETT, AND SAMUEL FOSTER v. B. J. WISE.

CONTRACT ESTABLISHING TRUST RELATION.—If one party agrees to unite with two others in the purchase of land, each to furnish one third the purchase money, and such party to conduct the negotiations, and buy the land for the least possible price, he assumes a position of trust towards his associates, and is bound to exercise the utmost good faith towards them, and share with them all the profits of the bargain.

Statement of Facts.

FRAUD OF ONE JOINT PURCHASER OF LAND TOWARDS HIS ASSOCIATES.—If A. agrees to unite with B. and C. in the joint purchase of a tract of land, each to furnish one third the price, and A. to conduct the negotiations, and buy the land at the least possible price, and A. represents to them that the land costs six hundred and fifty dollars per acre, when it only costs five hundred dollars per acre, and a purchase is made at the former sum, and A. pockets the difference between the two prices, B. and C. are entitled to recover from A. the full sum they paid beyond what they would have paid at five hundred dollars per acre.

ITEM.—Before bringing an action to recover such difference, B. and C. need not offer to rescind the contract of purchase, and an affirmation of the contract by them, after they discover the fraud practiced on them by A., does not destroy their right of action for the damage sustained.

RECOURSEMENT OF DAMAGES.—A claim of A. and B. to recoup damages from C., by way of set-off against the promissory note of A., B., and D., held by C., cannot be sustained, nor can such claim for damages be set off against an aliquot part of the sum due on the note.

APPEAL from the District Court of the Twelfth Judicial District, City and County of San Francisco.

On the 23d of March, 1869, the defendant proposed to plaintiffs Crosett and King to unite with them in the purchase of a tract of thirty-six acres of land in Alameda County. They agreed to unite with him in the purchase, and each was to furnish one third of the purchase money, and the defendant was to conduct the negotiations, and buy the land at the least price for which it could be purchased. Defendant represented to Crosett and King that J. Hardy owned the land, and that it could not be purchased for less than six hundred and fifty dollars per acre, and that the terms of purchase were five hundred dollars down and six thousand dollars in ten days, and the balance in periodical installments of about two thousand dollars each. On the same day Crosett and King paid defendant three hundred and thirty-three and thirty-three one hundredths dollars, being two thirds of the five hundred dollars. One Tyler was the real owner of the land, and Hardy had no interest in the matter, but acted as defendant's agent and trustee; and defendant, on the said twenty-third of March, gave

Statement of Facts.

Hardy the five hundred dollars, who, on the same day, paid it to Tyler, and took from Tyler a contract to sell the land at five hundred dollars per acre, payable in periodical installments, of which the first was three thousand dollars, payable ten days thereafter. Four days thereafter defendant, without consultation with Crosett or King, sold his interest in the transaction to plaintiff Foster.

The suit was first commenced in the name of Crosett and King, but Foster was, afterwards, by consent, made a joint plaintiff.

On the third day of April thereafter Crosett, King, and Foster, by direction of defendant, executed with Hardy a contract for the purchase of the land, at six hundred and fifty dollars per acre, and paid him four thousand dollars as an installment of the purchase money, being two thirds of six thousand dollars; and Wise and Foster also paid Hardy two thousand dollars, on the same account, and Hardy paid one half, to wit, three thousand dollars, to Tyler, and took from Tyler a contract for the purchase of the land at five hundred dollars per acre, payable thereafter in installments, and paid the remaining three thousand dollars to defendant. On the thirty-first of May thereafter, Hardy assigned to Crosett, King, and Foster, his contract with Tyler, and Crosett, King, and Foster, jointly, assumed to pay the obligations of Hardy to Tyler. At the same time, Crosett, King, and Foster executed to Hardy four promissory notes for the aggregate sum of two thousand four hundred dollars, payable on the respective days of August 3d and December 3d, 1869, and the 3d day of April and 3d day of August, 1870. The notes were intended to represent the unpaid difference between the price Hardy agreed to pay Tyler for the land and that which the plaintiffs agreed to pay Hardy. The plaintiffs knew when they made the notes that they were for the benefit of Wise, and that Wise would receive the money paid on them. Hardy immediately assigned the notes to the

Argument for Appellants.

defendant Wise. When Crosett & King executed the contract for the purchase of the land, and paid the money to Hardy, they were ignorant of the fraud Wise was practicing on them. When this action was commenced, the plaintiffs had not returned the land to either Hardy or defendant, or offered to rescind the contract of purchase. Foster was cognizant of all of Wise's acts, and was not deceived.

The complaint set out the above facts, and asked for judgment for the damages the plaintiffs had sustained by the deceit practiced on them by Wise, and that the plaintiffs might recoup and set off, against the promissory notes, the amount of the judgment they might recover, to the extent of the face of the notes, and that the defendant be compelled to surrender the promissory notes to be canceled. The defendant was insolvent.

The defendant had judgment in the Court below, and the plaintiffs, King and Crosett, appealed.

Gray & Haven, for Appellants.

The plaintiffs had the right to affirm the contract, even after the discovery of the fraud, and to recover damages for the tort; or they could have rescinded the contract and recovered back the money they had paid. (*Dorr v. Fisher*, 1 Cush. 274; *Kimball v. Cunningham*, 4 Mass. 505; *Heastings v. M'Gee*, Supreme Court, Penn., Pacific Law Reporter, Vol. 1, No. 10; *Whitney v. Allaire*, 4 Denio R. 557; *Earl v. Bull*, 15 Cal. 421; *Whitney v. Allaire*, 1 New York R. 312; Sedgwick on Damages, 4th ed., 296; *Lawrence v. Montgomery*, 37 Cal. 183; 2 Kent's Com. 480, Note a; *Boorman v. Johnston*, 12 Wend. R. 556; *Waring v. Mason*, 18 Wend. R. 425; *Morgan v. Skidmore*, 55 Barb. S. C. R. 263; *Short v. Stevenson*, 63 Penn. R.; Am. Law Reg., Vol. 19, p. 67; *Allaire v. Whitney*, 1 Hill, 484; *Ahrens v. Adler*, 33 Cal. 616.)

The defendant has received two thirds of five thousand

Argument for Respondent.

four hundred dollars — *i. e.*, three thousand six hundred dollars, being one hundred dollars per acre on thirty-six acres, in violation of the trust reposed in him by King and Crosett, which trust he accepted, and hence the plaintiffs are to recover that sum from him. (Dunlap's Paley on Agency, pp. 33, 34, 36; *Fawcett v. Whitehouse*, 1 Russell and Mylne, 132; *Alvarez v. Brannan*, 7 Cal. 503; *Rea v. Suryhne*, 39 Cal. 579; 1 Hilliard on Torts, 6.)

The measure of damages which plaintiff is entitled to recover, is the difference between the price of the land purchased by the defendant and the price paid by the plaintiff — *i. e.*, three thousand six hundred dollars. (Sedgwick on Damages, 4th ed., pp. 559, 560; *Van Epps v. Harrison*, 5 Hill, N. Y. 63; *Monell v. Coldon*, 13 Johns. N. Y. 395; *Short v. Stevenson*, *supra*.)

The notes being a portion of the fruits of the fraud, and the defendant being insolvent, the plaintiffs have a right to have them canceled, on the ground that if defendant should bring suit on the notes plaintiffs could recoup in that suit the amount of any judgment which they are entitled to recover for the tort alleged, to the extent of the value of the notes. Such is the prayer of plaintiffs' complaint. To support the last proposition, we cite: *Van Epps v. Harrison*, 5 Hill R. 65; Waterman on Recoupment, Secs. 416, 422-428; California Practice Act, Sec. 47; *Earl v. Bull*, 15 Cal. 421; *Dennis v. Belt*, 30 Cal. 252; Sedgwick on Damages, 4th ed., p. 560.

J. M. Seawell, for Respondent.

The assertion by the defendant, that the land cost six hundred and fifty dollars per acre, is not actionable. The most that could be claimed is that it was an assertion that the land was worth six hundred and fifty dollars per acre.

The complaint does not state that the land was not worth that sum. (*Sandford v. Hardy*, 23 Wend. 269; *Taylor v.*

Fleet, 4 Wend. R. 103; *G. L. R. R. Co. v. Magnay*, 25 Beav. 595.)

The measure of damages in an action for deceit is the difference between the real and represented values of the property sold. (Sedgwick on Measure of Damages, 5th ed., 655; id. 2d ed., 559; *Whitney v. Alain*, 1 Comstock's R. 312; *Stiles v. White*, 11 Metcalf's R. 356; *Carr v. Moore*, 41 N. H. R. 131; *Page v. Parker*, 40 N. H. R. 47; *Bamly v. Alexander*, 19 Iowa R. 162; *Gates v. Reynolds*, 13 Iowa R. 1; *Hahn v. Cumings*, 3 Iowa R. 583; *Cary v. Grumans*, 4 Hill, 627; *Sherwood v. Sutton*, 5 Mason's R. 1; *Lamson v. Marin*, 8 Barb. R. 9; *Jones v. Bartlett*, 1 Term R. 136.)

The plaintiffs, at the time of acquiring from Hardy the contract for the land and executing the notes, had full knowledge of the facts constituting the alleged fraud. Neither have they offered to restore the consideration. (1 Story's Equity Jurisprudence, Sec. 203 a; *Irwin v. Kirkpatrick*, 3 Eng. Law and Eq. R. 37; *Bronson v. Willis*, 4 Selden's R. 182; 2 Parsons on Contracts, 277, 279; *Saratoga and Schenectady R. R. Co. v. Ross*, 24 Wend. 25; *Parsons v. Hughes*, 9 Paige's R. 594.)

By the Court, NILES, J.:

By the terms of the original agreement between the defendant and the plaintiffs, Crosett and King, the defendant was to purchase the land for the least price for which it could be purchased, and for the benefit of the three parties concerned.

By this agreement the defendant assumed a position of trust, and in that relation was bound to exercise the utmost good faith towards his associates in the transaction. It is one of the plainest principles of equity that an agent cannot make a profit out of his principal in the business of his

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agency. The defendant, as associate of the plaintiffs in the proposed purchase, and entrusted by them with its management, was held to the same good faith, and could make no bargain, the benefits of which his co-associates would not be entitled to share. It is not mentioned whether the price which the defendant induced the plaintiffs to pay was more or less than the value of the property purchased. The plaintiffs were entitled to share the profits of a good bargain, as they would have been bound to share the losses of a bad one.

It is claimed by the defendant that the failure of the plaintiffs to offer a rescission of the contract and a restoration of the land, and their affirmance of the contract after the discovery of the fraud, was a bar to their recovery in this action.

The rule, which requires a rescission of the contract upon the discovery of fraud, has no application to this case. The contest is not between a vendor, who has made fraudulent misrepresentations in regard to the property sold, and the vendee, who has been misled and injured by the fraud. The plaintiffs may have been willing to purchase the land at the price they paid, or at even a larger price, and may not wish to rescind the sale; but they are none the less entitled to hold the defendant to a strict observance of the trust confided to him, and to enjoy their proportionate benefit of any bargain he may have made. They do not complain that they were induced to pay more than the land was worth, but that they would have paid less if the defendant had been faithful to his trust. By their affirmance of the contract, after knowledge of the fraud, they lost any right they may have had to rescind the sale and recover back the purchase money; but it was not a release of their right of action against the defendant for damages resulting from his fraudulent acts. We are of the opinion that the plaintiffs should have judgment upon the facts as found by the Court.

Opinion of the Court — NILES, J.

It is not difficult to arrive at the exact measure of damages which plaintiffs are entitled to recover. The actual value of the land is not an element in the estimate. The plaintiffs should have, from the defendant, the difference between the price of the land purchased by him for the plaintiffs and the amount paid by the plaintiffs.

The claim of the plaintiffs, Crosett and King, to set off the amount of the judgment in this action against the promissory note held by the defendant, cannot be sustained. These were joint notes of the plaintiffs, Crosett, King, and Foster. It is well settled that joint and separate debts cannot be set off against each other at law, and I can see no good reason for the application of a different rule to a claim for damages which is the subject of recoupment. Nor do sufficient facts appear to call for the equitable interposition of the Court. If the liabilities were in reality mutual, as if Foster were a merely nominal party to the notes or surety upon them, the insolvency of the defendant might be a ground for equitable relief. But Foster is a bona fide debtor of the defendant upon the notes, and we do not see upon what recognized principle we can apportion to the plaintiffs, Crosett and King, by way of recoupment, an aliquot part of the joint indebtedness.

Judgment reversed, with instructions to the Court below to render judgment for the plaintiffs, Crosett and King, in accordance with this opinion.

Opinion of the Court — NILES, J.

[No. 2,510.]

R. S. THOMPSON v. N. CONNOLLY ET AL.

APPEAL FROM NEW TRIAL ORDER.—An appeal from an order denying or granting a new trial, must be taken within sixty days from the time the order was made.

STATEMENT ON APPEAL FROM JUDGMENT.—A statement on motion for a new trial cannot be considered on an appeal from the judgment, without some agreement of the parties that it shall be so used.

CONSENT TO ERROR.—A party will not be heard to complain of an error which was the result of his deliberate and formal consent.

STIPULATION AS TO HEARING MOTION FOR NEW TRIAL.—Parties may stipulate that the Court pass on a motion for a new trial before the statement is engrossed, and the engrossed statement agreed to or certified as correct.

APPEAL from the District Court of the Fourth Judicial District, City and County of San Francisco.

Ejectment for a lot of land in San Francisco. The plaintiff recovered judgment.

The other facts are stated in the opinion.

B. S. Brooks, for Appellants.

John R. Jarboe and *Elisha Cook*, for Respondent.

By the Court, **NILES, J.:**

The order overruling the defendants' motion for a new trial was made November 29th, 1869. On the 10th February, 1870, the defendants filed and served their notice of appeal from this order, and from the judgment, and upon the same day filed an undertaking upon that appeal. On the 25th June, 1870, the defendants gave notice of a motion to vacate the order of November 29th, 1869, and to bring the motion for a new trial to a hearing, upon the ground "that it was irregular to dispose of the said motion for a new trial before the statement was engrossed and settled." This motion was based upon affidavits showing, among other

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things, that on the 5th November, 1869, the counsel for plaintiff and defendants entered into the following stipulation:

“In this case it is stipulated that the settled statement on motion for a new trial shall consist of the matters proposed to be inserted therein by the defendants’ amendments to plaintiff’s proposed statement on motion for new trial herein, and by what is left of the matters proposed to be inserted therein by plaintiff — said proposed statement, after striking out the matters proposed to be stricken therefrom by defendants’ said amendments, and that on engrossing said statement said matters shall be copied therein with the same force and effect as if set out in said statement and amendments; that said statement need not be engrossed until after argument on motion for new trial; that on the said argument on motion for new trial all the matters herein stipulated as constituting the settled statement may be referred to as if such statement were engrossed; and that in printing the transcript on appeal by either party, all said matters shall be printed in said transcript, and that said transcript shall be stipulated to contain the statement on motion for new trial on which the case was argued on motion for new trial.”

It further appeared that the order of November 29th, 1869, was made upon submission of the case by counsel, in pursuance of the foregoing stipulation, and before the statement had been engrossed or certified.

On the 7th July, 1870, the Court made an order overruling this last motion, and from this order, also, the defendants’ appeal.

First — The appeal from the order overruling the motion for a new trial was taken too late and cannot be considered.

Second — The transcript contains no statement on appeal from the judgment. A statement on motion for a new trial cannot be considered as a statement on appeal without some

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agreement of the parties that it shall be so used. (*Cosgrove v. Howland*, 24 Cal. 457.) On appeal from the judgment, therefore, we can look at the judgment roll only. Upon this no errors are assigned or disclosed by the record.

Third — The action of the Court in overruling the defendants' motion for a new trial before the statement was engrossed, and the engrossed statement agreed to, or certified as correct, would have been error in the absence of any stipulation between the parties. But the stipulation of November 5th, 1869, was not only a direct waiver of the engrossment before the hearing of the motion, but rendered certain the matters which the engrossed statement should contain. It is not necessary to consider what would have been the effect of the omission to engross the statement before the hearing of the motion for a new trial, upon an appeal from the order denying the motion. It is sufficient to say that a party will not be heard to complain of an error which was the result of his deliberate and formal consent. Upon this ground we think the motion to vacate the order denying a new trial was properly refused.

Judgment affirmed.

[No. 2,194.]

THE PEOPLE OF THE STATE OF CALIFORNIA v.
TERESA KEANE.

IDENTITY AND OWNERSHIP OF STOLEN GOODS.—Where, on the trial of K. for the larceny of certain articles of clothing, M. testified that she had lost the articles mentioned in the indictment, and that the stolen goods were hers, and B. testified that while tracking K. on the morning of the theft, he had found a bundle containing the articles named in the indictment: *Held*, that the evidence sufficiently established the ownership and identity of the stolen property.

APPEAL from the County Court of Santa Clara County.

Opinion of the Court — Wallace, C. J.

The indictment charges the defendant with the larceny of one silk dress, one merino dress, three pairs of lace curtains, three table spoons, one carving knife, steel, and fork; five table knives, and a certain number of pieces of money of the value of seventy-nine dollars and twenty-five cents, the property of Robert McPhearson and Jennie McPhearson, his wife. At the trial, a policeman named Bellows testified that on the morning the theft was committed, he met the defendant on the alameda coming from towards Santa Clara, where the McPhearsons live, and where the larceny was committed, and while tracking her back he found a bundle containing the articles named in the indictment.

The defendant was convicted, and the people appealed from an order granting her a new trial.

The other facts are stated in the opinion.

J. L. Love, Attorney General, for Appellants.

Bodley & Rankin, for Respondent.

By the Court, WALLACE, C. J.:

The prisoner was tried for the crime of grand larceny and a verdict of guilty found by the jury. Upon her motion, the Court set aside the verdict and granted her a new trial, on the ground that there was no evidence that the goods referred to by the witness Bellow were stolen, or were the goods of McPhearson or wife, and that in the evidence as given there was no identification of the stolen goods. Mrs. McPhearson, however, testified distinctly that the stolen goods were hers. She also testified that the goods she lost by the larceny were those mentioned in the indictment. It also distinctly appears in the statement that the bundle of articles which Bellow found "contained the articles named in the indictment," except the merino dress, which Mrs. McPhearson wore at the trial.

Statement of Facts.

It is not claimed that there was any conflict in the evidence — indeed, there was no evidence offered on the part of the accused; the case went to the jury entirely upon the evidence given on behalf of the people, and it sufficiently established the ownership and identity of the stolen goods.

The order granting the prisoner a new trial is therefore reversed and the cause remanded, with directions to the Court below to proceed to judgment upon the verdict.

Mr. Justice **BELCHER** did not participate in this opinion.

[No. 2,474.]

**IN THE MATTER OF THE ESTATE OF JOHN
BOLAND, DECEASED.**

HOMESTEAD UNDER PROBATE ACT.— If there has been no homestead created during the existence of the community, by a compliance with the Homestead Act, the widow can acquire no homestead interest in the property, under sections one hundred and twenty-one, one hundred and twenty-four, and one hundred and twenty-five of the Probate Act, until an order of the Probate Court, or Judge, has been made setting it apart to her.

ISSUE.— If a widow who is entitled to a homestead, under sections one hundred and twenty-one, one hundred and twenty-four, and one hundred and twenty-five of the Probate Act, again marries before an order of the Probate Court is made setting apart such homestead, she loses, by her marriage, the right to such homestead.

APPEAL from the Probate Court of the City and County of San Francisco.

On the 24th day of October, 1860, John Boland purchased a lot in San Francisco, with money, his separate property. He resided on the same with his wife and daughter, Margaret Boland, and died on the 3d day of February, 1861. No homestead was claimed under the provisions of the Homestead Act. Boland left a will, which was probated, by which he devised all his property to his

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daughter, and nominated John McNamara, the executor of his estate. The daughter was born in 1851. After Boland's death the widow and daughter continued to reside on the lot until November, 1868, when the daughter married one Brackett, and left to reside elsewhere with her husband. In 1862 the widow married Charles W. Lane, and she and said Lane have continued to reside on the premises.

In 1869 Boland's former wife, Mrs. Lane, applied to the Probate Court for an order setting apart the premises as a homestead, under the one hundred and twenty-first, one hundred and twenty-fourth, and one hundred and twenty-fifth sections of the Probate Act. The executor and the daughter opposed the application, and asked that the property be distributed to the daughter under the will. The Court granted the application, and the executor appealed.

Frank F. Taylor, for Appellant.

Unless a person is the head of a family the right of homestead cannot exist. As the primary object of the law was the protection of the family, when the family ceases to exist, the reason for the privilege is gone. (*McQuade v. Whaley*, 31 Cal. 534.)

The theory of the respondent is that an order of the Court should be made now for a state of affairs — widowhood — which existed nine years ago.

W. C. Burnett, for Respondent.

The one hundred and twenty-fourth section of the Probate Act says that the homestead shall be set apart to "the widow or child." It is a right *personal* to the widow. The law does not say that a marriage shall deprive her of any homestead right.

Opinion of the Court — NILES, J.

By the Court, NILES, J.:

Conceding, for the purpose of this case, that the property in question could be set apart to the widow, under the provisions of the Probate Act, notwithstanding the will of John Boland, it is evident that the widow could acquire no homestead interest in the property until an order of the Probate Court, or Judge, was made, setting it apart to her. It differs from the case of a homestead created during the existence of the community, by a compliance with the provisions of the Homestead Act, the title to which vests in the wife upon the death of the husband, by right of survivorship. In the latter case the property becomes the property of the widow by operation of law. In the case presented it could only become hers by the decree of the Court or Judge. If there could be any doubt at what time the right of the widow attaches to the land, and withdraws it from administration, it is settled by the provisions of section one hundred and twenty-five of the Probate Act: "When property shall have been set apart for the use of the family, in accordance with the provisions of this chapter, if the deceased shall have left a widow and no minor child, such property shall be the property of the widow. If he shall have also a minor child or children, the one half of such property shall belong to the widow, and the remainder to the child," etc.

The right of Margaret Lane to have a homestead set apart to her from the estate of her former husband, John Boland, must, therefore, be determined from the facts as they existed on the 3d of January, 1870, when the order of the Probate Court was made. This was nearly nine years after the death of John Boland. Margaret, his former widow, had been for over seven years married to her present husband, Lane. The only child of John and Margaret Boland had married, and was no longer under her mother's charge or control.

Sections one hundred and twenty-one, one hundred and

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twenty-four, and one hundred and twenty-five of the Probate Act, under which the order was made, make provision for but two classes — the *widow* and the *family* of the deceased.

Margaret Lane occupied neither of these positions. Her widowhood terminated by her marriage with Charles Lane, and she then became a member of his family. Whatever right she may have once had to have the property set apart for her use, she lost when she lost the *status* upon which the right depended.

Order and judgment reversed, and cause remanded.

[No. 2,750.]

HENRY REEVE v. J. M. KENNEDY AND D. M. DELMAS.

PURCHASER AT SHERIFF'S SALE.—In a complaint to set aside an execution sale, made under a judgment, on account of matters extrinsic to the judgment, at which the purchaser was not a party to the judgment, if there is no averment that the purchaser had notice of such extrinsic facts, he will be deemed a purchaser without notice.

INNOCENT PURCHASER AT SHERIFF'S SALE.—A purchaser for value at a judicial sale, who is not the judgment creditor, without notice of extrinsic facts which are relied upon to impeach the judgment under which the sale was made, is not affected by such facts.

IDEM.—A purchaser at a judicial sale is bound to inquire at his peril, whether it sufficiently appears on the face of the record that the Court had jurisdiction to render the judgment, and whether there is a valid execution; but beyond that he need not go, and subject to such inquiry his purchase will be protected, even though the judgment is afterwards reversed for error.

TITLE ACQUIRED AT JUDICIAL SALE.—A title acquired at a judicial sale by a bona fide purchaser, without notice, cannot be overthrown by subsequent proof that the judgment was obtained by fraud, or that the record which showed due service on the defendant was in fact false.

EVIDENCE TO CONTRADICT RECORD.—In an action to impeach the title to property acquired by an innocent purchaser at judicial sale, the plaintiff cannot contradict the record, by proof that there was in fact no service of summons, or that the judgment was obtained by fraud.

Statement of Facts.

COLLATERAL ATTACK ON JUDGMENT.—Against a stranger who is an innocent purchaser at a judicial sale, without notice, the judgment is no more open to attack than if offered in evidence in a collateral action.

VOID JUDGMENT OR EXECUTION.—A judgment is not void because it is for a larger sum than the proofs justify, nor is an execution void because it is for a larger sum than the judgment authorized.

SALE UNDER ERRONEOUS JUDGMENT.—If a judgment for a tax enforces a lien on real estate, not only for the tax on the land, but also for the owner's tax on personal property, and the latter is erroneous, a sale made under the judgment is not void, nor can it for that reason be impeached in an action brought to set it aside.

LIS PENDENS.—In an action to enforce the lien of a tax by a sale of the property, is not necessary to file a *lis pendens*.

LIEN OF TAX.—The lien of a tax extends back to the assessment, and the assessment creates a lien which is not extinguished until the tax is paid.

TAXES MATTERS OF PUBLIC RECORD.—The assessment of taxes and the lien which it creates, are matters of public record, of which all purchasers are bound to take notice, and the purchaser of land is bound at his peril to see that taxes have been paid.

APPEAL from the District Court of the Third Judicial District, Santa Clara County.

The complaint averred that the plaintiff owned a tract of land containing eight acres; that he purchased it of C. F. M. Dinnicke, on the 6th day of February, 1868; that prior to said sixth day of February, and while said Dinnicke owned the land, there was assessed to said Dinnicke a tax on said land and personal property, as State and county tax, sixty-eight dollars and fifty-one cents — of which sum, sixty-two dollars and forty cents were levied on the land; that on the 3d day of January, 1868, an action was commenced against said Dinnicke and the land and improvements, for the collection of said tax; that the Auditor failed to post notices that the delinquent tax list had been deposited with the District Attorney, and also failed to publish notice of such fact, nor did he file any affidavit of such posting or publishing; and that the Sheriff did not make any service of summons, either by posting a copy on the Court House door or delivering a copy to the person in possession of the

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land, or by serving on Dinnicke; that the District Court gave judgment against Dinnicke and the land and improvements. The judgment and summons and return were attached to the complaint as an exhibit, and the return of the Sheriff showed service of the summons on the 24th day of October, 1868, by posting a copy on the premises. The return showed that no service was made on Dinnicke. The complaint averred that the Auditor and Sheriff failed to post and make service, for the purpose of defrauding Dinnicke and those who might succeed to his interest in the premises. An execution on the judgment was issued and delivered to the Sheriff, on the 28th day of May, 1869, and the Sheriff sold the land to J. M. Kennedy, on the 3d day of July, 1869, and on the 6th day of January, 1870, executed to him a deed, and the plaintiff did not know that the taxes were delinquent, or had not been paid, until January 15th, 1870, and did not know that the taxes were a lien on the property, and did not know of the pendency of any action.

There was prayer that the deed to Kennedy be canceled and declared null and void, etc. No *lis pendens* was filed.

The defendant Delmas, who had acquired an interest in the property under the tax sale, demurred to the complaint, and the Court sustained the demurrer, and dismissed the complaint for want of equity. The plaintiff appealed.

The other facts are stated in the opinion.

Moore & Laine, and S. F. Leib, for Appellant.

In order to give a Court jurisdiction there must be service of process in some way. (Blackwell on Tax Titles, 211, 3d ed.)

If a judgment is void a sale thereunder is void. (*Smith v. The State*, 13 S. & M. 140; *Hastings v. Burning Moscow*, 2 Nev. 105; *Webster v. Reid*, 11 Howard, 432.)

Proceedings to enforce liens or proceedings *in rem* form no

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exception to the general rule. The only difference is in the mode of giving notice.

It is insisted that the records of Courts of superior jurisdiction import absolute verity, and that their judgments cannot be impeached unless want of jurisdiction appears upon their face. The case of *Hahn v. Kelly*, 34 Cal. 402, and *Reily v. Lancaster*, 39 Cal. 354, are relied on to support this doctrine. The last named case is but a reiteration of the leading case of *Hahn v. Kelly*, supra, and need not be specially considered. The case of *Hahn v. Kelly* has, in our judgment, been by the bar and the lower Courts much misapprehended. The Judges who pronounced that opinion were extremely careful to limit the doctrine as above set forth to the case of a collateral attack; and further, the Court was equally careful to define what was meant by such an attack, viz: where the judgment was offered as evidence in some other proceeding. The Court in that case, did hold that in a collateral attack, even if the judgment roll, outside of the judgment itself, showed a want of service, and the judgment recited service that it would be conclusively presumed that a proper service had in fact been made, but proof of it had not found its way into the judgment roll or had been lost therefrom. But the Judge who pronounced the opinion and decision of the Court in that case says in the very outset that "any judgment of any Court is absolutely void if it appear that there was a want of jurisdiction in either respect." (34 Cal. 402.)

Again, at page four hundred and twenty-seven, it is said by Justice Sawyer that "if the record in fact does not speak the truth, the only remedy of the party is to attack it directly on appeal, or in the Court of which it is a record, if under the circumstances it can be there corrected, or by some direct proceeding known to the law to vacate it."

We think this is a direct attack on the judgment. The time for appeal had passed before the plaintiff had any

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knowledge of the tax or tax suit. (Story's Eq. Pl. Secs. 426-428; *Sanford v. Head*, 6 Cal. 298; *Bryant v. Williams*, 21 Iowa, 329; *Hawley v. Blackman*, 20 Iowa, 188.) The plaintiff was an innocent purchaser.

The twenty-seventh section of the Civil Practice Act provides that in an action affecting the title to real property there must be a *lis pendens* filed to charge a purchaser *pendente lite* with constructive notice; that he is to be charged with such notice only after the *lis pendens* is actually filed.

A tax proceeding is one affecting title to real property, and of all actions known to our system, one most needing a notice to the outside world, as the proceedings are to a great extent summary, and valuable estates are liable to be sold for very small sums of money. In this case property worth from five thousand dollars to six thousand dollars has been sold for less than one hundred dollars taxes. (*Bensley v. Mountain Lake Water Company*, 13 Cal. 319; *Richardson v. White*, 18 Cal. 102.) The Supreme Court of Michigan, in *Clark v. Crane*, 5 Mich. 154, says that "what the law requires to be done for the protection of the taxpayer is mandatory, and cannot be regarded as directory merely." A similar rule has been recognized in Illinois and other States. (*Marsh v. Chestnut*, 14 Ill. 223; *Wheeler v. Chicago*, 24 Ill. 108.) The rule is stated by Chief Justice Shaw, in *Terry v. Milburry*, 21 Pick. 67. See also, Cooley on Constitutional Limitations, pp. 74 to 78, and notes.

D. M. Delmas, for Respondent.

The judgment is not void. It is valid until set aside or reversed. This proposition would seem too plain to need argument or authority. The judgment in this case is that of a superior Court. It emanates from the highest tribunal of original jurisdiction known in this State. Such judgments are never void unless they are so upon their face. When not

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void upon their face they are at most only erroneous; but notwithstanding the error, they are absolutely binding, and so remain until set aside or reversed. (*Creppe v. Durden*, 1 Smith L. Cases, Am. note, 998.) A judgment is never void for want of jurisdiction unless the want of jurisdiction appears affirmatively in the record. (*Hahn v. Kelly*, 34 Cal.; *Grignon's Lessee v. Astor*, 2 How. 319; *Voorhees v. U. S. Bank*, 10 Peters, 449.) The District Court, which foreclosed the tax lien, expressly found, in its decree, that summons in that case was served as required by law. Equity has no jurisdiction to set aside that decree on the ground that it was erroneous, or unsupported by the evidence on which it was based, or that it can be shown by extrinsic proof that the summons had not in fact been served. The District Court, having jurisdiction of the subject matter of the action, was competent and had authority to decide whether its jurisdiction had attached upon the parties before it. When it had decided that question, its judgment upon that matter was binding and conclusive. (*Sheldon v. Wright*, 1 Seld. 497, 514; *Borden v. State*, 6 English, 519, 544; *Cox v. Thomas*, 9 Gratt. 323; *Richards v. Skiff*, 8 Ohio St., 446, 453; *The Evansville R. R. Co. v. Evansville*, 15 Ind. 395, 421.)

The estoppel of a judgment is absolutely conclusive on all matters which could and ought to have been considered and passed upon in rendering it, and cannot be disproved or defeated, either at law or in equity, by proof that the law was mistaken by the Court, or misapprehended and misapplied by the jury. (*Vaughn v. Johnson*, 1 Stock. Ch. 173; 2 Smith Lead. Cases, 673; *Burgess v. Lovengood*, 2 Jones Eq. 457; *De Reimer v. Chattillon*, 4 Johns. Ch. 85.)

Courts of equity do not interpose to correct the errors or irregularities of Courts of law. (*Gregory v. Ford*, 14 Cal. 138, 142.)

No case for equitable cognizance is made out by the bill, because: First — It is not alleged that Dinnicke, the personal

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defendant in the tax suit, did not have notice of the action. Second—It is conceded that the taxes for which the judgment was rendered were, at the time, legally due and owing by the defendants in that action. Third—The defendants herein are bona fide purchasers under the judgment.

Even where a person is allowed to file a bill to be relieved against a judgment against him, on the ground that he has a valid defense to the action and had no opportunity to defend, the bill must not only show that he was not legally notified, but also, that he had, in fact, no knowledge of the proceedings. (1 Smith L. C. 1023; *Cowan v. Bradwood*, 1 M. & G. 882; *Reynolds v. Fenton*, 3 C. B. 187.)

The defendants are bona fide purchasers at the Sheriff's sale. Against such purchasers equity never lends its aid.

The maxim is as old as chancery itself. Since the rule was authoritatively thus laid down, two hundred years ago, in *Bassett v. Neworthy*, Rep. Temp. Finch, 102, it may safely be asserted that no departure from it has ever been sanctioned by the decision of any respectable tribunal. (Story's Eq. Pl. Sec. 604; Lead. Cases in Eq., Vol. 2, pp. 72, 73; *Simms v. Slocum*, 3 Cranch, 300; *Gray v. Brignardello*, 1 Wallace, 627; *Parker's Heirs v. Anderson*, 5 T. B. Monroe, 445.)

By the Court, CROCKETT, J.:

It is not averred in the complaint that the defendant Kennedy had any actual notice of the extrinsic facts relied upon to impeach the judgment on which the execution issued, under which he purchased the property in controversy. He is, therefore, to be deemed a purchaser without notice of these facts. The plaintiff assails the judgment, and claims that it is void on two grounds, viz: First, by reason of facts appearing on the face of the record which, it is alleged, show

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that the Court had no jurisdiction to render the judgment; second, because there was in fact no service of the summons, and no appearance by the defendant; and also, because the judgment was fraudulently obtained. The last point will be first considered. The defendant being a purchaser for value, at a judicial sale, without notice of the extrinsic facts, which are relied upon to impeach the judgment, cannot be affected thereby. No principle is better settled than that a purchaser at a judicial sale, without notice, under proceedings regular on their face, and had in a Court of competent jurisdiction, is not affected by any mere error of the Court, for which the judgment might be reversed on appeal, nor for any secret vice in the judgment, not appearing on the face of the record, and which can be made to appear only by the production of extrinsic evidence. He is bound at his peril to inquire whether it sufficiently appears on the face of the record that the Court had jurisdiction to render the judgment, and whether there is a valid execution. But nothing more is required of him. Unless the plaintiff in the action be also the purchaser at the sale, the latter will not be affected by any mere error of the Court, even though the judgment be afterwards reversed for such error; nor can his rights be impaired by any secret vice in the proceedings, resulting from fraud or other similar cause, of which he had no notice. As between the parties to the action, a judgment fraudulently obtained will be set aside and held for naught when the fraud is made to appear. But there would be no security in titles acquired at judicial sales if the rights of a bona fide purchaser, without notice, could be overthrown by subsequent proof that the judgment was obtained by fraud, or that the record, which showed a due service on the defendant, was in fact false. The repose of titles, and indeed every consideration of public policy, demands that a purchaser at a judicial sale, with-

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out notice, under proceedings regular on their face, and by a Court of competent jurisdiction, should be protected as against mere errors of the Court, and against secret vices in the proceedings founded on fraud, accident, or mistake, and which can only be made to appear by the proof of extrinsic facts not appearing on the face of the record. No prudent person would purchase at a judicial sale, if he incurred the hazard of losing his money, in case it afterwards should be made to appear that the judgment was obtained by perjury or other fraudulent practices, or that the record on which he relied, as proving a service on the defendant, was in fact false. These propositions are too familiar to require the citation of authorities in their support, and we have been referred to none which appear to contravene them, unless it be two cases decided by the Supreme Court of Iowa. (*Hansby v. Blackman*, 20 Iowa, 128; *Bryant v. Williams*, 21 Iowa, 329.) The principle settled in those cases is, that a defendant in an action, who was not a resident of the State, and was not served with process by publication or otherwise, and for whom an attorney without authority had entered an appearance, might afterwards, on proof of these facts, recover the property sold under the judgment from a bona fide purchaser, without notice.

It is unnecessary, for the purposes of this case, to examine the reasoning on which these decisions are founded. But if the peculiar facts of those cases should take them out of the general rule to which I have adverted, it would only prove that the rule, in its broadest sense, is not wholly without an exception, and would not impugn the rule itself. If an unauthorized appearance by an attorney, for a non-resident defendant, who was not served with process, can be afterwards shown to invalidate the title of a bona fide purchaser without notice, at the execution sale, it stands, so far as I am aware, as a solitary exception to the general rule, and the doctrine ought not to be further extended. I am, there-

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fore, of opinion that it is not competent for the plaintiff to establish by proof *dehors* the record that there was in fact no service of the summons in this case, or that the judgment was obtained by fraud. This brings us to the question whether the record in the tax suit discloses on its face any want of jurisdiction in the Court to render the judgment under which the property was sold. The return of the Sheriff on the summons shows that it was served by posting a copy on the land, and that Dinnicke, the personal defendant, was not found; but the judgment recites that it appeared to the Court "summons herein was issued in proper form by the Clerk of this Court, and was served as required by law upon each of said defendants, who have made default." In *Hahn v. Kelly*, 34 Cal. 402, we decided that a recital of this character in the judgment was, in effect, an adjudication by the Court as to the sufficiency of the service, and that it was conclusive on that point, in a collateral attack on the judgment, unless it affirmatively appeared, from some other part of the judgment roll, that the recital was untrue. We further held, that the fact that there appeared in the judgment roll a summons with a return upon it, showing a defective service, or no service at all, was not sufficient to overcome the effect of the recital in the judgment. But the plaintiff claims that the rule there laid down is applicable only when the judgment is offered in evidence, in a collateral action, and has no application to a direct proceeding to set aside the judgment, as this is claimed to be. But as against a stranger, who purchases at an execution sale without notice, the judgment is no more open to attack than it would be if offered in evidence in a collateral action. In each case the validity of the judgment must be tested by the record alone, and not by extrinsic facts. If it be conceded that the facts alleged in this complaint would be sufficient to vacate the judgment in a direct proceeding for that purpose against the

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plaintiff in the original action, it by no means follows that the same result would ensue as against a stranger who purchased at the execution sale without notice, whose rights are not to be affected by proofs *dehors* the record; and the record in this case shows the due service of process. But the judgment is also assailed on the ground that it orders the land to be sold, not only for the tax which was specifically assessed upon it and the improvements, but also for the personal property tax assessed to Dinnicke, and which could not become a lien on the land until after the judgment was docketed, which was long after the plaintiff purchased. This was unquestionably an error for which the judgment might have been reversed on appeal; but it does not affect the validity of the judgment and render it wholly void. It was only an error of the Court in determining the amount of the specific lien on the land, and a judgment is not void because it is for a larger amount than the proofs justify (*Murdock v. De Vries*, 37 Cal. 527), nor is an execution void because it is for a larger amount than the judgment authorized.

I am, therefore, of opinion that the judgment, execution, and the sale thereunder to the defendant Kennedy, are valid. The plaintiff, however, contends that if all this be conceded, Kennedy acquired no title as against the plaintiff, who purchased the property without either actual or constructive notice of the pendency of the action. The complaint alleges and the demurrer admits that no notice of *lis pendens* was filed, and that the plaintiff had no actual notice of the pendency of the action. But in this class of cases a notice of *lis pendens* is unnecessary. By the third section of the Revenue Act of May 17th, 1861, it is provided that "every tax levied under the provisions or authority of this Act is hereby made a lien against the property assessed, which lien shall attach on the first Monday in March in each year, and shall

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not be satisfied or removed until the taxes are all paid, or the property has absolutely vested in a purchaser, under a sale for taxes;" and by section forty-four of the same Act, it is provided that when a judgment is rendered, to enforce a lien for taxes, "such judgments, rendered in the District Court, shall be docketed and become liens upon all the property against which judgment is rendered, from the date of such assessment, and against all other real estate of the person assessed, subject to execution for the amount of any judgment against him, from the time of such docketing, as in other civil cases." The effect of these provisions is: First, that the assessment creates a lien upon the real property assessed, which is not extinguished until the tax is paid, or the property is sold to a purchaser, under the proceedings to enforce the tax; second, that when a judgment is rendered for enforcing the payment of the tax, the lien of the judgment, by operation of law, relates back to and takes effect from the date of the assessment. The precise object of these provisions was to subordinate to the lien of the judgment all rights acquired by purchasers intermediate the assessment and the rendition of the judgment.

The assessment of lands, and the lien which it creates, are public matters of record, of which all purchasers are bound to take notice; and when a purchaser buys land which is subject to an existing lien for taxes, he must see at his peril that the taxes are paid; and if he neglects this duty he takes the hazard of a judgment against the land, the lien of which, by operation of law and by relation, will antedate his purchase. If the rule were otherwise, it would be necessary in an action to foreclose a tax lien to bring in as defendants all purchasers and incumbrancers subsequent to the assessment and prior to the commencement of the action, and the effect of the judgment in a large number of cases would be practically defeated by secret unrecorded conveyances which

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were unknown to the District Attorney. It was to obviate the necessity for this, that these provisions were intended, making the judgment lien take effect by relation from the date of the assessment. No notice of *lis pendens* is therefore necessary in this class of actions.

Judgment affirmed.

EXTRA ANNOTATION
TO
PRECEDING VOLUME



VOLUME XLIII.

By S. W. CHARLES.

Revised to include citations to Volume 147, by CHARLES L. THOMPSON.

43 Cal. 11-22. POWELL v. MAGUIRE.

Partnership.—Where two persons make a verbal agreement to form a partnership, but such partnership was never launched, and one of the parties proceed to conduct the business in his own name and for his own benefit, the only remedy of the injured party is an action at law for breach of contract, p. 19.

Rule upheld in *Mann v. Bowen*, 85 Ga. 618. Cited in *Prince v. Lamb*, 128 Cal. 127, holding no partnership actually created under facts stated. Approved in *Hyer v. Richmond Traction Co.* 168 U. S. 484, holding that it is well settled that the wrongful refusal by a party to a contract of copartnership to launch the partnership business is ground for an action of law by the injured partner.

43 Cal. 23-24. IRWIN v. TOWNE.

New Trial.—If the supreme court reverses an order denying a motion for a new trial and remands the cause for further proceedings in accordance with the opinion filed, it places the case in point of the mere procedure to be followed in the same situation as though the court below had ordered a new trial, pp. 23, 24.

This is the settled rule unless there is something in the opinion of the court restricting the operation of the words "reversed" and "remanded"; *Myers v. McDonald*, 68 Cal. 165; *Eades v. Trowbridge*, 143 Cal. 30, discussing effect of appeal from order of trial court vacating verdict, *sua sponte*.

43 Cal. 25-27. BENNETT v. WALLACE.

The writ of certiorari will not lie where there is an appeal, or where there was an appeal but the time for taking it has elapsed, p. 27.

Cited and followed in *Faut v. Mason*, 47 Cal. 8. Cited in *Wittman v. Police Court*, 145 Cal. 476, certiorari does not lie to annul order of San Francisco Police Judge for summoning of trial jury by sheriff in misdemeanor; *Valentine v. Police Court*, 141 Cal. 617, denying writ ac-

cordingly. Will not lie to review an order of the probate court, directing an administrator to sell certain real estate; *Stuttmeister v. Superior Court*, 71 Cal. 323, affirmed in *McCue v. Superior Court* 71 Cal. 545; and rule adopted in *Ramsey v. Pettengill*, 14 Oreg. 209. See also, 18 Am. Dec. 236, note.

Writ of certiorari only lies where, in the exercise of judicial functions, an excess of jurisdiction has occurred, and in which there is no appeal, p. 26.

Will not lie to review legislative action of the supervisors: *Spring Valley W. W. v. Bryant*, 52 Cal. 137.

43 Cal. 29-37. PEOPLE v. SANFORD.

Oral Instructions.—The giving of an oral instruction to the jury in a criminal case without the consent of the defendant is error, pp. 35, 36.

This rule is adhered to in the cases following, citing the leading case: *People v. Kearney*, 43 Cal. 384, holding, however, that oral instruction may be given by mutual consent; *People v. Prospero*, 44 Cal. 184, where it was decided that consent cannot be inferred from a failure to object at the time the oral charge is given; *People v. Max*, 45 Cal. 255; *People v. Hersey*, 53 Cal. 575, where it was held that under the Penal Code as amended in 1874, if the charge be not given in writing, it must be taken down by the phonographic reporter; *Broadway v. Waddell*, 95 Ind. 173; *Sellers v. Greencastle*, 134 Ind. 647; *Territory v. Perea*, 1 N. Mex. 632; *Territory v. Lopez*, 3 N. Mex. 109; and *Hopt v. People*, 104 U. S. 635, deciding that it is error to give an instruction not reduced to writing otherwise than by a reference to a certain page of a law magazine. *Boggs v. United States*, 10 Okla. 448; *Swaggert v. Territory*, 6 Okla. 347.

The rule was somewhat modified by the decision of the court in *People v. Leary*, 105 Cal. 502, where it was held that if oral conversation and instruction to the jury causes no prejudicial injury to the defendant, it is not ground for a new trial; *Beatty, C. J.*, dissenting and citing the leading case, but holding that the rule laid down there was modified by the codes.

A witness, though not an expert, who details a conversation had between himself and another, may also, in connection therewith, state his opinion, belief, or impression as to the state of mind of such person as these seemed or appeared at the time of the conversation, pp. 32, 33.

Followed in *People v. Wreden*, 59 Cal. 394. Cited in *People v. Casey*, 124 Mich. 282, quoting *Armstrong v. State*, 30 Fla. 201. Where the disease causing a testator's insanity was a progressive one, evidence was properly admitted as to his sanity at other times than at the execution of the will; *Estate of Dalrymple*, 67 Cal. 446. A witness who is not an expert may testify as to the apparent condition of the defendant as to sobriety; *People v. Monteith*, 73 Cal. 9. Upon the

question of what is the market value of land, the opinions of those who have knowledge of the circumstances and surroundings may be taken, although they are not experts: *San Diego Land etc. Co. v. Neale*, 78 Cal. 77; and *Santa Ana v. Harlin*, 99 Cal. 545. But it is not proper to admit testimony which was a mere expression of opinion: *Ellen v. Lewiston*, 88 Cal. 260. Evidence as to intoxication admissible: *People v. Sehorn*, 116 Cal. 511. Nonexpert witnesses can detail the facts known to them which show insanity, and thereupon express an opinion as to the sanity of the person whose mental condition is being investigated: *Armstrong v. State*, 30 Fla. 201. Rule upheld in *Connecticut Mut. Life Ins. Co. v. Lathrop*, 111 U. S. 622.

Dying Declarations.—The rule that no person is to be held incompetent to be a witness on account of religious belief is applicable to dying declarations, p. 34.

Rule applied in *People v. Chin Mook Sow*, 51 Cal. 599. Similar rule upheld in *State v. Ah Lee*, 8 Oreg. 219.

Evidence.—Where a proffer of testimony was denied by the court "for the present," and no exceptions taken, but the proffer was not subsequently renewed nor any effort made to obtain the ultimate decision of the court, the point must be deemed waived, p. 32.

Cited in *State v. Goddard*, 162 Mo. 230, when ruling was reserved on original offer. Where a defendant makes no effort to obtain a definite ruling upon an objection to a question asked of a witness, the ruling upon which has been reserved, the legal presumption is that a ruling was waived: *People v. Westlake*, 62 Cal. 309. Settled rule in *Missouri; State v. Taylor*, 134 Mo. 140.

Jurors.—If in a criminal case a juror is sworn who is only on the poll tax list and the defendant receives the juror without objection, he cannot after verdict object to his competency in this respect, p. 32.

Leading case followed in *People v. Mortier*, 58 Cal. 206. He who complains of the incompetency of a juror must not only show his ignorance thereof in time to urge it sooner, but he must at the proper time have examined the juror touching his qualifications, and if he fails to do so will be deemed to have waived them; *Pitt v. Bishop*, 53 Mo. App. 604.

Indictment.—An indictment is a sufficient charge of the death of one Brown—that "the accused did feloniously, willfully, maliciously and of malice aforethought, shoot, kill, and murder one Enoch Brown," and it was unnecessary to aver that the deceased died within a year and a day, p. 31.

An indictment should allege an assault, and the nature thereof, a mortal wounding of the deceased and that he died of such wounds within a year and a day: *State v. Blair*, 69 Mo. 322, holding the California rule inapplicable.

43 Cal. 41-42. DANIELS v. LANDSDALE.

Pre-emption.—The filing of a declaratory statement before the plat of the survey is filed by the surveyor general, is premature and of no effect, p. 42.

Referred to in *Osgood v. Water and Mining Co.*, 56 Cal. 579, holding that in a question of priority or right between an appropriator of water on the public lands and a pre-emptor, the rights of the latter date from the issuance of his patent; and in *Lux v. Haggin*, 69 Cal. 433, 438, holding the rule of the leading case inapplicable. Rule upheld in *Lansdale v. Daniels*, 100 U. S. 116.

43 Cal. 43-53. VAN VALKENBURG v. BROWN. 13 Am. Rep. 136.

Citizenship does not per se include right to vote, p. 51.

Cited in *Dorsey v. Bingham*, 177 Ill. 258, 69 Am. St. Rep. 234, discussing right of women to vote under local statutes.

The elective franchise is not one of the "immunities" or "privileges" secured by the fourteenth amendment to the federal constitution, p. 53.

The rule of the leading case cited and applied in *Bloomer v. Todd*, 3 Wash. Ter. 623. Cited in *Gougar v. Timberlake*, 148 Ind. 46, 47, 62 Am. St. Rep. 493, 494 (and note 496), denying right of women to vote under local statutes. See, also, 97 Am. Dec. 263, 264, extended note; and 29 Am. Rep. 586, note.

General Citation.—Cited to the point that women are citizens as well as men in *State v. County Court*, 90 Mo. 598.

43 Cal. 55-56. PEOPLE v. MCAUSLAN.

Appeal from Order Setting Aside Verdict.—The presumption in the supreme court is, that the proceedings below are correct, except in so far as the record manifests the contrary, p. 56.

If the question is whether or not the evidence is sufficient to justify the verdict, the record must set forth all the evidence given at the trial: *People v. Woods*, 43 Cal. 177. Referred to in *People v. Lum Yit*, 83 Cal. 132.

43 Cal. 56-65. HINCKLEY v. FOWLER.

An application to buy tide lands, made in accordance with law, confers a right to purchase upon the applicant, and such applicant cannot be deprived of the benefit of his application by the malfeasance or misfeasance of a state officer, p. 63.

The validity of an application to purchase state lands is not affected by the error of the surveyor general in issuing a certificate of purchase prematurely; *Pollard v. Putnam*, 54 Cal. 634. Cited in *Sherman v. Wrinkle*, 121 Cal. 510, holding applicant not prejudiced by mistake of surveyor in including excess of land within survey lines.

Land Contest.—Ordinary rules, pleading and evidence must be observed, p. 64.

Cited in *Polk v. Sleeper*, 143 Cal. 74, holding complaint insufficient as against demurrer.

43 Cal. 65-74. WILLIAMS v. SUTTON.

Tenancy in Common.—A tenant in common is, as against every person but his cotenant, entitled to the possession of every part of the common land, and may recover the possession of all such land in an action of ejectment brought against a stranger, pp. 71, 72.

Where parties are tenants in common of a water right, each of them may maintain an action to enjoin a trespasser from diverting any portion of the water: *Lytle Creek W. Co. v. Perdew*, 65 Cal. 452. If one of several tenants in common recover judgment in ejectment against an adverse claimant of the premises, the judgment determines the right of possession to the whole premises: *Newman v. Bank of California*, 80 Cal. 372; 13 Am. St. Rep. 171, 172. But in *King v. Hyatt*, 51 Kan. 511, 37 Am. St. Rep. 308, while the rule was not expressly doubted, it was held that where the owner of an undivided interest, acting solely for himself, sues an adverse holder, and it appears that the plaintiff and the holders of the other undivided interest have no community of interest and do not recognize each other's title, that the plaintiff can only recover possession of his own share. Leading case approved in *Hopkins v. Noyes*, 4 Mont. 560; *Brown v. Warren*, 6 Nev. 241; and *Allen v. Higgins*, 9 Wash. 448; 43 Am. St. Rep. 848. A tenant in common, in actual possession with his cotenant, is not affected by the judgment in an action of ejectment against the latter, to which he was not a party: *Miller v. Blackett*, 47 Fed. Rep. 549. Cited, also, in 50 Am. St. Rep. 839, note.

Statute of Limitations.—If the statute has fully run and has become effectual to bar an adverse title, the disseisor becomes vested with a new title, and estate founded on and springing from the disseisin, p. 73.

It is a settled rule that the possession of property of the requisite character and time confers a title to the property: *Water Co. v. Richardson*, 72 Cal. 601, 608. But since the passage of the act of 1878, the taxes must be paid to set the statute in motion; *Woodward v. Faris*, 109 Cal. 18. Cited, also, in 94 Am. Dec. 742, note; and 49 Am. St. Rep. 714, note.

43 Cal. 75-80. POTTER v. AMES.

Trespass maintained against county for illegally taking possession of land for highways, p. 78.

Cited in *Robinson v. Southern Cal. Ry. Co.*, 129 Cal. 11, discussing remedies of owner against railroad for construction without condemnation.

Eminent Domain.—It is competent for the legislature to prescribe the several steps to be pursued in the assertion of a right to compensation for land appropriated for public use, but the prescribed procedure must not destroy or substantially impair the right itself, p. 79.

It is no objection to the mode of exercising the powers conferred upon the agents under the statute that the legislature has referred it to the consent of those whose property is burdened with the cost of the improvement: *Mulligan v. Smith*, 59 Cal. 229.

Public Road.—Where a statute for the alteration of a public road required the publication of a notice stating with particularity the course and terminus of the proposed alteration, a notice of an alteration to run northerly from one point to another "over the most practicable route for a road," is insufficient, pp. 79, 80.

The intermediate points through which the road passes must be specifically set forth, *Smithers v. Fitch*, 82 Cal. 156.

43 Cal. 83-90. LICK v. RAY.

Cloud upon Title.—Any claim of title which, if asserted, would drive the other party to the production of his own title to establish a defense, constitutes a cloud which a court of equity may be called upon to remove, p. 88.

Cited in *Schofield v. Ute etc. Co.*, 92 Fed. 273, holding action maintainable to remove fraudulent obstruction to enforcement of a lien; *McLeod v. Lloyd*, 43 Or. 271, upholding sufficiency of allegation that defendant claims some interest or right of title to specified property, as shown by an abstract of title attached to complaint; *Schenk v. Wicks*, 23 Utah, 581, 582, where land contract provided for execution of deed on payment of purchase money note, and land sold under owner's subsequent trust deed to secure his own note, which matured before purchase money note, and after default in payment of latter note, it was paid under subsequent agreement, trust deed was cloud on title which relieved payment of purchase money note at maturity; rule approved in *Corey v. Schuster*, 44 Neb. 273; *Engelbach v. Simpson*, 12 Tex. Civ. App. 195; *Goldberg v. Taylor*, 2 Utah, 491; and *West Portland H. Assn. v. Lownsdale*, 9 Saw. 118; 17 Fed. Rep. 618. Referred to in *Northern Pac. R. Co. v. Cannon*, 46 Fed. Rep. 230; approved in *Ormsby v. Ottman*, 85 Fed. Rep. 499. See, also, 45 Am. St. Rep. 374, note.

If a title be void upon its face, if it be a mere nullity, so that an action based upon it would fall of its own weight, it does not constitute a cloud, and an action to remove it cannot be maintained in the absence of special circumstances entitling the party to relief, p. 88.

A conveyance by a widow before her dower is allotted her is not a cloud upon the title of the heirs: *Lytle v. Sandefus*, 93 Ala. 399. Cited and the rule applied in *Sloan v. Sloan*, 25 Fla. 67; *Maskey v. Lock-*

mann, 146 Cal. 790, where apparent validity of sheriff's sale against plaintiff depended on continuance of attachment levied prior to plaintiff's deed and complaint shows acceptance of bond and release of attachment sheriff's sale casts no cloud; see, also, 45 Am. St. Rep. 374, note.

43 Cal. 110-119. ROSEMAN v. CANOVAN.

The rule of caveat emptor is not applicable where the vendor resorts to a trick or artifice for the purpose of diverting the purchaser from the line of inquiry otherwise open to him, pp. 117, 118.

Referred to in *Court v. Snyder*, 2 Ind. App. 443, 50 Am. St. Rep. 249, holding that where there is no willful misrepresentation, or artful device to disguise the character or conceal the defects of the article sold, the vendee is bound. Cited, also, in extended notes in 13 Am. Dec. 267; and 90 Am. Dec. 428, 430.

43 Cal. 136. FOUCAULT v. PINET.

Appeal.—Judgment will be modified on, when error is determinable from the record, p. 137.

Cited in *Fox v. Hale etc. Co.*, 122 Cal. 222, applying rule of modification when respondent released part of judgment which alone was the subject of the appeal.

43 Cal. 137-158. PEOPLE v. FAIR.

On a trial for murder the prosecution will not be allowed to introduce evidence of the general character of the accused, unless the defendant initiate the inquiry, p. 149.

Upon the trial of a defendant for murder, evidence of his having immoral relations with a woman is inadmissible; *People v. Wallace*, 89 Cal. 162. Commission of other crimes in no way related to the one on trial cannot be proved: *Mann v. State*, 22 Fla. 608. Cited in *Thompson v. State*, 38 Tex. Cr. App. 341, as to her reputation for chastity when charge was murder. Where a defendant introduces evidence of his good character in a prosecution for larceny, the evidence should be limited to that particular trait of character having relevancy to the crime charged, i. e., honesty: *State v. Bloom*, 68 Ind. 56; 34 Am. Rep. 248. Evidence that defendant was reported to belong to a "gang of horse thieves" is inadmissible: *State v. Thurtell*, 29 Kan. 149. Approved in *Carter v. State*, 36 Neb. 488. Cited, also, in 50 Am. Rep. 99, note.

New Trial cannot be granted on any other grounds than those specified in section 440 of the Criminal Practice Act, p. 146.

Cited and followed in *People v. Voll*, 43 Cal. 167, holding that it is not ground for new trial that one of the triers appointed is on the panel of the jury in attendance in the case; *People v. McCarty*, 48 Cal. 559;

People v. Shainwold, 51 Cal. 470, deciding that the mere fact that a sheriff, in the absence of the judge, adjourned the court at 10 o'clock A. M., instead of waiting until 12 M., is not ground for a new trial: *People v. O'Brien*, 88 Cal. 488, 490, where it was held that misdescription of the names of some of the jurors summoned to try the cause is not ground for a new trial or for arresting judgment; and *People v. Gardner*, 98 Cal. 128.

The fact that a juror had formed and expressed an unqualified opinion of the guilt of the accused is not ground for a new trial, where the objection is taken for the first time after the trial, p. 147.

Rule followed in *People v. Mortimer*, 46 Cal. 120; and in *People v. Samsells*, 66 Cal. 100, where the rule was applied in a case, in which after the verdict it was found that two jurors were not on the last assessment-roll of the county. Approved in *State v. Marks*, 15 Nev. 36. Distinguished in *State v. Morgan*, 23 Utah, 228, 229, where juror had beforehand prejudiced case, but answered falsely in voir dire, new trial granted.

Practice—Order of Argument.—The court in a capital case may, in its discretion, direct by which side the argument to the jury is to be opened, but by whichever side it is opened, the other side will have the close, p. 156.

Followed in *People v. Haun*, 44 Cal. 100. Rule changed by Penal Code.—In criminal cases since the penal code took effect, the district attorney must open and may conclude the argument: *People v. Mortimer*, 46 Cal. 116. Cited in *People v. Ah Hop*, 1 Idaho, 702, but distinguished.

Statutory Construction.—A statute is not to be considered as repealed by implication either in whole or in part except in so far as its provisions are found absolutely inconsistent with the subsequent act, p. 154.

If there is an inconsistency between statutes, the former is repealed by implication only to the extent of the conflict: *Capron v. Hitchcock*, 98 Cal. 432.

43 Cal. 159-161. **WARD v. McNAUGHTON.**

Parol testimony is not admissible to contradict, vary, or enlarge the effect of a written instrument, p. 160.

Cited in *Frink v. Roe*, 70 Cal. 316. If it appears on the face of the complaint, in an action to enforce an express trust in land, that the alleged trust rests in parol, the defense of the statute of frauds may be taken advantage of by demurrer: *Barr v. O'Donnell*, 76 Cal. 471; 9 Am. St. Rep. 244. Dissenting opinion, *Ames v. S. P. Co.*, 141 Cal. 734, as to construction of railroad ticket.

Foreclosure.—Junior Mortgagee, when made a party, is entitled to foreclosure and judgment protecting his rights in case of surplus, p. 161.

Cited in *Hibernia etc. Soc. v. London etc. Co.*, 138 Cal. 260, applying rule to judgment lien holder.

43 Cal. 162-163. PEOPLE v. DONOVAN.

Evidence.—While it is objectionable to ask a witness if he had signed a written verdict of a certain tenor without first allowing him an opportunity to examine such verdict, it is not error to admit his answer if the witness does in fact examine the verdict before answering, p. 165.

The writing itself must first be shown the witness: *Gunter v. State*, 83 Ala. 106. Cited in *Ortiz v. State*, 30 Fla. 277, but distinguished, the court holding that where a defendant on trial for crime makes a statement under oath of his defense to the jury, a previous inconsistent statement, made under the same statute, is admissible against him as evidence of guilt, without his mind being directed to the time, place, or circumstances of such inconsistent statement. Rule approved in *Simmons v. State*, 32 Fla. 392.

General Citations.—Leading case referred to in *People v. Sutton*, 73 Cal. 246, but held by the court to have no bearing on the question at issue.

43 Cal. 166-168. PEOPLE v. VOLL.

New Trial.—Where a new trial is asked on the ground of newly discovered evidence, the affidavits must set forth such evidence as would be received on the trial, p. 168.

The evidence must be such as to render a different result probable on a retrial: *Braithwaite v. Aiken*, 2 N. Dak. 62.

43 Cal. 176-178. PEOPLE v. WOODS.

Notes of Phonographic Reporter of evidence are prima facie evidence only in the court below, and cannot be considered in the supreme court, p. 177.

Cited and followed in *People v. Armstrong*, 44 Cal. 327. Stenographer's transcript of testimony given by a party in a prior action, although certified to as correct, is not admissible in a subsequent action as evidence of what he said on the former trial: *Reid v. Reid*, 73 Cal. 206, 210. *State v. Shephard*, 23 Mont. 327, holding stenographer's certificate that statement contained all the evidence insufficient. To be admissible they must be adopted by the court, and included in a bill of exceptions: *State v. Larkin*, 11 Nev. 323.

43 Cal. 178-180. HANSON v. McCUE.

Rules of Court are binding on the court equally with suitors and are to be construed as statutes would be construed. p. 179.

But rules of the court must conform to and be governed by the statute: *In re Jessup*, 81 Cal. 483. Cited and followed in *Merchants' Nat. Bank of Jacksonville v. Grunthal*, 39 Fla. 394; *Coyote G. & S. M. Co. v. Ruble*, 9 Oreg. 123, holding that the court has no discretion when the time for filing a petition for a rehearing has expired; and *Mill Company v. Johnston*, 5 Utah, 149. See, also, 41 Am. St. Rep. 643, 644, note.

Petition for Rehearing Lost.—Where a petition for a rehearing is sent by the customary and most reliable means of transmission (express company) and fails to reach the clerk within the time allowed for filing such a petition, the petition is in contemplation of law in the hands of the clerk and if lost may be supplied, p. 180.

Followed in *Bernal v. Wade*, 46 Cal. 641. But in *Ward v. Healy*, 110 Cal. 589, the court held that the fact that a printed transcript was in the office of the express company and in transit to the clerk for filing, was not equivalent to filing within the rules of the court, refusing to extend the rule of the leading case to include such a statement of facts.

Remittitur.—When a remittitur is improperly issued, the court still retains jurisdiction of the case, and the remittitur may be recalled, p. 180.

Cited in *Trumpler v. Trumpler*, 123 Cal. 253, noted under *Rowland v. Kreyenhagen*, 24 Cal. 52. Case is erroneously cited in *City of Los Angeles v. Pomeroy*, 124 Cal. 635 (quoted in *Copper King v. Wabash etc. Co.*, 114 Fed. 993), as to percolating waters probably for *Hanson v. McCue*, 42 Cal. 303. Followed in *Bernal v. Wade*, 46 Cal. 641, "If a remittitur has been regularly issued and filed, and there has been no violation of law or of our own rules in ordering it, no mistake of facts and no fraud practiced by the prevailing party, our jurisdiction over the cause is at an end and our judgment is final"; *People v. McDermott*, 97 Cal. 249. Cited, also, in 21 Am. Dec. 121, note.

43 Cal. 180-184. NEVADA & SACRAMENTO CANAL COMPANY v. KIDD.

Appeal.—An order striking out portions of a pleading cannot be reviewed on appeal from the judgment, unless it be supported by a statement on appeal, p. 184.

Cannot be presented upon an appeal from a judgment without a bill of exceptions: *Spence v. Scott*, 97 Cal. 181. Followed in *Reinhart v. Company D*, 23 Nev. 372. Cited in *Hawley v. Kocher*, 123 Cal. 79, noted under *Morris v. Angle*, 43 Cal. 240.

Pleading.—A complaint setting up in one and the same count ownership in and ouster from, a water right, and also a site for a dam, and the land on which a dam is built, and praying for restitution, is demurrable for improperly uniting several causes of action, p. 184.

A cause of action based upon alleged fraud, malice, and oppression of the defendant, and a cause of action arising from a breach of a covenant of warranty of property conveyed, cannot be united: *Cosgrove v. Fisk*. 90 Cal. 76.

43 Cal. 185-190. **WOOD v. GOODFELLOW.**

Mortgage—Statute of Limitations.—When third persons have acquired interests in mortgaged property subsequent to the mortgage, they may invoke the aid of the statute of limitations as against the mortgage, even though the mortgagor, as between himself and the mortgagee, may have waived its protection, p. 189.

Cited in *Cal. Bank v. Brooks*, 126 Cal. 200, noted under *Lord v. Morris*, 18 Cal. 482; *Wells v. Enright*, 127 Cal. 674, sustaining right of original parties to waive or prolong the statute; *Filipini v. Trobeck*, 134 Cal. 444, 445, 447, permitting distributee or mortgagor to plead statute under facts stated, when held to be a subsequent grantee; *Brandenstein v. Johnson*, 140 Cal. 31, 32, noted under *Lord v. Morris*, 18 Cal. 490; *Hanna v. Kasson*, 26 Wash. 574, where subsequent grantee of mortgaged lands has been compelled to redeem portion thereof from execution sale under personal judgment against mortgagor upon mortgage notes, limitations not extended as against foreclosure on mortgage debt; *Raymond v. Bales*, 26 Wash. 499, partial payment by mortgagor on his mortgage debt will not extend limitations as against judgment creditor of mortgagor who has bought mortgaged premises at execution sale; *George v. Butler*, 26 Wash. 462, 466, absence of mortgagor from state does not suspend limitations as to mortgage, when he has parted with interest in mortgaged premises to resident grantee. The absence of a mortgagor from the state stops the running of the statute as to him, but not as to subsequent lienholders: *Watt v. Wright*, 66 Cal. 206, 207. Rule cited in *Ward v. Waterman*, 85 Cal. 507, but it was held that a mere creditor, who has acquired no contract lien and parted with no value, would not come within the rule. Rule denied in *Kerndt v. Porterfield*, 56 Iowa, 415, holding that a note and mortgage barred by the statute of limitations may be revived by an admission of indebtedness by the mortgagor and the priority of the mortgage lien will thereby be preserved as against subsequent liens. Denied in *Waterson v. Kirkwood*, 17 Kan. 13; and in *Schnucker v. Sibert*, 18 Kan. 109, 110; 26 Am. Rep. 767, 768, 769. Rule generalized in *Gruner v. Westin*, 66 Tex. 217, holding that "one who has purchased property from another, in whose hands and on whose account it is charged with a lien, may assert the loss of that lien or its extinguishment, whenever it becomes necessary for the protection of his own rights." Approved in *Eubanks v. Leveridge*. 4 Saw. 279. Cited, also, in 82 Am. Dec. 758, note; 31 Am. Rep. 41, note; and 60 Am. St. Rep. 205, 206, 207.

Mortgage—Subsequent Encumbrancers.—As against subsequent en-

cumbrancers or a subsequent holder of the equity of redemption, the mortgagor has no power by stipulation to prolong the time of payment or in any manner increase the burdens of the mortgaged premises, p. 188.

Approved in *Cook v. Prindle*, 97 Iowa, 475, 59 Am. St. Rep. 431, holding that after the debt was barred, the mortgagor could not revive the mortgage lien, as against one to whom he had sold the land before the statute had run. Cited in *Bassett v. Monte Cristo M. Co.*, 15 Nev. 300, as the correct rule. A renewal of a mortgage barred by the statute of limitations does not affect the rights of third parties to the property, accruing after the execution of the mortgage: *Cason v. Chambers*, 62 Tex. 307. Approved in *De Voe v. Rundle*, 33 Wash. 610, 611, where limitations has run against a mortgage it cannot be revived by any act of mortgagor as against a subsequent judgment lien.

Action on Mortgage must be brought within four years after its maturity, p. 190.

Cited in *Newhall v. Sherman*, 124 Cal. 511, noted under *Union etc. Co. v. Murphy's etc. Co.*, 22 Cal. 621.

43 Cal. 191-196. SLATTERY v. HALL.

Demurrer.—Under a general demurrer objection cannot be taken that the complaint is ambiguous, p. 196.

Defects of form of averment or uncertainty cannot be considered on general demurrer. *Ward v. Clay*, 82 Cal. 505. Uncertainty in a pleading must be taken advantage of by a special demurrer: *Palmer v. Utah & N. Ry. Co.*, 2 Idaho, 293. Referred to in *Isaacs v. Holland*, 4 Wash. 60.

43 Cal. 196-200. PEOPLE v. AVILA.

Indictment for Receiving Stolen Property.—An allegation of the name of the person who stole the goods, or that his name is unknown to the grand jury, is unnecessary and immaterial, p. 199.

It is sufficient to charge the offense as defined by the code, and it is not necessary to allege the value of the property: *People v. Rice*, 73 Cal. 221. Followed in *People v. Ribolsi*, 89 Cal. 496; and in *People v. Clausen*, 120 Cal. 383. Cited in *Commonwealth v. Avery*, 14 Bush. 631.

Idem.—A charge in an indictment which alleges that the defendant received certain stolen property for his own gain, knowing it was stolen, is sufficient, p. 199.

Followed in *People v. Ribolsi*, 89 Cal. 499.

43 Cal. 200-205. ESTATE OF UTZ.

Will.—Where a testator used the expression, "to my children," and proceeded to name them and the portion devised to each, but omitted any

special mention of a devise to the children of a deceased daughter, the use of the word "children" did not indicate a purpose to exclude the children of the deceased daughter, and they were entitled to a full share of the estate, as if the deceased had died intestate, p. 203.

An illegitimate child unintentionally omitted from the will of its mother is entitled to share in the estate in like manner as if legitimate; *Estate of Wardell*, 57 Cal. 493. In order to disinherit a child whose name is omitted from a will, the words of the will must show that the testator had the child in mind, and must indicate directly or by implication equally as strong that he intended to omit such child from the will: *In re Stevens*, 83 Cal. 329; 17 Am. St. Rep. 257. The fact that the testator mentioned in the will the widows of his deceased sons, the mothers of the omitted grandchildren, is not sufficient to show that he had his grandchildren in mind and does not rebut the presumption that they were forgotten, or show that the omission was intentional: *In re Salmon*, 107 Cal. 617; 48 Am. St. Rep. 166.

Idem.—Rule in *Shelly's Case* when applied to wills, is confined to cases in which after a freehold interest is devised to one, the remainder is to go in terms to the heirs of the first taker, p. 204.

Rule abrogated by section 779 of the Civil Code; *Barnett v. Barnett*, 104 Cal. 220.

43 Cal. 206-210. MAIN v. TAPPENER.

Attachment.—The service or posting of an attachment must precede the filing of a copy of it with the recorder, p. 209.

Approved in *Sharp v. Baird*, 43 Cal. 580; and in *Watt v. Wright*, 66 Cal. 208. But if an attachment is levied according to law, a sheriff's deed, executed in pursuance of an execution sale under a judgment rendered in the attachment suit, takes effect from the levy of the attachment. *Porter v. Pico*, 55 Cal. 172. Cited and the rule followed in *First Nat. Bank v. Jasper County Bank*, 71 Iowa, 488.

Idem.—To complete the service of an attachment of real property, both the service of the attachment on the occupant or posting on the premises, and the filing of it with the county recorder, are essential, p. 209.

Approved in *Schwartz v. Cowell*, 71 Cal. 306. Cited in *Ames v. Parrott*, 61 Neb. 851, on point that statute must be strictly followed and holding levy insufficient under local statute. Distinguished in *Woldert v. Nedderhart etc. Co.*, 18 Tex. Civ. App. 604, noted under *Wheaton v. Neville*, 19 Cal. 42; *First Nat. Bank v. Sonnelitner*, 6 Idaho, 27, notice of levy of attachment must describe property sufficiently to be identifiable by purchaser; dissenting opinion of Beck, C. J., in *Reynolds v. Ray*, 12 Colo. 121, where he dissented from the holding of the court,

that a valid levy of a writ of attachment may be made on real estate and a valid lien acquired, by indorsing thereon a description of the property attached and filing a copy of such writ in the recorder's office. Leading case approved in *Graham v. Reno*, 5 Colo. App. 334.

43 Cal. 210-217. BYERS v. NEAL.

Ejectment—Judgment.—A judgment for plaintiff in ejectment where title was directly in issue, is conclusive and bars defendant's rights under the same title in a subsequent action, p. 214.

Approved in *Avery v. Superior Court*, 57 Cal. 249. Cited in *Graves v. Hebron*, 125 Cal. 405, applying rule to judgment rendered against a person before patent, but after issuance of pre-emption receipt in subsequent action to quiet title involving same question of boundaries. A judgment in ejectment, where both parties claimed under executory contracts from the holder of a Mexican grant, is a bar in a subsequent action between the same parties, notwithstanding the common grantor received his patent subsequent to the judgment: *Phelan v. Tyler*, 64 Cal. 83. But neither the parties nor their privies are precluded from showing in a subsequent action any new matters occurring after its rendition which give the defeated party a title or right of possession: *Thrift v. Delaney*, 69 Cal. 192. Rule applied in *Breon v. Robrecht*, 118 Cal. 472.

Pre-emption.—Where a pre-emptioner had made proof and payment, a patent issued to him does not confer a new title, but is merely a formal assurance of the estate already acquired by such proof and payment, p. 215.

Cited in *Thrift v. Delaney*, 69 Cal. 192, holding that no estate vests, however, in the pre-emptor until he has proved up and paid for the land. A pre-emptor becomes the equitable owner of land after payment, and ejectment may be maintained on the title and right of possession evidenced by the certificate of purchase: *Witcher v. Conklin*, 84 Cal. 503. Cited and followed in *Brown v. Warren*, 16 Nev. 235.

43 Cal. 225-228. PEOPLE v. DE LA GUERRA.

Writ of Mandate will issue to compel a judge to proceed with a cause which he refuses to do without sufficient reason, p. 228.

"Mandamus lies to compel an inferior court to proceed to the trial of a cause and to set it in motion, where it has unreasonably delayed the proceedings, or where its refusal is a denial of justice": *State v. Judge of Civil District Court*, 34 La. Ann. 77. Writ lies where an inferior court refuses to take jurisdiction when by law it ought to do so, or where, having attained jurisdiction, it refuses to proceed in its exercise: *State v. Eddy*, 10 Mont. 324.

43 Cal. 229-238. MINOR v. KIDDER.

Election Contest.—An election contest is not an ordinary adversary proceeding and public interests imperatively require that the ultimate determination should, if possible, reach the very right of the case, pp. 237, 238.

Cited in *Sweeny v. Adams*, 141 Cal. 561, discussing protection of public interest, therein involved; *Abbott v. Hartley*, 143 Cal. 485, holding petition sufficiently certain; *Preston v. Culbertson*, 58 Cal. 209, where the rule was applied; and *Lord v. Dunster*, 79 Cal. 488, holding it error for the court to deny a motion for a continuance made after the trial has ended but before its decision is announced, upon affidavits of an election board showing that they were greatly surprised at the result of the recount, and that they had since the adjournment of the court procured certificates of a sufficient number of voters of that precinct, who would testify that they had voted for respondent, to insure his election. But the doctrine of the leading case does not go to the extent of holding that the usual rules for the introduction and taking of evidence and other rules for the orderly conduct of judicial proceedings do not apply as much to election contests as to ordinary civil actions: *Lay v. Parsons*, 104 Cal. 663. Court has power of its own motion to adjourn the session in an election contest several days and does not thereby lose jurisdiction: *Falltrick v. Sullivan*, 119 Cal. 617. Cited in *Nash v. Craig*, 184 Mo. 356, where an amendment was allowed making the grounds of contest more specific; and in *Schneider v. Bray*, 22 Nev. 278.

Idem.—Any person who is an elector may contest the election of a county officer, p. 237.

So a private citizen may institute an inquiry into the conduct of office holders: In the *Matter of Marks*, 45 Cal. 216.

43 Cal. 238-241. SERVANTI v. LUSK.

Execution.—Personal property exempt from sale under execution is none the less exempt because the judgment debtor owns an undivided interest in it, p. 240.

Approved as a general rule in *Wise v. Fry*, 7 Neb. 136; 29 Am. Rep. 381. Referred to in *Noyes v. Belding*, 5 S. Dak. 616. The actual homestead of a head of a family is protected from forced sale, and there is nothing restricting the benefit of exemption to those having any particular kind of title—any interest of the claimant is exempt: In re *Swearinger and Lamar*, 5 Saw. 57. Cited, also, in extended note in 21 Am. Dec. 551; and in 1 Am. St. Rep. 593, note. Distinguished in *Poreh v. Arkansas etc. Co.*, 65 Ark. 44, 67 Am. St. Rep. 897, denying right of partners to claim individual exemption in firm property during its existence, under local statutes.

All Facts Within Issues, not expressly found and not inconsistent with other findings, are presumed to have been found in accordance with judgment, p. 241.

Approved in *Gay v. Havermale*, 27 Wash. 401, decree against plaintiff on ground of laches which recites it is based on findings and evidence is erroneous where issue of laches not raised by the answer.

43 Cal. 242-250. **JOHNSON v. SIMONTON.**

Swill Milk Ordinance.—It is within the constitutional power of the legislature to authorize to supervisors to make all regulations necessary or expedient for the preservation of the public health, and under it the supervisors had the right to prohibit the feeding of cows on still slopes and vending the milk of such cows, p. 249.

Cited in *Odd Fellows' Cem. Assn. v. San Francisco*, 140 Cal. 231, 234, noted under *Ex parte Andrews*, 18 Cal. 679; *Weeks v. McNulty*, 101 Tenn. 506, 70 Am. St. Rep. 699, holding innkeeper civilly liable for injuries resulting from failure to erect fire-escapes under ordinance; *Jackson v. Kansas etc. Co.*, 157 Mo. 637, ruling similarly as to breach of ordinance regulating rate of speed of railroad trains. Ordinance prohibiting the slaughtering of animals within the city limits is valid: *Ex parte Heilbron*, 65 Cal. 610. Ordinance is valid prohibiting the keeping of more than two cows within certain portions of the city limits: *In re Linehan*, 72 Cal. 116. An ordinance establishing fire limits is valid: *McCloskey v. Kreling*, 76 Cal. 512. Cited in *Yount v. Denning*, 52 Kan. 636, to the point that an ordinance authorized by statute, and duly passed, becomes binding on all persons within the corporate limits. Referred to in *Commonwealth v. Parks*, 155 Mass. 533, where an ordinance was held valid which prohibited blasting without the written consent of the board of aldermen; and in *Bott v. Pratt*, 33 Minn. 328; 53 Am. Rep. 51. Cited, also, in 34 Am. Dec. 633.

Idem.—The scientific correctness of the determination by the supervisors that the milk of cows fed on still slopes is unwholesome is not open to inquiry in the supreme court, p. 249.

Where the questions of fact calling into exercise the police power were determined by the municipality, the correctness of their determination as to matters of fact is not open to inquiry, by way of defense, to a prosecution under the ordinance: *Ex parte Lacey*, 108 Cal. 329; 49 Am. St. Rep. 95.

43 Cal. 250-253. **GRIMM v. CURLEY.**

Adverse Possession.—Where a grantee by mistake and in good faith entered into a strip of land adjoining his lot, but not within its boundaries, and remains in continuous, open, notorious, and adverse possession for five years from the time of entry, the remedy of the former owner is barred, p. 253.

Cited in *Unger v. Mooney*, 63 Cal. 590, 49 Am. Rep. 103, to the point that to set the statute of limitations in motion there must be a hostile possession, open and notorious; *Bowers v. Ledgerwood*, 25 Wash. 18, holding adverse possession established under facts stated. Leading case followed in *Silverer v. Hansen*, 77 Cal. 582, 584. If one tenant in common notifies the other that he claims the whole property as his own, and the latter acquiesces in the pretension and leaves the premises in the possession of the first, the statute of limitations begins to run notwithstanding each of the parties was under a mistake as to his rights: *McCormack v. Silsby*, 82 Cal. 76. Title may be acquired by adverse possession for five years, although the land in controversy was claimed under a mistaken belief as to boundaries: *Woodward v. Faria*, 109 Cal. 17. Cited in *Loockey v. Horsky*, 4 Mont. 463, and in 24 Am. St. Rep. 369, note.

40 Cal. 253-263. CORWIN v. BENSLEY.

Lis Pendens.—If such a *lis pendens* is filed in an action to try the title to land as imparts notice to purchasers from a party to the action, such purchasers must apply for leave to protect their interests during the pendency of the suit, p. 259.

One who purchased land subject to the mortgages, and with notice of the pendency of the suit to foreclose them, becomes bound by the notice to appear in the action and defend his interests: *Amador C. & M. Co. v. Mitchell*, 59 Cal. 178.

Does a *lis pendens* filed by a plaintiff, in an action to try title to land in which defendants set up title and ask for affirmative relief, impart notice to purchasers from plaintiff pending the action? p. 259.

Answered in the affirmative in *Welton v. Cook*, 61 Cal. 487, declaring the leading case not an adjudication upon the point.

If a *lis pendens* is not filed or recorded, the title of a bona fide purchaser without actual notice would be unaffected by the judgment, p. 259.

Statutory mode must be followed, or there can be no *lis pendens* as to third parties: *Pennington v. Martin*, 146 Ind. 637.

General Citation.—*Barnham v. Smith*, 82 Mo. App. 46.

43 Cal. 264-269. BUHNE v. CORBETT.

A plea or defense regarded as an entirety is not to be defeated or disregarded merely because it is inconsistent with some other plea or defense pleaded, p. 269.

The rule is well established in the cases citing it. Cited in *Banta v. Siller*, 121 Cal. 418, noted under *Billings v. Drew*, 52 Cal. 568; *Detroit etc. Co. v. Stevens*, 20 Utah, 247, noted under *Bell v. Brown*, 22 Cal. 672; *Hayes v. Silver etc. Co.*, 136 Cal. 241, on point that verified answer must be consistent. A party does not waive the effect of a denial contained

in one portion of his answer by setting up in the appropriate manner new or affirmative matter: *Billings v. Drew*, 52 Cal. 568. A judgment on the pleadings is not authorized if the answer deny the material allegations of the complaint, although in a special defense separately stated the allegations formerly denied are admitted: *Botto v. Vandament*, 67 Cal. 334. Cited in *McDonald v. Southern Cal. Ry. Co.*, 101 Cal. 218, to the point that there is no distinction between verified and unverified answers in this particular. The effect of a denial in one defense is not waived by the setting up of affirmative matter of examination in another defense, nor can the admissions made in the affirmative defense relieve the plaintiff from the necessity of proving the matters denied: *Miles v. Woodward*, 115 Cal. 316. Approved in *People v. Lothrop*, 3 Colo. 449; *Stebbins v. Lardner*, 2 S. Dak. 140; *Lawrence v. Peck*, 3 S. Dak. 648, holding that even if defenses were inconsistent, it would not justify the court in requiring the defendant to stand upon one alone and abandon the other; and *Lake Shore & M. S. Ry. Co. v. Warren*, 3 Wyo. 137.

The effect of a denial of possession in one defense is not waived by the setting up of affirmative matter admitting possession in another defense, and the admissions made in the affirmative defense cannot relieve the plaintiff from proving the matters denied, p. 269.

Approved in *Miles v. Woodward*, 115 Cal. 316. Denied in *McLaughlin v. Alexander*, 2 S. Dak. 236; and in *Seattle National Bank v. Carter*, 13 Wash. 289.

Cited in *Ray v. Moore*, 24 Ind. App. 490, where denials and plea of confession and avoidance were joined.

43 Cal. 270-274. ALDEN v. COUNTY OF ALAMEDA.

When a money judgment is recovered against a county, the proper remedy is to present it to the supervisors for allowance as an audited claim, and if the board refuses to allow it, it may be compelled to do so by mandamus, p. 273.

Cited in *County v. Raymond etc. Co.*, 139 Cal. 132, but holding personal judgment against county for compensation in its condemnation suit not prejudicial to defendant therein; *Bigelow v. Los Angeles*, 141 Cal. 507, noted under *McCann v. Sierra Co.*, 7 Cal. 121; *Greeley v. Cascade Co.*, 22 Mont. 589, noted under *Dana v. San Francisco*, 19 Cal. 496. Where a city board of education has audited and allowed a claim against a school district, mandamus will lie to compel it to draw an order on the county superintendent: *Barber v. Mulford*, 117 Cal. 360. It is for the board to determine how far the county will defend against a claim which has been prosecuted to judgment, and if the board refuses or delays to make payment the claimant is entitled to a writ of mandamus: *Stoddard v. Benton*, 6 Colo. 517. Cited in *State v. Commissioners Lander Co.*, 22 Nev. 76, to the point that a judgment for a cer-

tain sum against a county is an auditing within the meaning of the statute. Rule approved in *Emery County v. Burrenson*, 14 Utah, 333; 60 Am. St. Rep. 901; *Lockard v. Board of Commrs., Decatur Co.*, 10 Kan. App. 319. Cited, also, in 68 Am. Dec. 297, note.

Rule Limited.—Rule requiring presentation to the board applies only to unliquidated claims and accounts, not to bonds and coupons, nor to a judgment upon bonds and coupons, and such presentation is not necessary before an action on such a judgment: *Vincent v. Lincoln County*, 62 Fed. Rep. 707.

No action can be prosecuted against a county until the claim has been first presented to the supervisors for allowance and has been rejected, pp. 272, 273.

An averment that a claim has been duly presented and rejected is not sufficient—the plaintiff must aver all matter required by the statute: *Rhoda v. Alameda Co.*, 52 Cal. 351.

43 Cal. 274-278. *LIVERMORE v. STINE.*

If a party claiming under a contract required by the statute of frauds to be in writing be permitted, without objection, to prove the contract by parol, such testimony cannot be stricken out at a subsequent stage of the trial because not in writing, p. 278.

Applied in a case where a deposition was improperly admitted as evidence: *People v. Salorse*, 62 Cal. 145, laying down the general rule that a party must object at the time the act is done or the ruling made by the court. Cited in *Schultz v. Noble*, 77 Cal. 81. *People v. Howard*, 135 Cal. 273, applying rule to objections to evidence when similar evidence was theretofore admitted without objection. Applied where parol proof of agency was admitted without objection: *McLaughlin v. Wheeler*, 1 S. Dak. 507.

General Citations.—Referred to, but not to any point in law: *Sagely v. Livermore*, 45 Cal. 614.

43 Cal. 279-285. *UTTER v. CHAPMAN.*

Plaintiff is only entitled to recover the actual loss suffered from the breach of a contract to furnish freight to a steamboat, that is, the net profits that would have been made under the contract, p. 284.

Where there was a breach of contract to purchase all the lumber plaintiff should manufacture, et cetera, it was held that the measure of damages was the contract price of the lumber less the expense he would have incurred in manufacturing it: *Winans v. Sierra Lumber Co.*, 66 Cal. 67.

The measure of damages for breach of contract to furnish a steamboat with freight is the difference between the net profits that would have been made under the contract and the net profits which might

have been made with reasonable diligence, but the burden of proof is on the defendant to show that a profit had been or might have been realized, p. 284.

Cited in *Leblond v. McNear*, 104 Fed. 831, noted under *Utter v. Chapman*, 38 Cal. 659; *Cornwall v. Moore*, 132 Fed. 870, and 125 Fed. 651, both holding measure of damages for refusal to accept chartered vessel is net amount that would have been earned by the vessel under charter, less net amount earned, or which might with reasonable diligence have been earned during time required for charter voyage. *Cederberg v. Robinson*, 100 Cal. 95, rule was not discussed. In an action for breach of a contract of employment, the plaintiff is not bound, as a condition of recovery, to prove that he endeavored to find other employment and failed: *Rosenberger v. Pacific Coast Ry. Co.*, 111 Cal. 318.

43 Cal. 285-295. *SABICHI v. AGUILAR*.

Under the act of 1863, the statute of limitations did not begin to run against lands included in a Mexican grant until after final confirmation by the courts of the United States or the issuance of a patent, p. 291.

Statute of limitations begins to run only from the issuance of the patent: *O'Connor v. Fogle*, 63 Cal. 11, where the rule was applied to a patent issued by the state. Cited, also, in 85 Am. Dec. 172, note; 76 Am. St. Rep. 483, note, on adverse possession of public property.

Where the final confirmation of a Mexican grant was to be made by the board of United States land commissioners, and not by the district court, the district court has no jurisdiction under the act of Congress of June 14, 1860, to adjudicate on the survey unless the survey had been returned into court and remained pending there at the time of the passage of the act, p. 292.

Applied in *Morris v. De Cella*, 51 Cal. 62.

43 Cal. 299-306. *JOHNSON v. CHELY*.

Unlawful Detainer.—Jurisdiction is vested in county court, p. 304.

Cited in *Ivory v. Brown*, 137 Cal. 605, noted under *Caulfield v. Stevens*, 28 Cal. 120.

In an action of unlawful detainer against a tenant for holding over, if the tenant be able to show that he did not enter under the lease, but that, being already in possession, he was induced to accept a lease from the plaintiff, through deception and imposition practiced upon him, then this state of facts destroys the relation of landlord and tenant and he is not estopped to deny the title of the plaintiff, p. 305.

Referred to in *Peralta v. Ginochio*, 47 Cal. 460. Approved in *Steele v. Bond*, 28 Minn. 273; and in *Loring v. Harmon*, 84 Mo. 127, holding that if the "lessee was in possession at the time he entered into the lease, as tenant of another, he may resist a recovery on the ground

that he accepted the lease in mistake, or was induced by fraud or misrepresentation to accept it." Cited, also, in 13 Am. Dec. 71, note.

Rule Limited.—The rule that in an action of unlawful detainer the tenant is not estopped from disputing the title of the landlord, is limited to cases where the tenant was induced to accept the lease by reason of the fraud of the lessor which destroyed the relation of landlord and tenant; *Knowles v. Murphy*, 107 Cal. 114.

43 Cal. 306-312. **PHELAN v. GARDNER.**

A broker employed to make a sale of land is entitled to his commission on finding a purchaser ready and willing to complete the purchase on the terms agreed upon, p. 311.

Cited and approved in the following cases: *Gonzales v. Broad*, 57 Cal. 226, holding that the refusal of the purchaser to purchase because of an unsatisfactory title does not affect the broker's right to his commission; *Dolan v. Scanlan*, 57 Cal. 263, deciding broker is entitled to his commission if he find a purchaser, even though the owner negotiated a sale himself; *Wilson v. Sturgis*, 71 Cal. 229; *Maxon v. Jones*, 128 Cal. 81, holding broker entitled to commission for negotiating loan for administrator, although probate court thereafter refuses to confirm the project; *Parker v. Estabrooke*, 68 N. H. 350, ruling similarly, though contract of sale was rescinded and vendee paid damages stipulated therefor; *Phelps v. Prusch*, 83 Cal. 628, where it was held that the validity of title did not affect the broker's rights; *Smith v. Schiele*, 93 Cal. 149, a case of failure of title; *Gunn v. Bank of California*, 99 Cal. 352, deciding, however, that the mere finding of a person able to purchase and who makes a deposit with the broker, to be returned if title is defective, and who refuses to consummate the sale owing to a defective title, does not entitle the broker to his commission, particularly where the vendor never met or even knew the name of such purchaser; *Oullahan v. Baldwin*, 100 Cal. 661, dissenting opinion of Harrison, J.; *Martin v. Ede*, 103 Cal. 161, 162; *Finnerty v. Fritz*, 5 Colo. 179; *Goss v. Stevens*, 32 Minn. 474; *Hamlin v. Schulter*, 34 Minn. 536; *Gaty v. Foster*, 18 Mo. App. 645; *Hayden v. Grillo*, 26 Mo. App. 293; *Hayden v. Grillo*, 35 Mo. App. 654, holding that if the broker refuse to inform the owner of the name of the proposed purchaser, the owner may rightfully refuse to close the transaction without being liable for commissions; *Kyle v. Rippey*, 20 Oreg. 453; and *Watson v. Brooks*, 8 Saw. 320; 13 Fed. Rep. 543.

Res Judicata.—A judgment is only conclusive upon questions involved in the suit, and upon which it depends, or upon matters which might have been litigated and decided in the suit, p. 311.

Approved in *Parnell v. Hahn*, 61 Cal. 132. Not followed in *Greenup v. Crooks*, 50 Ind. 421. All matters involved in the issue, determined by the court upon the merits, are as fully concluded by the judgment

as other matters which may have been considered or discussed: *Sanderson v. Peabody*, 58 N. H. 118; and *Girardin v. Dean*, 49 Tex. 247. Cited, also, in 96 Am. Dec. 776, 780, note.

Contract—Intoxication.—Where the fact to be arrived at was the mental condition of the plaintiff at the time the contract was made, evidence of intoxication several hours after entering into the contract is admissible, p. 312.

Cited in 12 Am. Dec. 654, note.

43 Cal. 312-314. YENAWINE v. RICHTER.

Certiorari.—Certiorari will not lie to review an order of a county court granting a new trial, however erroneous such order may be, p. 314.

If the lower court has jurisdiction, certiorari will not lie: *Hutchinson v. Inyo County*, 61 Cal. 121. Inquiry upon the writ cannot be extended any further than is necessary to determine whether the inferior tribunal has exceeded its jurisdiction or regularly pursued its authority: *Phillips v. Welch*, 12 Nev. 169. Cited, also, in 12 Am. Dec. 535, note.

County Courts are courts of superior jurisdiction, and have power to grant new trials, p. 314.

Cited in 94 Am. Dec. 765, note.

43 Cal. 314-319. JARVIS v. HOFFMAN.

Homestead.—If, on the death of the husband, the widow performs the conditions and obtains the patent for the homestead, she acquires an absolute title in fee, from all trust in favor of children, p. 319.

Cited and applied in *Buxton v. Traver*, 67 Cal. 174, holding that the children of a deceased pre-emption claimant acquire no rights in a homestead filed by the widow on the same land after the pre-emptor's death.

Idem.—If the father and mother should both die before the conditions had been fully performed by the homestead claimant, the right and fee would immediately inure to the minor children and might be sold for their use at any time within two years, and the purchaser, on the payment of the remaining fees, would become entitled to a patent, pp. 317, 318.

Leading case followed in *A. T. & S. F. R. R. Co. v. Pracht*, 30 Kan. 77.

43 Cal. 320-323. COTTLE v. LEITCH.

The giving of notice of intention to move for a new trial amounts to a waiver of the right to notice of filing of the findings, p. 322.

Approved in *Thorne v. Finn*, 69 Cal. 254; *Gray v. Winder*, 77 Cal. 527, where it was held that when a party acts as if he had formal notice of a decision, such acts constitute a waiver of such formal notice; *Forni v.*

Yoell, 99 Cal. 178; and *Burlock v. Shupe*, 5 Utah, 433, holding, however, that the asking of a stay of proceedings to prepare notice of intention to move for a new trial would not be a waiver of the statutory right to have written notice of the decision of the court before filing notice of intention.

An order extending the time to prepare and file motion for a new trial extends the time to prepare and file notice of motion for a new trial, p. 321.

Affirmed in *Burton v. Todd*, 68 Cal. 488.

A defendant in a motion for a new trial may file amendments to the statement without waiving his right to object that the statement was not filed in time, by a preface that he does so without prejudice to his right to object in this particular, p. 322.

Approved in *Stevens v. Northwestern Stage Co.*, 1 Idaho, 606. Cited in *Beach v. Spokane etc. Co.*, 25 Mont. 372, holding objection to settlement of statement sufficient.

43 Cal. 323-325. **POORMAN v. MILLS & CO.** S. C. 35 Cal. 118, 39 Cal. 345.

Res Judicata.—A decision by the supreme court upon the points of a case becomes the law of the case in all subsequent proceedings, p. 324.

Cited in 27 Am. Dec. 634, note.

43 Cal. 325-331. **WITTE v. VINCENOT.**

Negotiable Instruments.—Pass-book of a bank transferrable to order, is not a negotiable instrument, p. 339.

Rule approved in *McCaskill v. Connecticut Savings Bank*, 60 Conn. 312; 25 Am. St. Rep. 328.

43 Cal. 331-340; 16 Am. Rep. 143. **PEOPLE v. EDDY.**

Taxation.—A solvent debt, whether secured by mortgage or not, is property for the purposes of taxation within the meaning of the constitution, p. 336.

Cited in *Judge v. Spencer*, 15 Utah, 249, sustaining local statute as to taxation of mortgage debt; *Arapahoe Co. v. Printing Co.*, 15 Colo. App. 196, membership in or contract with Associated Press by newspaper publisher is not property subject to taxation. Doubted in *Savings & Loan Society v. Austin*, 46 Cal. 492, in which Crockett, J., held a tax levied on both the mortgage debt and the property mortgaged to be double taxation; Rhodes, J., dissented from this view relying upon the leading case, 46 Cal. 500. Overruled in *People v. Hibernia Bank*, 51 Cal. 248, 250; 21 Am. Rep. 708, 709. The leading case cited in *Attorney General v. Supervisors*, 71 Mich. 22, to the point that taxation of credits is not unjust taxation. Leading case approved in *State v. Carson Savings Bank*, 17 Nev. 156, 157; *Morrison v. Manchester*, 58 N. H. 553; and in

County of Perry v. Troutman, 114 Pa. 364. Cited, also, in 74 Am. Dec. 93, extended note.

Idem.—All private property must be taxed, and is not competent for the legislature to exempt from taxation any particular class or species of property held in private ownership, p. 336.

Approved in *L. R. & F. S. Ry. v. Worthen*, 46 Ark. 327, 330, holding that a statute exempting railroad embankments, tunnels, ties, and trestles from taxation, is unconstitutional. Fruit trees are subject to taxation: *Cottle v. Spitzer*, 65 Cal. 464. A commutation of the taxes of a railroad company, in consideration of its carrying without charge troops and munitions of war, is unconstitutional: *Hogg v. Mackay*, 23 Oreg. 341; 37 Am. St. Rep. 684. An act providing that no taxes shall be levied upon a railroad company until its profits should amount to ten per cent on the capital, is unconstitutional: *C. & O. Ry. Co. v. Miller*, 19 W. Va. 427. Cited, also, in 37 Am. St. Rep. 688, note.

Interpretation of Statute.—The general rule in the interpretation of words in constitutions or in statutes is that they are used in their ordinary and popular sense, unless the context shows that they have some technical or arbitrary meaning, pp. 336, 337.

Cited in *San Francisco v. Flood*, 64 Cal. 507, to the point that the word "property" is used in its popular sense in the constitution; and to the same effect in *Cottle v. Spitzer*, 65 Cal. 461. A word repeatedly used in a statute will bear the same meaning throughout, unless it is apparent another meaning was intended: *Miller v. Dunn*, 72 Cal. 466; 1 Am. St. Rep. 70.

43 Cal. 341-344. **GRAFF v. MIDDLETON.**

Quitclaim Deeds.—A quitclaim deed passes whatever interest the seller has in the land at the time of its execution, and the prior recording of such deed will give it a preference over a deed of bargain and sale previously executed, but which was subsequently recorded, p. 344.

Affirmed in *Frey v. Clifford*, 44 Cal. 343. A quitclaim deed is sufficient to enable the grantee to maintain ejectment if his grantor could have done so: *Rego v. Van Pelt*, 65 Cal. 256. Rule of the leading case seems to be doubted in *Allison v. Thomas*, 72 Cal. 564, 1 Am. St. Rep. 90, where it was said to be contrary to the decisions elsewhere. But in *Nidever v. Ayers*, 83 Cal. 42, the leading case was approved and followed. Cited in *Spaulding v. Bradley*, 79 Cal. 456, to the point that a quitclaim deed conveys the absolute fee simple title if the grantor has it; and to the same effect in *Taylor v. Opperman*, 79 Cal. 470. The rule was discussed in *Hastings v. Brooker*, 98 Ind. 159, but the court did not decide the point. However, in *Davidson v. Coon*, 125 Ind. 503, and in *Smith v. McClain*, 146 Ind. 84, the rule of the leading case was approved and followed. Leading case was also approved in *Schott v.*

Dosh, 49 Neb. 193; 59 Am. St. Rep. 536; *Wilhelm v. Wilken*, 149 N. Y. 452; 52 Am. St. Rep. 746; and in *Cutler v. James*, 64 Wis. 178, 54 Am. Rep. 606. There is, however, a great diversity of opinion in other jurisdictions as to the rule of the leading case. In *Gress v. Evans*, 1 Dak. Ter. 384, the point was discussed, but not decided. But in *Parker v. Randolph*, 5 S. Dak. 558, a contrary doctrine was upheld, Corson, J., dissenting and approving the leading case. The question was raised but not decided in *Hentig v. Redden*, 35 Kan. 475. And in *Johnson v. Williams*, 37 Kan. 182, 1 Am. St. Rep. 246, the doctrine of the leading case was limited, the court holding a purchaser under a quitclaim deed not to be a bona fide purchaser as to outstanding equities and interests discoverable by the exercise of reasonable diligence. Rule of the leading case doubted in *America Mort. Co. v. Hutchinson*, 19 Oreg. 347. Cited in 25 Am. Dec. 164, 165, note.

43 Cal. 344-352. **PEOPLE v. WILLIAMS.**

Insanity produced by intoxication does not destroy responsibility for crime, if the accused, when sane, voluntarily made himself intoxicated, p. 352.

Approved in *People v. Ferris*, 55 Cal. 592; *People v. Jones*, 63 Cal. 169; and in *State v. Thompson*, 12 Nev. 151. Cited in *People v. Fellows*, 122 Cal. 239, and *People v. Methever*, 132 Cal. 332, noted under *People v. Lewis*, 36 Cal. 531.

In deliberating, there need be no appreciable time between the intention to kill and the act of killing, p. 351.

Approved in *Miller v. State*, 54 Ala. 157; *People v. Jamarillo*, 57 Cal. 114, holding that there need be no appreciable space of time between the intention to kill and the act of killing; *State v. Pritchard*, 15 Nev. 80; and *People v. Calton*, 5 Utah, 459. Cited, also, in 18 Am. Dec. 783, note.

In a case of homicide, when the jury are to pass upon the question of premeditation for the purpose of fixing the degree of the crime, drunkenness may be taken into consideration solely for the purpose of passing on the fact of premeditation, p. 352.

Cited in *People v. Blake*, 65 Cal. 278, holding evidence of protracted intemperance admissible on the question of intent, in a prosecution for forgery. Applied in *People v. Franklin*, 70 Cal. 643, in a prosecution for assault with intent to murder. Approved in *People v. Vincent*, 95 Cal. 428; *Aszman v. State*, 123 Ind. 357; *State v. Zorn*, 22 Oreg. 601, where it was said that the fact of intoxication is to be submitted to the jury for the purpose of enabling them to determine the intent of the accused in committing the act; *State v. Robinson*, 20 W. Va. 733, 738; 43 Am. Rep. 804, 808; and *Hopt v. People*, 104 U. S. 634. *Savary v. State*, 63 Neb. 172. Cited also, in 87 Am. Dec. 102, note; and 40 Am. Rep. 566, 567, note.

Defendant's counsel is not entitled to make his argument on the case

made out by the prosecution when it closes, but must wait until the evidence is concluded, p. 349.

Approved in *People v. Goldenson*, 76 Cal. 348, 349, holding that counsel for defendant must confine himself to a statement of the facts, the effect thereof, and his conclusions therefrom, without any argument upon the evidence introduced by the prosecution.

An instruction should be refused, if there is no evidence on which it could be founded, p. 351.

Approved in *People v. Bourke*, 66 Cal. 456.

43 Cal. 353-356. **ROBINSON v. BUTTE COUNTY.**

Mandamus.—When the legislature makes it the duty of the supervisors to provide by taxation a sufficient amount to meet the accruing interest on county bonds and also to create a redemption fund, the supervisors may be compelled to do so by mandamus if they refuse, p. 356.

Mandamus will lie to compel the levy and collection of a tax for the payment of a municipal debt: *People v. Getzendauer*, 137 Ill. 260.

43 Cal. 356-358. **AUTENREITH v. HESSENAUER.**

Writ of Assistance.—A party who forecloses a mortgage, given by one partner, and obtains a sheriff's deed for an undivided interest in partnership property, without making the other partner a party to the action, is not entitled to a writ of assistance to be placed in possession, as against a receiver of the partnership appointed by the court, p. 358.

Cited in extended note, 51 Am. Dec. 156.

43 Cal. 359-364. **GREY v. TUBBS.**

Equity will treat time as the essence of contract when from the agreement it clearly appears that the parties so intended; and if it appears that the parties have in fact contracted that if the purchaser makes default in the payments as agreed upon he shall not be entitled to a conveyance and shall lose the benefit of his purchase, and it also appears that the purchaser is without excuse for his delay, equity will not relieve him from the consequences of his default, p. 364.

Cited and followed in *Cleary v. Folger*, 84 Cal. 320, 321, 18 Am. St. Rep. 190, 191. *Glock v. Howard etc. Co.*, 123 Cal. 9, 69 Am. St. Rep. 24, discussing right of respective parties on vendee's default, and denying him right to recover installments theretofore made; *Williams v. Long*, 139 Cal. 189, holding time of the essence under facts stated; *Peterson v. Davis*, 63 Kan. 673, sustaining ejectment against vendee in possession after his default under such contract. No particular form of stipulation is necessary to make time the essence of contract, but any clause will have the effect which clearly and absolutely provides that the contract is to be void if the fulfillment is not within the prescribed time; *Martin v.*

Morgan, 87 Cal. 207, 208; 22 Am. St. Rep. 242. Rule applied in *Woodruff v. Semi-tropic L. & W. Co.*, 87 Cal. 280, to a case where vendor was in default owing to delay or neglect to convey. Referred to in *Drew v. Pedlar*, 87 Cal. 450; 22 Am. St. Rep. 262. A stipulation that time should be of the essence of contract is applicable only to the agreement on the part of the purchaser to pay the purchase money, and is intended for the benefit of the vendor alone, who may elect either to rescind or enforce the contract, and the purchaser cannot work a rescission by a default on his part: *Newton v. Hull*, 90 Cal. 494. Approved in *Bennett v. Hyde*, 92 Cal. 133, a similar case; and *Alexander v. Jackson*, 92 Cal. 526, holding that to entitle a person in default to relief, it must appear that he has promptly and in good faith offered to fulfill his contract, and neither infancy or ignorance of his rights is a sufficient excuse. Although it is unnecessary in order to make time the essence of contract that it should be declared to be so in the words of the statute (section 1492 of the Civil Code), yet the intent to make it the essence of contract must be clearly, unequivocally, and unmistakably shown by an express declaration: *Miller v. Cox*, 96 Cal. 344. Time is usually regarded as of the essence of contract where the character of the property renders it liable to fluctuations in value, and this is especially true of mining transactions: *Settle v. Winters*, 2 Idaho, 209. Approved in *Missouri River F. S. & G. R. R. Co. v. Brickley*, 21 Kan. 291. Cited, also, in 50 Am. Dec. 509, extended note; 50 Am. Dec. 677, extended note; 68 Am. Dec. 87, note; and 27 Am. St. Rep. 166, note.

Contracts.—Courts of equity have not the power to make contracts for the parties, nor alter those which have been deliberately made, p. 364.

Equity can only enforce the performance of a contract as made by the parties themselves; it has no power to make a contract for them: *Magee v. McManus*, 70 Cal. 558. Equity cannot make or alter a contract of the parties and then execute it: *Rison v. Newberry*, 90 Va. 521.

43 Cal. 365-369. CENTRAL PACIFIC RAILROAD COMPANY v. PLACER COUNTY. S. C. 32 Cal. 582; 34 Cal. 352.

Certiorari.—The writ will only lie where an inferior tribunal, board, or officer exercising judicial functions has exceeded its jurisdiction, and there is no appeal nor any plain, speedy, or adequate remedy, p. 367.

The leading case is cited with approval in the following decisions: *Certiorari* will not lie to review the proceedings of the board of supervisors in allowing an illegal claim: *Andrews v. Pratt*, 44 Cal. 318. It cannot be used as a writ for the correction of mistakes, either in law or in fact: *C. P. R. R. Co. v. Placer Co.*, 46 Cal. 670. Cited in *P. M. S. S. Co. v. Board of Supervisors*, 50 Cal. 283, to the point that the board of supervisors, sitting as a board of equalization, does not exceed its jurisdiction by refusing to accede to an application to reduce the assessed value of property. Legislative acts cannot be reviewed by *certiorari*:

Spring Valley W. W. v. Bryant, 52 Cal. 137. Action of board of supervisors in rejecting a bid for county printing is not judicial and cannot be reviewed by the writ; *Townsend v. Copeland*, 56 Cal. 615. If a court has jurisdiction, an erroneous order or decree of the court cannot be corrected by the writ of prohibition: *Wiggin v. Superior Court*, 68 Cal. 402. Writ will not lie to review an order for a street improvement: *Quinchard v. Board of Trustees*, 113 Cal. 668. If one in possession of the office of city alderman seeks only a review of the proceedings taken by the board of alderman disturbing him in the enjoyment of it, certiorari will lie: *Aldermen v. Darrow*, 13 Colo. 465; 16 Am. St. Rep. 217. Approved, also, in *Moline, Wilburn & Stoddard Co. v. Curtis*, 38 Neb. 532; and in *Phillips v. Welch*, 12 Nev. 169. See, also, extended notes, 12 Am. Dec. 536; and 23 Am. St. Rep. 108.

Jurisdiction.—Erroneous views entertained, or evidence erroneously admitted, do not make a case of want of jurisdiction, p. 368.

That errors of fact or law cannot be reviewed by this writ is approved by the following cases: *C. P. R. R. Co. v. Placer Co.*, 46 Cal. 670; *Farmer's etc. Bank v. Board*, 97 Cal. 327; *White v. Superior Court*, 110 Cal. 64, 65.

Construction of Statute.—The words in section 446 of the Practice Act "has exceeded the jurisdiction of such tribunal, board," et cetera, presents substantially the same idea as the words "has regularly pursued the authority of such tribunal, board," et cetera, in section 462 of the act, p. 367.

This construction has been followed in *Farmer's etc. Bank v. Board*, 97 Cal. 326; *Quinchard v. Board of Trustees*, 113 Cal. 668; and *Phillips v. Welch*, 12 Nev. 175.

43 Cal. 369-371. **FEELEY v. SHIRLEY.**

Appeal.—A ruling of the court striking out a portion of the complaint or answer cannot be reviewed on appeal unless made a part of the record by a statement or bill of exceptions, p. 370.

Approved in *Spence v. Scott*, 97 Cal. 182; and in *Graham v. Linehan*, 1 Idaho, 781. Cited in *Hawley v. Kocher*, 123 Cal. 79, noted under *Morris v. Angle*, 42 Cal. 240.

Pleadings.—If a complaint avers that the defendant wrongfully broke down plaintiff's flume, and the answer denies that the plaintiff, wrongfully or otherwise, broke down the flume, the answer admits the breaking down of the flume and only denies its wrongful character, p. 369.

Referred to and applied in a somewhat similar case: *Thomas v. State*, 51 Ark. 139. The averment by a defendant that he did not "make and furnish" is by implication an admission that he did furnish: *Thomas v. State*, 54 Ark. 587.

43 Cal. 371-377. SMITH v. O'HARA.

Appropriation of Water.—If the first appropriator of water takes only a part of the water of a stream, another may afterward appropriate the residue, p. 375.

Cited in *Southside Imp. Co. v. Burson*, 147 Cal. 407, where non-riparian owner appropriates limited quantity of water for irrigation subsequent appropriator may take whole of surplus though former afterwards needs surplus; *Edgar v. Stevenson*, 70 Cal. 290, where an injunction restraining a defendant from using surplus water during extraordinary high water was refused. The rule, however, is not applicable in a case where water discharged from a canal is appropriated without the owner's consent: *Ball v. Kehl*, 95 Cal. 614. Cited in a case where riparian rights were in issue, and holding that if the upper proprietor only uses a portion of the water, the proprietor below may have the benefit of that surplus: *Mumpower v. City of Bristol*, 90 Va. 155; 44 Am. St. Rep. 905. Cited, also, in extended note in 42 Am. Dec. 282.

There is no difference in principle between appropriation measured by time, and those measured in volume, p. 376.

Cited in *Cache etc. Co. v. Water etc. Co.*, 25 Colo. 167, 71 Am. St. Rep. 136, sustaining appropriation for definite periods; *Mattis v. Hosmer*, 37 Or. 530, noted under *Ortman v. Dixon*, 13 Cal. 34. Where an appropriator has limited his use of water for irrigation to certain days of the week, the water not used is subject to appropriation by another: *Santa Paula Water Works v. Peralta*, 113 Cal. 44. If a plaintiff only appropriated the water during certain days of the week, or during a certain number of days in a month, then the defendants would be entitled to appropriate such surplus during the remaining days; *Barnes v. Sabron*, 10 Nev. 245.

Sale of Ditch and Water Right cannot be proved by parol but must be evidenced by a deed, p. 376.

Approved in *Hayes v. Fine*, 91 Cal. 398; *Burnham v. Freeman*, 11 Colo. 606; and *Child v. Whitman*, 7 Colo. App. 119.

One entering into the possession of a ditch and water right under a verbal sale does not succeed to the rights of the seller so as to claim the benefit of the seller's prior appropriation, but must date his appropriation from the time he enters into possession, p. 377.

Cited and applied in *Fabian v. Collins*, 3 Mont. 228. The rule was held inapplicable where a ditch was conveyed with a possessory interest in land as an incident of such possessory interest; *Hindman v. Risor*, 21 Oreg. 119. A transfer of the possessory right to land by parol carries with it the water so appropriated: *Low v. Schaffer*, 24 Oreg. 242, citing the leading case to the point that the verbal sale and transfer of his water right by a prior appropriator operates ipso facto as an abandonment thereof. Leading case approved in *Union Mill & Mining Co. v. Dangberg*, 81 Fed. Rep. 104. Cited in *Salina etc. Co. v. Salina etc. Co.*, 7 Utah, 460, discussing water rights as between successive appropriators.

Denied.—The rule of the leading case was denied in *McDodd v. Lannen*, 19 Mont. 86.

General Citations.—Cited in *Lux v. Haggin*, 69 Cal. 447, as an illustration of a case recognizing the right of appropriation of water.

43 Cal. 377-380. MORSE v. GIBBONS.

Sheriff's Fees.—Where a sheriff advertises property for sale under execution, the judgment debtor cannot deprive the sheriff of his fees allowed in the case of a sale, by paying the full amount of the judgment to the judgment creditor, p. 380.

Cited in dissenting opinion of Watson, J., in *Jackson v. Siglin*, 10 Oreg. 100. Approved in *Jurgens v. Hauser*, 19 Mont. 187, holding that a sheriff is entitled to his commission on the purchase price of land sold by him under foreclosure when the mortgagee buys in the premises.

43 Cal. 380-383. ROBERTS v. EVANS.

When goods are wrongfully taken and converted, the owner may waive the tort and sue in assumpsit for their value, p. 382.

Indebitatus assumpsit lies for pasturage where defendants' cattle were wrongfully on plaintiff's land: *De la Guerra v. Newhall*, 55 Cal. 23. Approved in *Lehmann v. Schmidt*, 87 Cal. 20, holding that if a bailee refuses, upon demand, to deliver the property to the bailor, without setting up any lien thereon, he waives his right to claim a lien after suit brought to recover the value of the property. Cited in *Monroe v. Cannon*, 24 Mont. 320, noted under *Fratt v. Clark*, 12 Cal. 89; *Crown Cycle Co. v. Brown*, 39 Or. 289, where sale of goods under contract giving specified time in which to pay is fraudulently procured by purchaser, seller may waive tort and sue for value of goods without waiting for vendee to convert them into cash; *Livingston v. Lovgren*, 27 Wash. 109, purchaser of logs on which there is lien, within thirty days in which claimant may file lien notice, must see that purchase money is appropriated to satisfaction of lien, or he is liable upon an implied contract to lien claimant, up to full value of logs.

General Citation.—*Buchanan v. McClain*, 110 Ga. 481.

43 Cal. 383. PEOPLE v. KEARNEY.

Oral Charge is improper in criminal case except when given by mutual consent, p. 384.

Cited in *State v. Fisher*, 23 Mont. 552, noted under *People v. Chares*, 26 Cal. 79.

43 Cal. 385-389. PEOPLE v. BERNAL.

Service of Summons.—In making service of summons, and in the

return of such service, the provisions of the statute must be and must be shown to have been substantially observed and followed by the officer; otherwise the proceedings cannot be supported upon a direct appeal taken, p. 389.

An affidavit which fails to show service upon the appellant, and is the only proof of service in the record, is insufficient to sustain a judgment upon a direct appeal therefrom: *Linott v. Rowland*, 119 Cal. 453. If the summons had been served by any party empowered to act, the affidavit thereon must show that he was one of the persons described in the statutes: *Black v. Clendenin*, 3 Mont. 47. Upon an appeal from a judgment by default, the record must affirmatively show jurisdiction of the defendant, either by his appearance or by a proper service of summons, and no presumption can be indulged in that there was some other and different kind of service made from that appearing in the record: *Lonkey v. Keyes D. M. Co.*, 21 Nev. 320.

43 Cal. 393-395. *PIERATT v. KENNEDY*.

Practice—Arbitration.—A submission to arbitration is invalid unless: 1. The parties by their stipulation authorize the clerk to enter the note of submission in the register; and 2. That the note of submission is in fact entered by the clerk, p. 395.

Approved in *Kettleman v. Treadway*, 65 Cal. 505.

43 Cal. 395-397. *DAVANAY v. EGGENHOFF*.

Pleadings—Promissory Note.—A complaint on a promissory note that fails to allege that the note remains "due and unpaid," does not state facts sufficient to constitute a cause of action, p. 397.

An allegation that the defendant has refused and still refuses to pay and that there is now due the sum, etc., is insufficient: *Scroufe v. Clay*, 71 Cal. 124.

Rule Limited.—In *Wise v. Hogan*, 77 Cal. 188, it was held that the rule was firmly settled that an averment of nonpayment is necessary to the sufficiency of a complaint for money due on contract, but is not applicable in an action against an administrator, where the complaint alleges nonpayment by the deceased, and presentation and rejection by the administrator; nonpayment by the administrator should be presumed from the alleged fact of his rejection of the claim. Leading case followed in *Barney v. Vigoreaux*, 92 Cal. 632, and *Hurley v. Ryan*, 119 Cal. 72. Rule of the leading case admitted to be correct in *Hershfield & Bro. v. Aiken*, 3 Mont. 449, but the court further held that such a defect would be cured by answering over and going to trial on the merits. Cited and followed in *Vogel v. Walker*, 3 Utah, 229. Cited, also, in 61 Am. Dec. 61, extended note.

General Citations.—Cited in *Tomlinson v. Ayres*, 117 Cal. 571, to the

point that an allegation that "there is now due," is not an allegation of "nonpayment."

Pleadings.—If an unverified complaint on a promissory note avers that it has not been paid, a general denial in the answer puts in issue the fact of payment, p. 397.

In an action to recover money due, the defendant, under the general denial, may prove payment, or that the plaintiff had transferred the demand to another person: *Wetmore v. San Francisco*, 44 Cal. 300. Cited and followed in *Bank of Shasta v. Boyd*, 99 Cal. 606. Distinguished in *Alden v. Carpenter*, 7 Colo. 91, on the ground that in Colorado there is no such a "thing" as a general denial. Again distinguished on the same and other grounds in *Watson v. Lemen*, 9 Colo. 203. Approved in *Weissman v. Russell*, 10 Oreg. 75.

Idem.—If, in an action on a promissory note, the pleadings are verified, a denial on information and belief that the note had not been paid, is insufficient, p. 397.

Cited in 70 Am. Dec. 625, extended note.

43 Cal. 398-437. PEOPLE v. CENTRAL PACIFIC RAILROAD COMPANY.

Constitutional Law.—The state revenue laws are not unconstitutional for want of uniformity where the legislature has prescribed different modes for the enforcement of the payment of delinquent taxes in the several counties, pp. 433, 434.

Followed in *San Francisco v. S. V. W. W.*, 54 Cal. 574, where a special act of the legislature providing for the collection of taxes assessed, levied, and delinquent in San Francisco, was declared constitutional, rule changed by new constitution, article IV, section 5: *Ex parte Burke*, 59 Cal. 8, but the change in the constitution was held not to apply to past legislation. It is within the power of the legislature to pass local or special laws regulating the compensation of county officers; *State v. Fogus*, 19 Nev. 253. Cited in *McGill v. State*, 34 Ohio St. 241, holding that an act of the legislature prescribing a different mode of summoning jurors in one county from that prescribed for the remaining counties, to be constitutional: *State v. Shearer*, 46 Ohio St. 282, deciding that the formation of a school district from territory within the limits of a township by special act of the legislature, is constitutional.

Idem.—Laws of a general nature must have a uniform operation, p. 433.

Cited in *Edmonds v. Herbrandson*, 2 N. Dak. 282.

Idem.—**Creation of Revenue Districts.**—The constitution does not prohibit the creation of more than one revenue district in a county, nor the election of assessors and collectors in each district, p. 435.

The rule of the leading case explained, as being founded on a provision of the California constitution in *Hutchinson v. Ozark Land Co.*, 57 Ark. 558, 38 Am. St. Rep. 280, in which a contrary rule was maintained. Approved in *Rosenborough v. Boardman*, 67 Cal. 118. Referred to and the principle followed in *Gilson v. Board of Commissioners*, 128 Ind. 72.

Taxation.—The state has authority to tax the property of railroads lying within its limits, p. 431.

Where lands have been granted to a railroad company, and patents thereto have been regularly issued, the lands became subject to the legislative will in the imposition of taxes: *Wisconsin C. R. Co. v. Taylor Co.*, 52 Wis. 56.

New Trial—Statement.—A statement on motion for a new trial should specify the particulars in which the evidence is insufficient, or the particular errors of law upon which the party will rely, p. 423.

Followed in *Leonard v. Shaw*, 114 Cal. 71; and *Smith v. Smith*, 119 Cal. 186.

43 Cal. 437-439. CLELAND v. THORNTON.

Damages.—If, through the negligence of a party who starts a fire, the fire spreads and destroys adjacent property, the one who builds the fire is liable for the damages, p. 439.

Approved in *The Louisville, New Albany, & Chicago R. Co. v. Nitsche*, 126 Ind. 232, holding a railroad company liable for damages for negligence in starting fires. Cited, also, in 30 Am. St. Rep. 504, 505, extended note.

Measure of Damages.—Evidence as to the cost of new buildings to replace those destroyed is admissible, as furnishing data for an approximate estimate of the value of the old buildings, p. 438.

It is a general rule that for permanent injuries to real or personal property, the plaintiff is entitled to recover the depreciation in value caused by the injury: *Williams v. Missouri Furnace Co.*, 13 Mo. App. 73. Where buildings are destroyed, the proper measure of damages is the value of the buildings: *White v. C. M. & St. P. Ry. Co.*, 1 S. Dak. 329.

43 Cal. 439-444; 13 Am. Rep. 148. PEOPLE v. BOWEN.

Pardon.—An executive pardon removes from the offender the disabilities which follow conviction of a felony, p. 442.

Referred to as a case on the subject of "pardons," in *Singleton v. State*, 38 Fla. 304, 56 Am. St. Rep. 182, in which the above rule is approved. Cited, also, in 59 Am. Dec. 579, extended note.

An executive act restoring a felon to the rights of citizenship is not a pardon and does not remove the disability to testify, p. 443.

Cited in *State v. Grant*, 79 Mo. 127, 49 Am. Rep. 224, where it was held that incompetency is one of the incidents of a conviction of a

felony and the legislature cannot, without trenching on the pardoning power of the executive, do away with it; and *State v. Foley*, 15 Nev. 68, 37 Am. Rep. 460, holding that a pardon may be granted after the prisoner has suffered the full penalty.

Pardoning power is the same in its nature and effect as that exercised by the representatives of the English crown in this country during colonial times, p. 442.

Cited in 59 Am. Dec. 572, note.

An offender may be pardoned after suffering the full penalty for his crime, p. 441.

Cited in 59 Am. Dec. 575.

General Citations.—*Territory v. Richardson*, 9 Okla. 584; *In re Conditional Discharge of Convicts*, 73 Vt. 429.

43 Cal. 444-446. PEOPLE v. LONG.

Evidence—Motion to Strike Out.—A motion to strike out evidence should not be allowed in either civil or criminal cases, where evidence is permitted to be given without objection in the first instance and then a motion to strike out made, on grounds readily available when the evidence was offered, p. 446.

Leading case approved in *People v. Rolfe*, 61 Cal. 542, where it was said that a party is not permitted to remain silent when evidence is offered, with the privilege of accepting it if favorable, and afterward moving to strike it out if unfavorable: *People v. Salorse*, 62 Cal. 145, holding that an objection to the admission of evidence cannot be made for the first time in the supreme court; *Wright v. Seymour*, 69 Cal. 128; *People v. Samario*, 84 Cal. 485; *People v. Nelson*, 85 Cal. 426.

Doctrine Limited.—The rule of the leading case does not apply where the answer of the witness sought to be stricken out is not responsive to the question addressed to him: *People v. Dixon*, 94 Cal. 258. Leading case cited and followed in *Wheelock v. Godfrey*, 100 Cal. 588; and *In re Wax*, 106 Cal. 347, holding that the withdrawal of an objection deprives the contestant of the right to object afterward by moving to strike out. See, also, 6 Am. St. Rep. 245, note.

Confession.—A voluntary confession made to an officer having the prisoner in custody, is admissible if not induced by improper means, p. 446.

Statements made by a person accused of crime, together with his demeanor at the time of arrest, are always open to inquiry when not made under duress, or induced by menace, or promises of immunity; *State v. Phelps*, 5 S. Dak. 490. The admission of confessions made in the defendant's presence implicating him in a homicide which were not denied by him, is not cause for reversal when the jury were instructed as to dangerous and unsatisfactory character of such evidence: *Green v. State*, 97 Tenn. 67. Cited, also, in 6 Am. St. Rep. 243, note.

43 Cal. 447-451. PEOPLE v. WALSH.

A challenge for implied bias must specify the particular grounds on which the challenge is founded, pp. 447, 448.

Cited and approved in *People v. Hopt*, 4 Utah, 250; *Shields v. State*, 149 Ind. 400; and *Southern Pac. Co. v. Raugh*, 49 Fed. Rep. 701.

Homicide held not justifiable under facts stated, p. 449.

Cited in *State v. Taylor*, 143 Mo. 164, holding similarly when committed to prevent a mere trespass.

43 Cal. 452-454. COOMBS v. HIBBERD. S. C. 45 Cal. 174.

New Trial.—If the court has passed on a motion for a new trial made in due form upon a settled statement, the order is conclusive on the court making it, and the court cannot afterward vacate the order and decide again on the motion, p. 454.

Cited and followed in *People v. Center*, 61 Cal. 194; *O. F. Sav. Bank v. Deuprey*, 66 Cal. 170, but the rule is otherwise when the order of the court was prematurely or inadvertently made; *Dorland v. Cunningham*, 66 Cal. 486, holding that the Code of Civil Procedure authorizes but one motion for a new trial, and the order thereunder is final so far as the superior court is concerned; *Lang v. Superior Court*, 71 Cal. 493, deciding that where a motion for a new trial was stricken off the calendar, that such action of the court was equivalent to a denial of the motion, and that the court could not afterward set its ruling aside and grant a rehearing; and *Carpenter v. Superior Court*, 75 Cal. 597, holding that the rule is not affected by the fact that terms of court are abolished. *Whitbeck v. Montana etc. Ry. Co.*, 21 Mont. 107, 108, applying rule to appealable order granting judgment on pleadings. In *Lake v. Bender*, 18 Nev. 374, the leading case was distinguished on the ground that there was not an intimation in the statutes of Nevada that the power of the trial court is not coextensive with that of the appellate court in the matter of granting new trials. But the leading case is approved in *Crosby v. North Bonanza M. Co.*, 23 Nev. 76. Also, cited and approved in *Burnham v. Spokane Mercantile Co.*, 18 Wash. 211, 212.

Remedy.—The proper and only redress is an appeal to the supreme court, p. 454.

Approved in *People v. Center*, 61 Cal. 194; *Goyhinech v. Goyhinech*, 80 Cal. 409, deciding that where a judgment or order is itself appealable, the appeal must be taken from such order or judgment, and not from a subsequent order refusing to set it aside; and *Crosby v. North Bonanza M. Co.*, 23 Nev. 76.

43 Cal. 455-458. EX PARTE MURRAY.

Habeas Corpus.—Upon habeas corpus, if the court whose judgment is assailed be one of competent jurisdiction to render a final judgment, the

appellate court will only inquire if the judgment as rendered be upon its face certain and definite in terms, so that it may be known what punishment the prisoner is to suffer, p. 457.

The rule of the leading case is approved by the cases citing it. The sentence of the court is sufficient which shows the offense of which the defendant had been convicted, and the penalty imposed: *Ex parte Raye*, 63 Cal. 492. Where the judgment in the record shows sentence for petit larceny, second offense, it is good: *Ex parte Young Ah Gow*, 73 Cal. 442. A judgment is sufficient as stating the general offense "murder," although the degree of the murder is not given: *People v. McNulty*, 93 Cal. 444. A judgment is sufficient which recites "that whereas, the said Geo. Stephen, having been duly convicted in this court of the crime of establishing and carrying on a saloon, and there selling and giving away malt liquors without a license," et cetera; *Ex parte Stephen*, 114 Cal. 283. All that is necessary is that the judgment shall sufficiently express that which is adjudged; it need contain no recital of the facts upon which it is based: *People v. Kelly*, 120 Cal. 273. A judgment by a court of competent jurisdiction, valid upon its face, is an unanswerable return to a writ of habeas corpus, issued for the release of a person imprisoned by virtue of such judgment: *Smith v. Hess*, 91 Ind. 429. If a magistrate be an officer de facto, his judgments will be as unquestionable in collateral proceedings by habeas corpus as if he were a magistrate de jure: *Parks, Petr. for Writ of Habeas Corpus*, 3 Mont. 432. A person held in custody under a regular commitment of a justice of the peace, will not be discharged on habeas corpus, unless it appears that the jurisdiction of the justice has been exceeded, or the commitment issued without authority of any judgment, order, a decree of any court: *Ex parte Winston*, 9 Nev. 75.

Jurisdiction of Police Court—Collateral Attack.—The police court of San Francisco is not of inferior jurisdiction in the sense that upon mere collateral inquiry nothing is to be intended in support of its judgment, when rendered in a particular case, included by general definition in that class of criminal cases over which jurisdiction has been conferred upon it by law, p. 458.

Overruled.—Mere dictum: *Ex parte Kearney*, 55 Cal. 214, 216, holding that police court of San Francisco is of inferior jurisdiction, and the evidence of its proceedings must affirmatively show jurisdiction of the person of the defendant and over the subject matter.

43 Cal. 458-467. VASSAULT v. EDWARDS.

Specific Performance.—A contract will not be specifically enforced unless it is mutual, p. 464.

The general rule of the leading case approved in the cases citing it. A contract calling for the exercise of personal skill cannot be specifically enforced: *Sturgis v. Galindo*, 59 Cal. 31; 43 Am. Rep. 239; and *Lattin v.*

Hazard, 91 Cal. 91. The rule as to the inability of courts to compel specific performance of a contract for "personal services" is not applicable where the personal services have been fully or substantially performed: *King v. Gildersleeve*, 79 Cal. 510. An acknowledged executory contract of a married woman for the sale of her separate real estate is not enforceable against her, and cannot be specifically enforced by her against the vendee: *Ranbury v. Arnold*, 9 Cal. 608. But an original lack of mutuality in the right to specific performance will not preclude the enforcement of the contract, where this want has been removed at the time the action is brought; *Sayward v. Houghton*, 119 Cal. 548. Cited in *Claypool v. Board of School Commissioners*, 132 Ind. 271, in which the rule is discussed, especially as regards exceptions thereto. Optional contracts are almost uniformly enforced after the one who has had the privilege of accepting them has exercised his privilege in such a mode as to bind himself by the contract. From that moment it becomes mutual: 5 Am. St. Rep. 113, extended note. For other citations under this rule see cases collected under syllabi four and five.

An executory contract for the sale of real estate, signed by the vendor alone satisfies the requirements of the statute of frauds, p. 464.

Rule approved in the citations following: *McDonald v. Huff*, 77 Cal. 282; *Scott v. Glenn*, 87 Cal. 225; *Cavanaugh v. Casselman*, 88 Cal. 549, 551; *Nason v. Lingle*, 143 Cal. 367, but holding rule as to mutuality of remedy inapplicable under facts stated; *McPherson v. Fargo*, 10 S. Dak. 616, 66 Am. St. Rep. 727, holding vendee bound under such contract when he accepts and records it, even without his signature; *Meux v. Hogue*, 91 Cal. 447, holding that although it is unnecessary for the vendor of real property to subscribe the agreement for its sale, yet where the agreement is made through agents acting under verbal authority, subject to the approval of the owner, it is necessary that the vendor should know its contents and approve and ratify it before it becomes binding on the other party: *Scott v. Glenn*, 98 Cal. 171, deciding that the signature of vendor to the contract, taken in connection with a delivery thereof to the vendee, and a partial payment thereunder, binds both parties: *Peevey v. Houghton*, 72 Miss. 924; 48 Am. St. Rep. 594; and *Ide v. Leisler*, 10 Mont. 15; 24 Am. St. Rep. 22. See, also, 7 Am. Dec. 290, note; and 5 Am. St. Rep. 113, note.

In an action to enforce an agreement required by the statute of frauds to be in writing, an averment that the agreement was made is sufficient, without alleging that it was reduced to writing and signed, p. 463.

The citations show this to be a settled rule of pleading. Where, under the statute, an agreement is required to be in writing, such agreement, if in other respects properly pleaded, will be presumed to have been in writing for the purpose of testing the sufficiency of the pleadings: *Reagan v. Justice's Court*, 75 Cal. 255.

Exception.—An exception to the rule arises in cases where the con-

tract must necessarily be in writing to confer jurisdiction: *Reagan v. Justice's Court*, 75 Cal. 255. Leading case approved in *Emerson v. Bergin*, 76 Cal. 202; *Broder v. Conklin*, 77 Cal. 336, holding that a defendant relying upon the defense of the statute of frauds must plead it; and *Bradford Investment Co. v. Joost*, 117 Cal. 207, expressly affirming the rule. Cited, also, in 16 Am. Dec. 149, note; and 86 Am. Dec. 685, note.

Specific Performance.—If under an executory contract for the sale of land, the time for completion of the purchase is extended, an acceptance by the vendee of the vendor's offer within a reasonable time makes a binding contract of sale, which may be specifically enforced, p. 464.

Cited and a similar holding made in *Ide v. Leisler*, 10 Mont. 14; 24 Am. St. Rep. 21; *Spires v. Urbahn*, 124 Cal. 111, as reviewing *Cooper v. Pena*, 21 Cal. 404, granting specific performance in such cases though mutuality did not exist originally. Approved in *Johnston v. Trippe*, 33 Fed. Rep. 536.

An executory contract of sale, when its terms are accepted and acted upon by the vendee, becomes a binding contract of sale, p. 464.

Approved in *Gordon v. Darnell*, 5 Colo. 305; *Byers v. Denver C. R. Co.*, 13 Colo. 556; and *Weaver v. Burr*, 31 W. Va. 775, dissenting opinion of Snyder, J.

Where time is of the essence of the contract, the court has no power to extend it, p. 463.

Cited in *McDonald v. Huff*, 77 Cal. 283; *Larned v. Wentworth*, 114 Ga. 222, holding acceptance of offer ineffectual if after time limited therein.

43 Cal. 467-477. **McLERAN v. BENTON.** S. C. 31 Cal. 29; 73 Cal. 329.

Acknowledgment of Married Woman.—If the certificate of acknowledgment of the deed of a married woman for her separate property does not state that she was examined by the notary without the hearing of her husband, and that she was made acquainted with the contents of the instrument, it is radically defective and void as to her, p. 272.

The general rule that the acknowledgment of a married woman is an essential part of the execution of a deed by her, and that to make the acknowledgment valid the provisions of the statute must be strictly complied with, is approved by the following cases: *Leonis v. Lazzarovich*, 55 Cal. 58, holding that a court of equity cannot reform a certificate of acknowledgment; *Hand v. Hand*, 68 Cal. 140; *Bollinger v. Manning*, 79 Cal. 11; *Wambole v. Foote*, 2 Dak. Ter. 23, holding that the private examination of a married woman is personal, and is a matter in which she cannot be represented by another; and *A. S. & L. Assn. v. Burghardt*, 19 Mont. 326, 61 Am. St. Rep. 508, holding that where a mortgage of a homestead was void unless executed by the husband and wife, the acknowledgment was an essential part of the execution by the wife.

Abandonment of Land.—An attempted sale of land which fails be-

cause of a defect in the deed is not an abandonment. There cannot be an abandonment to a particular person or for a consideration, p. 476.

Abandonment is a matter of intention, and there is no such thing as an abandonment to a particular person or for a consideration; *Middle Creek D. Co. v. Henry*, 15 Mont. 577, an action to determine water rights. Cited, also, in 40 Am. Dec. 465, note; and 51 Am. Rep. 460, note.

General Citations.—Cited in the same case, after, 73 Cal. 337, to the point that on the death of the husband, the wife and children became tenants in common in the common property. Same case, 73 Cal. 339, where the court referred to the general supposition of the court in the case before, that an unacknowledged lease for a term of years by a married woman was valid; but on consideration the court held it created only a tenancy at will. Same case, 73 Cal. 344, the court apparently referring to the holding of the case before, that actual possession of land was necessary to entitle a party to the benefits of the Van Ness Ordinance.

43 Cal. 478-481. EX PARTE DELANEY.

Profane Swearing.—A municipal legislative body if empowered by the legislature to prohibit or suppress practices against good morals or public decency, may by ordinance, punish the uttering of profane language, whether uttered frequently or only once by the same person, p. 480.

So an ordinance establishing fire limits in San Francisco is valid: *McCloskey v. Kreling*, 76 Cal. 512. Cited, also, in 34 Am. Dec. 642, note.

General Citations.—Referred to in 26 Am. Dec. 48, note, as sustaining the proposition that where a conviction is had under a void municipal ordinance, the one convicted may be discharged on habeas corpus.

43 Cal. 482-484. THOMPSON v. LYNCH.

New Trial.—The right to give notice of intention to move for a new trial is lost, when the right to move for a new trial is lost, p. 483.

Cited and followed in *People v. Center*, 61 Cal. 194; and *Cooney v. Furlong*, 66 Cal. 522.

Idem.—An order striking a notice of motion for a new trial from the files ceases to be a subject of review after sixty days, and a party cannot move to vacate it and then appeal from the order denying his motion, p. 484.

The time allowed for an appeal cannot be extended by an order refusing to vacate or vacating an appealable order: *Insurance Co. v. Weber*, 2 N. Dak. 246. Approved in *Vert v. Vert*, 3 S. Dak. 623.

General Citation.—*Casteel v. State*, 9 Wyo. 275.

43 Cal. 485-492. HOBBS v. DUFF.

If the opposite party, without reserving his right to object for want of notice of motion for a new trial, settles the statement, or files amendments, he waives the right to notice, pp. 491, 492.

Cited in *Harrigan v. Lynch*, 21 Mont. 42, noted under *Williams v. Gregory*, 9 Cal. 76. Objection that a motion for a new trial is not given in time must be taken in the court below, or it will be deemed to have been waived, and the time extended by consent: *Brichman v. Ross*, 67 Cal. 602. Where a statement was settled and certified according to law, without any objection taken, or right to object thereafter reserved, any irregularity in the proceeding upon the motion was waived: *Savings and Loan Society v. Moore*, 68 Cal. 158. Approved in *Schiefferly v. Tapia*, 68 Cal. 185, where an objection that a notice of intention to move for a new trial was not filed in time was deemed waived; *Simpson v. Budd*, 91 Cal. 491, where the court say that, "it has been assumed if not directly decided, that the time for giving notice of motion for a new trial, as well as for every other step to be taken in relation thereto, may be waived or extended by consent."

Attorneys—Substitution of.—The proceedings in a cause on behalf of the parties thereto must be conducted by their respective attorneys until their authority is revoked, or other attorneys substituted, p. 491.

But in *Shirley v. Burch*, 16 Oreg. 8, it was held that a notice of appeal is sufficient, although signed by attorneys who were not the attorneys of the appellants below, and no substitution had been made in the manner provided by the Civil Code. Cited, also, in 76 Am. Dec. 256, note.

Evidence.—A defendant is not injured by the admission of parol evidence to establish title to real estate, when written testimony is also introduced to prove the same title, and the parol testimony does not add to or contradict it, p. 489.

Approved and followed in *Crim v. Kessing*, 89 Cal. 491; 23 Am. St. Rep. 499.

43 Cal. 492-494. PEOPLE v. OLVERA.

Taxes assessed on the property of an estate pending administration, are not claims required to be presented for allowance, p. 494.

Followed in *Hancock v. Whitmore*, 50 Cal. 523. Cited in *Estate of Freud*, 31 Cal. 671, sustaining right of executor to pay off existing liens and redeem from mortgage, though not presented as a claim.

43 Cal. 497-502. LANDER v. CASTRO.

Attorney in Fact, who executes a note binding principal, is not personally liable therefor, even if he had no authority to make the note, p. 501.

Approved in *Melone v. Ruffino*, 129 Cal. 523, 524, 79 Am. St. Rep. 134, 135, noted under *Hall v. Crandall*, 29 Cal. 568; dissenting opinion in *Andrus v. Blazzard*, 23 Utah 264, majority holding guardian who mortgages realty of ward to pay debts is personally liable, *Blanchard v. Kaull*, 44 Cal. 450, 452, where a promissory note given by trustees of a company was held not to bind the trustees personally; *Bean v. Pioneer Mining Co.*, 66 Cal. 455; 56 Am. Rep. 108, holding that a note signed "Pioneer Mining Company, John E. Mason, Supt.," did not bind the superintendent; *Wallace v. Bentley*, 77 Cal. 21; 11 Am. St. Rep. 233, deciding that an agent is not liable as principal on a contract for sale of land if the contract does not contain apt words binding him personally; *Senter v. Monroe*, 77 Cal. 351, to the same effect; and *Hefron v. Pollard*, 73 Tex. 102, 15 Am. St. Rep. 770, where it was held that the proper action was not upon the contract itself, but upon the implied warranty or for deceit. Cited, also, in 89 Am. Dec. 69, note; 11 Am. St. Rep. 234, note; and 22 Am. St. Rep. 511, note.

43 Cal. 506-509. RAIMOND v. ELDRIDGE.

Nonsuit.—Grounds for the motion must be precisely stated and none other than those stated can be considered in passing upon the motion, or in reviewing the same in the appellate court, p. 506.

Rule approved in *Shain v. Forbes*, 82 Cal. 582; *Daley v. Russ*, 86 Cal. 117; and *Bronzan v. Drobaz*, 93 Cal. 650. Referred to but not commented upon in *Mattoon v. Fremont E. & M. V. R. Co.*, 6 S. Dak. 198.

Exception.—Where the defects cannot be corrected by amendment, the error of not specifying the grounds of the motion is immaterial: *Daley v. Russ*, 86 Cal. 117.

Statute of Limitations.—A defendant, to avail of the statute, must show adverse possession of demanded premises for the statutory period, p. 508.

Cited in *Townsend v. Edwards*, 25 Fla. 588.

43 Cal. 509-511. PATTEN v. HICKS.

Statute of Frauds.—A verbal contract not to be performed within one year from the making thereof, is void, p. 511.

Referred to in *Feeney v. Howard*, 79 Cal. 535, 12 Am. St. Rep. 170, holding that if a plaintiff relies upon a contract within the statute, a denial of the contract is sufficient to raise the question of its validity under the statute. Cited in 93 Am. Dec. 88, note.

Idem.—For labor and services performed under a contract void under the statute, recovery may be had on a quantum meruit, p. 511.

Rule approved in *Lapham v. Osbourne*, 20 Nev. 177; and *Towsley v. Moore*, 30 Ohio St. 191, 27 Am. Rep. 439, holding that where a contract

void under the statute has been fully performed by one party, the other having obtained its benefits, cannot refuse to pay its reasonable value.

43 Cal. 511-514. MOORE v. BESSE.

Sale of Pre-emption Right under execution passes no interest in the land which will enable the purchaser thereunder to procure the title through pre-emption laws, p. 514.

Followed in *Rupert v. Jones*, 119 Cal. 112. Approved in *Rio Grande etc. Ry. v. Telluride etc. Co.*, 23 Utah, 41, one settling on unsurveyed government land, who in good faith complies with statutory requirements, derives no right thereto by purchasing claim of prior settler.

43 Cal. 515-526. HICKS v. MURRAY.

Mechanic's lien law is not unconstitutional on the ground that it confiscates private property, p. 521.

Cited in *Jones v. Great Southern Fireproof Hotel Co.*, 86 Fed. Rep. 382, holding that an act giving sub-contractors a lien on the building and land for the amount of their claim for services or materials, without regard to the amount still due the principal contractor and limited only by the original contract price to be paid by the owner, is not unconstitutional; *Griffith v. Maxwell*, 20 Wash. 412, as to provision for attorney's fees in such law.

Mechanic's Lien.—If a person claiming a mechanic's lien signs the verification attached to the claim this is a sufficient signing of the claim, p. 521.

Cited in *Deatherage v. Woods*, 37 Kan. 62, holding that the signing of the verification by one member of the firm is sufficient; and in *Pain v. Isaacs*, 10 Wash. 175, deciding that the statute does not require the claims to be signed at all, if it appears in the statement who the claimants are; but the court apparently rely upon the opinion of *Crockett, J.*, dissenting in part, p. 522, rather than upon the opinion of the court.

It is necessary that the claim for the benefit of such lien shall state the name of the owner or reputed owner of the premises, p. 521.

Approved in *Phelps v. M. C. G. M. Co.*, 49 Cal. 339.

Pleadings.—Facts essential to the support of a case must be alleged in the pleadings, and evidence upon omitted facts cannot be admitted, p. 522.

Findings of fact outside the issues raised by the pleadings and contrary to their admissions will be disregarded on appeal from their judgment: *Ortega v. Cordero*, 88 Cal. 226. Neither stipulations nor admissions can make a case broader than it is by allegation: *Tucker v. Parks*, 7 Colo. 68. Cited in *Ellis v. Rademacher*, 125 Cal. 558, on point that court cannot grant any relief not warranted by averments of complaint.

General Citations.—Dissenting opinion of Crockett, J., referred to in 76 Am. Dec. 508, note, to the point that notice of mechanic's lien need not set out the items of account, a general statement of the demand showing its nature and character being sufficient.

43 Cal. 526-530. MARQUART v. BRADFORD.

Abandonment and estoppel in pais distinguished, p. 528.

Cited in *Wolff v. Canadian Pacific etc. Co.*, 123 Cal. 539, holding motion not abandoned under facts stated.

General Citations.—Cited in 40 Am. Dec. 464, to the point that standing by when a sale of property in which an interest is claimed is made, without objecting, is not sufficient evidence of an abandonment. It is questionable whether and such holding is to be found in the leading case. Referred to in 85 Am. Dec. 171, as a case on estoppel in pais.

43 Cal. 530-532. PEOPLE v. BROTHERTON.

An unqualified expression of opinion is ground for challenge for implied bias, p. 531.

But mere hypothetical opinions founded upon hearsay, and unaccompanied with malice or ill-will, would not come within the rule of the leading case: *People v. Murphy*, 45 Cal. 142, Approved in *State v. Morgan*, 23 Utah, 225, where juror had prejudiced case beforehand, but made false answers on voir dire, new trial granted.

43 Cal. 534-541. PEOPLE v. MORSE.

An assessor may assess and place a valuation on a block or part of a block in a city, as a whole, when one man owns it, without placing a separate valuation on the several lots into which it is divided, p. 541.

Approved in *People v. Culverwell*, 44 Cal. 622. Cited in *Spiech v. Tierney*, 522, sustaining en masse assessment of contiguous lots; *Co-operative etc. Assn. v. Green*, 5 Idaho, 665, two contiguous town lots owned by same person may be jointly assessed, and one valuation fixed for said lots. Distinguished in *People v. Clunie*, 70 Cal. 507, deciding that city lots must be separately assessed, and a separate valuation placed on each. Overruled in *Cadwalader v. Nash*, 73 Cal. 50. Expressly affirmed in *Cooper v. Miller*, 113 Cal. 243, a case where five lots owned by one person were assessed and a valuation placed upon them as a whole. Leading case approved in *Roth v. Gabbert*, 123 Mo. 30, in which it is held that the mode of use is important in determining whether lots may be assessed as a whole; and in *Land & River Imp. Co. v. Bardon*, 45 Fed. Rep. 709.

County Indebtedness.—Legislature cannot require the creditors of a

county to accept new evidences of indebtedness, different in terms from the old, p. 540.

Cited in 68 Am. Dec. 300, note.

General Citation.—Pettibone v. Fitzgerald, 62 Neb. 872.

43 Cal. 542-543. JOHNSON v. MUIR.

Motion for New Trial on Affidavits.—When an application for a new trial is made on affidavits, the affidavits used in the hearing of the motion must be identified by the indorsement of the judge or clerk, p. 542.

On an appeal from an order refusing a new trial affidavits embodied in the record, and marked filed by the clerk, will not be considered unless they are contained in and form part of a bill of exceptions or statement, or are otherwise identified by the judge; *Fish v. Benson*, 71 Cal. 431. Approved in *Mining Co. v. Weinstein*, 7 Mont. 351.

43 Cal. 543-552. ESTATE OF SIMMONS.

Administrator's Commissions must be based on the value of the estate taken into possession and accounted for, p. 549.

But executors of the last will of a deceased person are not entitled to commissions on the value of a piece of land of which they had taken possession but which was afterwards determined not to belong to the estate: *In re Ricaud*, 70 Cal. 71. Referred to in *In re Dewar's Estate*, 10 Mont. 438.

In determining administrator's commissions, the inventory is only prima facie evidence of value, p. 549.

Approved in *Estate of Carver*, 123 Cal. 106, approving such allowance in absence of evidence as to unfairness of valuation; *Estate of Fernandez*, 119 Cal. 584, 585, holding that commissions cannot be allowed upon any greater amount than the sum for which the property was actually sold; and in *Horton v. Barto*, 17 Wash. 678.

Estate cannot be charged with attorney's fees for procuring letters of administration, p. 547.

Cited in *Estate of Byrne*, 122 Cal. 261, disallowing administrator's expenses prior to application for letters; *In re McKinney*, 112 Cal. 453, holding that it is within the discretion of the court to allow costs in an unsuccessful contest of a will before probate.

Administrator should be allowed expenses necessarily incurred, p. 551.

Cited in note to *Fletcher v. American etc. Co.*, 78 Am. St. Rep. 203, on general subject.

43 Cal. 552-556. PEOPLE v. VALENCIA.

Murder.—When the instructions of the court on a material point are contradictory, there should be a new trial, p. 556.

Approved in *People v. Anderson*, 44 Cal. 60; *People v. Wong Ah Ngow*, 54 Cal. 154, 35 Am. Rep. 71, holding that an erroneous instruction is not cured by a correct statement of the law in another part of the charge; *People v. Messersmith*, 57 Cal. 575, holding the following instructions erroneous: "That insanity must be proved beyond a reasonable doubt, and in that connection read to the jury a decision to the effect that it is sufficient to prove insanity by preponderance of evidence"; *Haight v. Vallet*, 89 Cal. 249, 23 Am. St. Rep. 468, where the rule was applied in a civil case; and *McClaine v. Territory*, 1 Wash. 353.

The question of deliberation and premeditation is peculiarly within the province of the jury to determine, p. 556.

Approved in *People v. Ah Lee*, 60 Cal. 86, and *People v. Chew Sing Wing*, 88 Cal. 271.

Murder in First Degree.—The wilful and felonious killing of another does not constitute murder in the first degree, but there must also be deliberation and premeditation, p. 555.

Approved in *People v. Guance*, 57 Cal. 154, holding an instruction, that "if the jury find from the evidence that the defendant killed the deceased, and that such killing was with malice aforethought, you will find the defendant guilty of murder in the first degree," to be erroneous; and *State v. Wong Fun*, 22 Nev. 341, holding that the words "malice aforethought" are not synonymous with "wilful, deliberate, and premeditated."

Indictment.—An indictment is good which charges a person as principal in one count and as accessory in another count, p. 555.

Approved in *State v. Hamlin*, 47 Conn. 119.

43 Cal. 557-560. PEOPLE v. GIBBONS.

Preliminary Examination of Prisoner.—A justice of the peace has no authority to administer an oath to a prisoner, upon his preliminary examination, nor to hear or receive testimony from him in that proceeding, p. 559.

Rule changed by code.—Under the code a person accused of crime may become a witness for or against himself at a preliminary examination, and his testimony may be used in evidence against him on his subsequent trial: *People v. Kelly*, 47 Cal. 125. The rule laid down in *People v. Kelly*, supra, approved in *State v. Glass*, 50 Wis. 222; 38 Am. Rep. 347.

43 Cal. 560-564. PEOPLE v. BURT.

Repeal by Implication.—Where a subsequent act is repugnant to a prior one, the last operates, without any repealing clause, as a repeal of the first, p. 564.

Approved in *People v. Sargent*, 44 Cal. 432, holding that an act authorizing the levy of a tax for school purposes not to exceed fifty cents on the hundred dollars, is in conflict with and repealed by a subsequent act providing that the levy shall not exceed thirty-five cents; In the *Matter of Yick Wo*, 68 Cal. 304, deciding that, in order for a subsequent act to repeal the former, it should appear that it was extended to take the place of or repeal the former, or that the two acts are so inconsistent that force and effect cannot be given both; *Ex parte Henshaw*, 73 Cal. 506, dissenting opinion of Thornton, J., and *Busby v. Riley*, 6 S. Dak. 405. Referred to in *Barden v. Wells*, 14 Mont. 464, but distinguished on the ground that the statutes in question were not inconsistent. Cited, also, in 14 Am. Dec. 210, note.

If an act is properly enrolled and authenticated, and is deposited with the secretary of state, the courts will not look into the journals of the legislature to see whether or how the bill is passed, p. 564.

Cited in *County v. Colgan*, 132 Cal. 268, 269, noted under *Sherman v. Story*, 30 Cal. 266; *Narregang v. Brown Co.*, 14 S. Dak. 364, journals of two houses of legislature are not competent to impeach validity of statute enrolled and authenticated by proper officers. Rule approved in *Board of Commissioners v. Burford*, 93 Ind. 385; *Ex parte Wren*, 63 Miss. 533, 56 Am. Rep. 830, where it was held that the journals of the legislature are not admissible in evidence to show that a statute does not contain amendments which were adopted; *State v. Jones*, 6 Wash. 476; and *Field v. Clark*, 143 U. S. 675, holding that it is not competent to show from the journal of either house of Congress that an act duly authenticated, approved, and deposited did not pass in the precise form in which it was signed by the presiding officers of the two houses and signed by the president. But in *Chicot County v. Davies*, 40 Ark. 210, a different rule was laid down, and it was held that not only the enrolled bill, but the legislative journals and records and files of the office of the secretary of state, may be looked to in ascertaining whether the act was duly passed. Cited, also, in 51 Am. Dec. 618, note; 85 Am. Dec. 357, note; and 47 Am. St. Rep. 818, extended note.

43 Cal. 564-569. GORDON v. SWAN.

Contract—Option.—Where a person is given the privilege of prospecting a mine with the option of purchasing the same at a fixed price, he does not become liable for the purchase money or refusing to consummate the sale, p. 568.

Rule held inapplicable in *Wilcoxson v. Stitt*, 65 Cal. 597, 52 Am. Rep. 311, deciding that under a contract for the sale of land in which the vendor agrees to convey upon payment, and which provides that if the vendee shall fail to make such payment, he shall forfeit all right to the land, and the vendor shall be released from all obligations to convey, the vendor has the option to avoid or enforce the contract.

43 Cal. 569-573. BORLAND v. LEWIS.

Forfeiture of Swamp Lands.—A failure to pay interest annually, and to pay the principal in five years, works a forfeiture under the Act of 1855, and the state may resell, p. 573.

So if a franchise to construct a street railroad is granted by the legislature, with a condition that it shall be forfeited if the track is not laid within a specified time, a failure to lay the track within such specified time works a forfeiture: *O. R. R. Co. v. O. B. & F. V. R. R. Co.*, 45 Cal. 377; 13 Am. Rep. 188. It is the settled law of this state that when a forfeiture is declared by statute, the title to the thing immediately vests in the state, upon the happening of the event or the commission of the offense for which the forfeiture is declared and such forfeiture need not be established judicially: *Upham v. Hosking*, 62 Cal. 258. But in the absence of a statutory provision or municipal ordinance declaring a forfeiture for a failure to complete a sidetrack within a reasonable time, the right of the company to the use of the streets can be terminated only by a judgment of forfeiture in an action commenced directly for that purpose and cannot be considered in an action of ejectment: *Arcata v. Arcata & M. R. R. Co.*, 92 Cal. 646. Cited and approved in *State v. Emmert*, 19 Kan. 548, holding that a purchaser of school lands who fails to pay interest or principal when due loses all interest in the land. Distinguished in *California Reduction Co. v. Sanitary Reduction Works*, 126 Fed. 44, validity of grant of franchise by city not collaterally attackable by private party in equity on ground of irregularity in exercise of power by city, nor because of failure of grantee to perform conditions imposed.

43 Cal. 573-576. DONAHUE v. GALLAVAN.

Nonsuit—Appeal.—An error in granting a nonsuit is an error of law, and, if excepted to and specified as such, may be reviewed without any specifications of evidence, p. 576.

Rule approved in *Schroeder v. Schmidt*, 74 Cal. 460, holding that error in granting a nonsuit cannot be reviewed on the ground that the evidence is insufficient to sustain the decision; *Hammond v. Wallace*, 85 Cal. 527; 20 Am. St. Rep. 240; *Warner v. Darrow*, 91 Cal. 311, expressly affirming the leading case; *Toulouse v. Pare*, 103 Cal. 252; and *Emerson v. Eldorado Ditch Co.*, 18 Mont. 257. Referred to in *Brown v. Warren*, 16 Nev. 232. General principle approved in *Sanford v. Duluth & Dakota Elevator Co.*, 2 N. Dak. 10; and *Sioux Banking Co. v. Kendall*, 6 S. Dak. 545.

Constructive Possession.—One who has actual possession of a part of tract of land under a deed conveying the whole has constructive possession of the whole tract, p. 575.

Approved in *Watt v. Wright*, 66 Cal. 208, holding that where a party

enters under color of title upon an open tract of grazing land and pastures sheep upon it during the pasturing season—the tract being unoccupied during the rest of the year—he has sufficient possession under the statute of limitations. Cited, also, in 85 Am. Dec. 125, note.

43 Cal. 577-580. **SHARP v. BAIRD.**

Attachment.—In order to create a lien, the requisite acts prescribed by the statute must be performed by the officer and must appear on such officer's return, p. 580.

Approved in *Watt v. Wright*, 66 Cal. 208, holding that where land is not occupied, a failure of the officer to post upon the land a copy of the description of the land in connection with a copy of the writ of attachment, and of the notice that the land had been attached, is fatal and no lien is created; *Schwartz v. Cowell*, 71 Cal. 306; *Brusie v. Gates*, 80 Cal. 467, holding a general return by a constable, that he attached certain described real estate, is not sufficient to show a valid levy; *Rudolph v. Saunders*, 111 Cal. 235, where the rule was applied to an attachment of personal property; and *Graham v. Reno*, 5 Colo. App. 334; *Ames v. Parrott*, 61 Neb. 852, noted under *Main v. Tappiner*, 43 Cal. 206. Referred to in *First National Bank v. Jasper*, 71 Iowa, 488. Rule questioned in *Wilkins v. Tourtellott*, 28 Kan. 835. The court expressly withdrew their dissent in *Wilkins v. Tourtellott*, 29 Kan. 515. Rule of the leading case denied in *Wilkins v. Tourtellott*, 42 Kan. 194, 195, 201. Cited, also, in 79 Am. Dec. 174, note.

Idem.—**Sheriff's Deed** takes effect by relation from the date of attachment, pp. 578, 579.

Followed in *Porter v. Pico*, 55 Cal. 174. Cited in *Holter etc. Co. v. Ontario etc. Co.*, 24 Mont. 193, holding levy of attachment not vitiated by failure to file transcript of judgment thereafter.

43 Cal. 581-586. **LORD v. HOUGH.**

Husband and Wife.—Husband cannot make a voluntary conveyance of any portion of the community property, with the intent to deprive the wife of her claims, in anticipation of divorce, any more than he could make a fraudulent disposition in anticipation of her widowhood, p. 585.

Wife cannot maintain an action while the marriage bond exists to set aside a transfer of the common property, made by the husband for the purpose of defrauding her: *Greiner v. Greiner*, 58 Cal. 120, distinguishing the leading case on the ground that the marriage bond had ceased. *Morrison, J.*, dissented in 58 Cal. 123, relying upon the leading case. A wife deserted by her husband may sue to avoid transfers made by her husband of his separate property, with a design to defeat her right to maintenance: *Murray v. Murray*, 115 Cal. 273; 56 Am.

St. Rep. 101, referring to the leading case. A conveyance of real estate made by a husband during coverture for the purpose of defeating the wife's marital rights are fraudulent and void as against her: *Walker v. Walker*, 66 N. H. 392; 49 Am. St. Rep. 617. Cited, also, in 89 Am. Dec. 220, note.

A voluntary disposition of a portion of the community property, reasonable in reference to the whole amount, may be made by the husband, in the absence of a fraudulent intent, p. 585.

Deed of gift of a portion of the community property is not void per se: *Corker v. Corker*, 95 Cal. 309. Cited, also, in 73 Am. Dec. 537, note; 89 Am. Dec. 205, note; and 24 Am. Dec. 492, note.

Pendency of a suit for divorce does not of itself interrupt the husband's power of disposition of the community property, p. 585.

Approved in *Ray v. Ray*, 1 Idaho, 580. Cited in *Sun Ins. Co. v. White*, 123 Cal. 200, sustaining bona fide mortgage by husband pending divorce suit.

43 Cal. 590-596. *LICK v. AUSTIN*.

Double Taxation.—The mortgagor cannot complain of double taxation if the land subject to the mortgage is taxed, and the debt secured by the mortgage is also taxed, p. 594.

Denied.—If a debt for money lent, which is secured by mortgage, is taxed and the mortgaged property is also taxed, it is a double taxation, and a violation of the constitution: *Sav. and Loan Society v. Austin*, 46 Cal. 483, 485 (by Crockett, J., Niles, J., concurring).

Taxation.—Solvent debt secured by mortgage is property for the purpose of taxation within the meaning of the constitution, p. 594.

Approved in *Sav. and Loan Society v. Austin*, 46 Cal. 492, and *Lamar v. Palmer*, 18 Fla. 150, holding that promissory notes and other credits were property, and as property liable to be taxed, and further deciding that a tax upon notes secured by mortgage upon land, the land mortgaged also being taxed, does not present a case of double taxation. Referred to in *Attorney General v. Supervisors*, 71 Mich. 22; and *State v. Carson Savings Bank*, 17 Nev. 156, holding that taxation of note secured by mortgage and of the land mortgaged is not double taxation. Cited, also, in 74 Am. Dec. 93, note.

General Citation.—*Globe Lumber Co. v. Lockett* 108 La. 420.

43 Cal. 597-605. *DAVENPORT v. TURPIN*.

Res Adjudicata.—An action merely commenced, and then dismissed without trial, determines nothing and concludes no one, p. 602.

A dismissal of an election contest before citation is served upon the defendant, and before any appearance has been made in the action, does not operate as a retraxit, and is no bar to the institution of

another action: *Lord v. Dunster*, 79 Cal. 489. Dismissal of an action by leave of the court, without the consent of the opposite party, and which was expressly entered as "without prejudice to the commencement of another action," is not a bar to a subsequent suit: *Westbay v. Gray*, 116 Cal. 668.

A Mortgage is Merged in the decree of foreclosure, and a party who enters under the decree cannot be regarded as a mortgagee in possession, p. 603.

Followed in *Black v. Gerichten*, 58 Cal. 57, holding that a judgment docketed for a deficiency after a sale of the mortgaged premises, is not a lien on the premises sold, if purchased by any person other than the mortgage debtor.

Foreclosure of Mortgage instituted against a mortgagor alone, cannot affect the title of a vendee of the mortgagor vesting between the delivery of mortgage and commencement of foreclosure suit, p. 601.

The foreclosure of a prior mortgage lien upon real property, without making a subsequent judgment lien creditor a party, in nowise affects the rights of the latter: *De Lashmutt v. Sellwood*, 10 Oreg. 326.

Estoppel.—Where one person holds the legal title to land claimed by another, but, believing that the other had the superior title, surrendered his possession thereto, such withdrawal, in the absence of fraud or deception, will not estop him from setting up his title later, p. 602.

Referred to in *State to the use of State v. Berning*, 74 Mo. 96, holding that an administrator is not estopped from reclaiming notes illegally pledged by him for his own purposes to a person having notice of their true ownership. Cited, also, in 38 Am. Rep. 316, note.

Abandonment.—A party holding the legal title to land as vendee of a mortgage cannot divest himself of that title by abandonment or parol disclaimer, p. 602.

Cited in 40 Am. Dec. 466, note.

Deed as Mortgage.—Under the general issue in ejectment, a deed absolute in form cannot be attacked on the ground that it was intended as a mortgage, p. 604.

Cited in 35 Am. Dec. 128, note.

43 Cal. 615-617. **HILL v. KIDD.**

Election Wager is illegal and void, upon grounds of public policy, and an action for affirmative relief cannot be maintained, p. 616.

Cited in *Gridley v. Dhorn*, 57 Cal. 79, 42 Am. Rep. 111, to the point that where an illegal wager is made, the parties to it may recover their stakes before the wager is decided, but that after the money has been lost and won, neither party can be heard in a court of justice; and *Wise v. Rose*, 110 Cal. 162, where a party repudiating a wager on a

horse race before the race was run, was held entitled to recover his stake. Approved in *Cooper v. Rowley*, 29 Ohio St. 548. Cited, also, in 12 Am. Dec. 340, note; 18 Am. Dec. 500, note; and 37 Am. St. Rep. 702, note.

43 Cal. 617-625. **SCHMITT v. GIOVANARI.**

Mexican Grant.—A decree confirming a Mexican grant vests the legal title in the confirmees and their assigns, and not in the assigns of their grantor, p. 623.

Followed in *Hartley v. Brown*, 46 Cal. 204, holding that if the confirmation of a Mexican grant is made to the children of the grantee, they have the legal title, and they and their assigns will prevail in ejectment against one claiming title under a sale made by the administrator of the grantee, when no equitable defense is set up, and *Hartley v. Brown*, 51 Cal. 467, to the same effect. Cited in *Bihler v. Platt*, 52 Cal. 552, where the principle was adhered to.

Decree of confirmation which declared the confirmation should be without prejudice to the legal representatives of the original grantee, and should inure to the benefit of any person who owned the land by any title derived from the original grantee, gives a perfect title to a purchaser from the confirmee, who bought from him before he presented his petition for confirmation, p. 625.

Referred to in *Bixby v. Bent*, 59 Cal. 531. Cited in *McDonald v. McCoy*, 121 Cal. 67, noted under *Moore v. Wilkinson*, 13 Cal. 478.

43 Cal. 625-628. **REGAN v. McMAHON.**

Motion for New Trial may be resorted to for the purpose of correcting errors in a preliminary decree of partition, p. 627.

Followed in *Tormey v. Allen*, 45 Cal. 121. Cited in *Deyoe v. Superior Court*, 140 Cal. 486, discussing nature of interlocutory divorce decree.

Supposed Errors in Preliminary Decree in Partition cannot be reviewed through an appeal taken from the final decree, p. 627.

Approved in *State v. Reed*, 3 Idaho, 559, writ of error does not lie to review order overruling motion for change of venue.

43 Cal. 628-635. **KING v. WISE.**

If one party agrees to unite with two others in the purchase of lands, each to furnish one-third the purchase money, the first party to conduct the negotiations, he assumes a position of trust towards his associates, and is bound to exercise the utmost good faith towards them, p. 633.

Cited and the principle approved in *Newell v. Cochran*, 41 Minn. 378; *Keogh v. Noble*, 136 Cal. 155, holding associate entitled to accounting accordingly; *Calmon v. Sarraille*, 142 Cal. 641, 642, sustaining right of

principal to annul deed obtained by agent in fraud of the fiduciary relation.

Recoupment of Damages.—Joint and separate debts cannot be set off against each other, p. 635.

So a cause of action arising on the liability, promise, or undertaking of a partnership is a joint one only, and, in an action thereon against the members of the firm, one of the defendants cannot maintain a counterclaim arising on a cause of action existing in his own favor: *Coleman v. Flavel*, 12 Saw. 465; 31 Fed. Rep. 392.

43 Cal. 636-638. THOMPSON v. CONNOLLY.

Appeal.—Statement on new trial motion cannot be used as a statement on appeal from judgment unless so stipulated, p. 637.

Cited in *Wall v. Mines*, 128 Cal. 139, but held inapplicable under present code (Code Civ. Proc., sec. 950).

Stipulation.—Parties may stipulate that the court pass on a motion for a new trial before the statement is engrossed, and the order of the court relying upon such stipulation will not be reviewed, p. 638.

Approved in *Erlanger v. Southern Pac. R. R. Co.*, 109 Cal. 395, holding that it is well settled that judgments and orders by consent will not be reviewed; and in *Crosby v. North Bonanza M. Co.*, 23 Nev. 76.

43 Cal. 640-643. ESTATE OF BOLAND.

Homestead under Probate Act, is to be set apart in pursuance of the statute in force at the time the order of the court is made, p. 642.

Approved in *Sulzberger v. Sulzberger*, 50 Cal. 388; and *Sheehy v. Miles*, 93 Cal. 294.

Homestead, under Probate Act, cannot be acquired by a widow in the estate of her deceased husband, until an order of the probate court has been made setting it apart for her, p. 642.

Cited in *Fealey v. Fealey*, 104 Cal. 360, 43 Am. St. Rep. 115, holding that an order setting apart a homestead to the widow of a decedent, no homestead having been declared during the lifetime of deceased, operates to vest in the widow a title to the land set apart out of the community property.

Idem.—A widow who marries before an order of the probate court setting apart a homestead, loses by her marriage her right to such homestead, p. 643.

Followed in *In re Still*, 117 Cal. 514.

43 Cal. 643-655. REEVE v. KENNEDY.

Title by Sheriff's Sale—Evidence to Contradict Record.—In action to

impeach the title to property acquired by an innocent purchaser at judicial sale, the plaintiff cannot contradict the record by proof that there was in fact no service of summons, or that the judgment was obtained by fraud, pp. 651, 652.

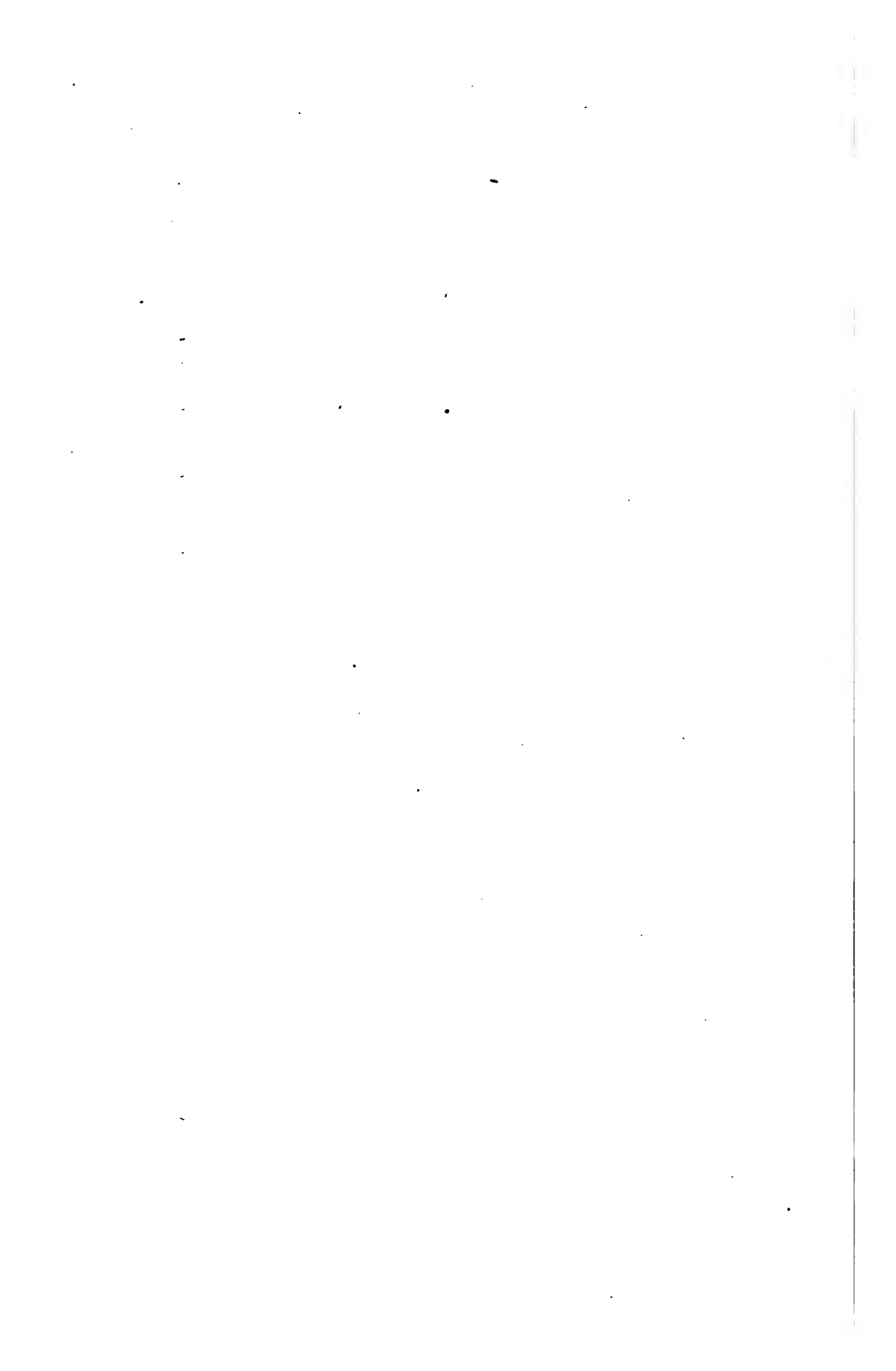
Approved in *McCauley v. Fulton*, 44 Cal. 361, deciding that upon collateral attack recitals in the judgment of service upon the defendants are conclusive of the question of jurisdiction of the person when rendered by a court of competent jurisdiction. Affirmed in *Jones v. Gillis*, 45 Cal. 543, and *Stokes v. Geddes*, 46 Cal. 19. Distinguished in *Martin v. Parsons*, 49 Cal. 98, and holding that while a court of equity will not vacate a judgment obtained by the wrongful act of a party without service of summons, still it will interfere to prevent the party thus obtaining it from using it as an instrument of injustice. Cited in dissenting opinion of *Crockett, J.*, *Mayo v. Haynie*, 50 Cal. 75. Proof of the execution of a deed, and of the judgment and execution are sufficient for recovery in ejectment against the debtor: *Kelley v. Desmond*, 63 Cal. 519. Referred to in *Rollins v. Wright*, 93 Cal. 400. Domestic judgment of a superior court must be presumed to have been rendered with jurisdiction over the person of the defendant, when offered in evidence in another action, although there is no proof of service of summons, and although the judgment itself is silent concerning jurisdiction over the defendant. In *re Eichhoff*, 101 Cal. 603, referring to the leading case as a holding on a cognate subject. Leading case cited and principle applied in *Bagley v. Sligo Furnace Co.*, 120 Mo. 251; *Leonard v. Sparks*, 63 Mo. App. 612; *Roush v. Fort*, 2 Mont. 485, holding that the sale of real property under execution, which has been issued in excess of the judgment through the fraud of the creditor, and which the debtor has not sought to correct by an amendment, does not affect the rights of bona fide purchasers; and *Marrow v. Brinkley*, 85 Va. 61.

Sheriff's Sale.—In a complaint to set aside an execution sale on account of matters extrinsic to the judgment, if there is no averment that the purchaser had notice of such extrinsic facts, he will be deemed a purchaser without notice, p. 649.

Cited and approved in *Heard v. Stack*, 81 Mo. 616.

Taxes—Public Record.—Assessment of taxes and the lien which it creates are matters of public record, of which all purchasers are bound to take notice, p. 654.

Cited and approved in *Empire etc. Co. v. Engley*, 18 Colo. 393; and *Adams v. Osgood*, 42 Neb. 457. Distinguished in *Page v. W. W. Chase*, 145 Cal. 582, purchaser who took title from defendant in foreclosure of street assessment lien pending action, without actual notice of its pending, is not bound by judgment therein.



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